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RE: City of Mission Viejo Adopted 6th Cycle Housing Element

Dear Mr. Cross,

As a follow-up from our conversation on December 16, 2021, Public Law Center (“PLC”) provides the following comments regarding the City of Mission Viejo’s (the “City”) Adopted 6th Cycle Housing Element (the “Draft”). The points herein provide additional detail and reiterate points raised at the meeting on December 16, 2021. These detailed, written comments are provided largely for the benefit of the City of Mission Viejo so that, as City revises its 6th Cycle Housing Element, they may have the additional details regarding the general comments we shared with HCD.

A jurisdiction must develop a housing element that substantially complies with statutory requirements.<sup>1</sup> This includes demonstrating a diligent effort to achieve public participation of all economic segments of the community, such as incorporating public comments into the housing element.<sup>2</sup> Then, the jurisdiction must submit a draft element to HCD for review.<sup>3</sup> If HCD finds that the draft element does not substantially comply with statutory requirements, the jurisdiction must change its draft element to meet the requirements.<sup>4</sup> Here, the City failed to develop a statutorily compliant housing element and failed to respond to comments made by the public and HCD.

PLC has provided the City three letters related to its Draft 6th Cycle Housing Element, all of which have been included as attachments to this letter. Three letters, dated June 7, 2021; June 21, 2021; and July 28, 2021, directly comment on the Draft 6th Cycle Housing Element. While

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<sup>1</sup> Cal. Gov. Code Section 65585.

<sup>2</sup> Cal. Gov. Code Section 65583; Cal. Gov. Code Section 65583(c)(9); HCD, Building Blocks: A Comprehensive Housing-Element Guide, *Public Participation*, <https://hcd.ca.gov/community-development/building-blocks/getting-started/public-participation.shtml> (last visited Mar. 17, 2021).

<sup>3</sup> Cal. Gov. Code Section 65585.

<sup>4</sup> Cal. Gov. Code Section 65585.

some of the issues raised in these letters have been addressed, mainly those that were echoed by HCD in its September 7, 2021 letter to the City, several issues remain and will be identified below.

### **Emergency Shelters**

The City's assessment of emergency shelter needs and identification of zones for emergency shelters remain insufficient.<sup>5</sup> When assessing its emergency shelter need, the City only utilizes the most recent Point-in-Time data to identify 22 unsheltered and 9 sheltered people experiencing homelessness.<sup>6</sup> However, the Point-in-Time Count is only one factor that must be considered, as Government Code Section 65583(a)(7) requires jurisdictions to also consider the number of beds available on a year-round and seasonal basis, the number of shelter beds that go unused on an average monthly basis within a one-year period, and the percentage of those in emergency shelters that move to permanent housing solutions. Without this full analysis, the City's assessment of its emergency shelter need remains incomplete. The City should be required to conduct a full analysis of its emergency shelter need as it is necessary to determine how many emergency shelters are needed within the jurisdiction and whether the identified zone can accommodate that many shelters.

Here, the City's emergency shelter standards limit the number of beds in each emergency shelter to 10 beds.<sup>7</sup> Even if the City's incomplete analysis of its emergency shelter need is accepted, three shelters are needed to accommodate these 22 unsheltered individuals. Although the City allows emergency shelters by-right in the Business Park district and states that vacant parcels and buildings within the area can accommodate its need, the City does not identify which parcels and buildings it is referencing.<sup>8</sup> Further, the City does not explain how it determined the adequacy of these parcels and buildings. Without this information, it is difficult to assess the likelihood of three shelters being developed in this zone. The City should be required to provide more information about this zone and the parcels and buildings it believes are best suited for the development of emergency shelters to demonstrate its ability to accommodate its emergency shelter need.

### **Special Housing Needs**

The City's quantification of special housing needs has improved from past drafts to include more information about these groups.<sup>9</sup> However, its programs addressing the needs of these groups are still vague and noncommittal.<sup>10</sup> For people with disabilities, the City relies on services provided by the California Department of Developmental Services, the Regional Center

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<sup>5</sup> Letter from the Public Law Center, to the City of Mission Viejo, 2 (Jun. 7, 2021) (on file with author).

<sup>6</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 21 (October 2021).

<sup>7</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 35 (October 2021).

<sup>8</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 35 (October 2021).

<sup>9</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 15 to 21 (October 2021); Cal. Gov. Code Section 65583(a)(7).

<sup>10</sup> Letter from the Public Law Center, to the City of Mission Viejo, 4 (Jun. 7, 2021) (on file with author); HCD, Building Blocks: A Comprehensive Housing-Element Guide, *Program Overview and Quantified Objectives*, <https://hcd.ca.gov/community-development/building-blocks/program-requirements/program-overview.shtml> (last visited Apr. 4, 2021).

of Orange County, the Dayle McIntosh Center branch located in Laguna Hills, and Vocational Visions, a local non-profit organization that provides employment and education assistance to people with disabilities.<sup>11</sup> The City does not describe any resources that specifically assist its senior residents, large households, female-headed households, farmworkers, or people experiencing homelessness and fails to identify which City programs serve each group.<sup>12</sup> Several existing programs could be modified to better serve these groups.

Program 1. Housing Rehabilitation Program provides funding to lower-income households to “correct nonconforming uses, remedy code violations, and generally repair and improve deteriorating properties.”<sup>13</sup> This program could be revised to provide funding to lower-income seniors and people with disabilities for the installation of accessibility devices in both owned and rented units.

Programs 7. Density Bonus Units, 8. Accessory Dwelling Units, and 12. Non-Profit Housing Development generally promote the construction of affordable housing but do not specifically address the special housing needs of these groups.<sup>14</sup> Program 7 could be modified to provide an extra bonus to developments that include affordable accessible units, large units, or childcare services. Program 8 could offer additional incentives to homeowners that rent the ADU at affordable rates. Program 12 should explain how the City will specifically encourage senior housing and include additional benefits to developers that seek to provide housing for other special needs groups.

Program 9. Affordable Housing Outreach and Development previously only promoted general affordable housing but has been modified to include special needs groups.<sup>15</sup> However, these modifications simply added the phrase “and special needs” to various sentences.<sup>16</sup> The City does not describe how this program’s actions will specifically encourage special needs housing and should be required to do so.

Similarly, Program 10. Special Needs Housing; previously named Emergency Shelters, Transitional and Supportive Housing; has only been slightly revised.<sup>17</sup> The majority of this program remains focused on complying with SB 2 and AB 101 requirements related to emergency shelters and transitional and supportive housing. To address all other special housing needs, the City simply added the following sentences:

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<sup>11</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 17 to 18 (October 2021).

<sup>12</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 18 to 21 (October 2021).

<sup>13</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 59 (October 2021).

<sup>14</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 61 to 62 (October 2021).

<sup>15</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 62 to 64 (October 2021).

<sup>16</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 62 to 64 (October 2021).

<sup>17</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 64 (October 2021).

- “Housing for persons with special needs includes shelters for the homeless, transitional and supportive housing, care facilities and agricultural employee housing.”<sup>18</sup>
- “The Employee Housing Act (Health & Safety Code §17021.5) requires that housing occupied by up to six agricultural employees be allowed as a single-family use.”<sup>19</sup>
- “The City is currently processing an amendment to the Development Code in conformance with State laws regarding low barrier navigation centers, transitional and supportive housing, and employee housing.”<sup>20</sup>

These additions merely acknowledge special housing groups or bring the City’s codes into conformity with State law. None of these revisions actually encourage the development of accessible units, large units, affordable childcare, or units affordable to extremely-low- or very-low-income residents. The City should be required to modify this program to include meaningful actions that will encourage this development.

#### **No Net Loss Requirements**

The City’s current use of vacant sites, underutilized sites, and estimated ADU production continues to only provide a 6 percent buffer.<sup>21</sup> Although a higher buffer is not required, we again recommend that the City add additional sites to its inventory to follow HCD’s recommendation of a 15 to 30 percent buffer.<sup>22</sup>

Government Code Section 65863 requires that jurisdictions maintain adequate sites to accommodate its remaining unmet RHNA in each income category throughout the entire planning period. If there is a shortfall of sites to accommodate its RHNA, the jurisdiction must either amend its site inventory to include sites that were previously unidentified or rezone sites to meet the need.<sup>23</sup> Failure to do so would constitute a violation of the No Net Loss law and Housing Element law.<sup>24</sup> Without an inclusionary housing ordinance, the City cannot be sure the sites in its inventory will actually be developed to include the number of lower income units listed. With such a small buffer, a single identified site developed without lower income units has the potential to trigger No Net Loss and Housing Element laws and require the City to identify additional parcels. To avoid this, the City should have included more sites in its inventory to increase its buffer.

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<sup>18</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 64 (October 2021).

<sup>19</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 64 (October 2021).

<sup>20</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 64 (October 2021).

<sup>21</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 80 (October 2021); Letter from the Public Law Center, to the City of Mission Viejo, 3 (Jun. 21, 2021) (on file with author).

<sup>22</sup> HCD, Memorandum regarding No Net Loss Law, 5 (Oct. 2, 2019).

<sup>23</sup> HCD, Memorandum regarding No Net Loss Law, 4 (Oct. 2, 2019).

<sup>24</sup> HCD, Memorandum regarding No Net Loss Law, 4 (Oct. 2, 2019).

### Constraints

Both HCD and PLC have made several comments regarding the City's analysis of governmental and nongovernmental constraints.<sup>25</sup> Despite this, the City has failed to make substantial changes to these sections. Complete analyses of both governmental and nongovernmental constraints upon the development of housing are important to the assessment of the City's efforts to make adequate provision for the existing and projected needs of all economic segments of the community.<sup>26</sup> To facilitate this assessment, the City should be required to revise its analysis in the following ways.

### Governmental Constraints

#### Land Use Controls

The City updated its Draft to include more information about residential and mixed-use land use categories, residential zoning designations, residential development standards, agricultural employee housing, and parking requirements for emergency shelters.<sup>27</sup> However, the City failed to actually analyze this information and did not change its existing analysis of land use controls. Additionally, the City failed to analyze "any impacts on cost, supply, housing choice, affordability, timing, approval certainty and ability to achieve maximum densities."<sup>28</sup> Based on this incomplete analysis, the City either fails to determine whether several land use controls are constraints or claims they are not constraints based on minimal analysis. The City should be required to analyze the added information, make the requisite determinations, explain the determinations, and craft programs to address any constraints.<sup>29</sup>

#### Local Processing and Permit Procedures

The City claims that the Draft has been updated to address the following comments from HCD:

- "describe the procedures for a typical single family and multifamily development;"
- "address the approval body, the number of public hearing(s) if any, approval findings and any other relevant information;" and
- "address impacts on housing cost, supply, timing and approval certainty."<sup>30</sup>

However, the Draft has not been revised to include any of this information.<sup>31</sup> The City should be required to actually make these changes and indicate where the changes can be found.

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<sup>25</sup> Letter from the HCD, to the City of Mission Viejo, 5 to 9 (Sep. 7, 2021) (on file with author); Letter from the Public Law Center, to the City of Mission Viejo, 4 (Jun. 7, 2021) (on file with author).

<sup>26</sup> Cal. Gov. Code Section 65583.

<sup>27</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 29 to 36 (October 2021).

<sup>28</sup> Letter from the HCD, to the City of Mission Viejo, 5 (Sep. 7, 2021) (on file with author).

<sup>29</sup> Letter from the HCD, to the City of Mission Viejo, 5 (Sep. 7, 2021) (on file with author).

<sup>30</sup> Letter from the HCD, to the City of Mission Viejo, 5 (Sep. 7, 2021) (on file with author).

<sup>31</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 39 to 40 (October 2021).

### Site Improvements

The City updated its analysis of site improvements by adding the following: “A local residential and collector streets require a 28- to 40-foot right-of-way, depending on whether on-street parking is required. These road standards are typical for cities in urban areas of Southern California and do not act as a constraint to housing development.”<sup>32</sup> However, HCD said that the Draft “must identify subdivision local improvement requirements, such as minimum street widths (e.g., 40-foot minimum street width), and analyze their potential impact as potential constraints on housing supply and affordability.”<sup>33</sup>

Here, the City should have included information about all site improvement requirements, including, but not limited to, minimum street widths. Once this information is provided, the City must analyze how various site improvement requirements affect housing supply and affordability. Simply declaring standards as “typical” without further analysis is not sufficient to declare site improvement requirements as not a constraint to housing.

### Fees and Other Exactions

The City claims it updated its Draft “to describe all required fees for single-family and multi-family housing development, including impact fees and analyze their impact as potential constraints on housing supply and affordability.”<sup>34</sup> However, the City made no such changes to this section.<sup>35</sup>

Additionally, the City continues to generally state that “although development fees and improvement requirements can impact the cost of housing, the City of Mission Viejo strives to keep such fees to a minimum and actively pursues other sources of revenue to fund public improvements that are coordinated with private development.”<sup>36</sup> Further, the City still does not explain how fees can impact the cost of housing without constraining development or how it works to keep fees to a minimum and should be required to make these changes.

### Nongovernmental Constraints

In previous letters, both PLC and HCD have commented that the City’s assessment of construction costs, land costs, and availability of financing is too vague, and that the City did not analyze requests to develop housing at densities below those anticipated in the site inventory or the length of time between receiving approval for housing development and submittal of an application for building permits.<sup>37</sup> Although the City claims it revised this section to include this

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<sup>32</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 40 (October 2021).

<sup>33</sup> Letter from the HCD, to the City of Mission Viejo, 6 (Sep. 7, 2021) (on file with author).

<sup>34</sup> Letter from the City of Mission Viejo, to the HCD (Oct. 13, 2021) (on file with author).

<sup>35</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 40 to 41 (October 2021).

<sup>36</sup> Letter from the Public Law Center, to the City of Mission Viejo, 4 (Jun. 7, 2021) (on file with author); City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 41 (October 2021).

<sup>37</sup> Letter from the Public Law Center, to the City of Mission Viejo, 4 to 5 (Jun. 7, 2021) (on file with author); Letter from the HCD, to the City of Mission Viejo, 7 (Sep. 7, 2021) (on file with author).

information, the Draft does not reflect these changes.<sup>38</sup> The City must actually make these changes and conduct a full analysis of these constraints.

### **Programs to Address Constraints**

The City has failed to recognize any governmental or nongovernmental constraints and failed to explain how its programs and policies would address such constraints.<sup>39</sup> While several of the City's programs could address some of these possible constraints, they do not include concrete actions that would actually operate to mitigate any negative impacts on the development of housing.<sup>40</sup>

Program 9. Affordable Housing Outreach and Development's Development & Parking Incentives and Concessions component could address local processing and permit procedures and site improvements.<sup>41</sup> It states that "the City will provide various incentives and concessions for the identified parcels, including, but not limited to, a reduction in the minimum setback and square footage requirements, and in the ratio of required off-street parking spaces, and an increase in the building height limit and maximum lot coverage, to promote the financial feasibility of homes affordable to lower-income families and persons with special needs."<sup>42</sup> However, the City should describe the changes it will make to these requirements, describe any other incentives it will include, and explain how these changes will mitigate governmental constraints to housing.

Additionally, this program's Development Fees component could address fees and other exactions as constraints on affordable housing.<sup>43</sup> The program simply states that, "for affordable and special needs housing projects proposed on these parcels, the City will provide a fee waiver or subsidy."<sup>44</sup> The program should include more detail about which projects will be eligible for these incentives, such as projects with one affordable unit or senior housing that is not affordable.

Further, Program 9's Remove Governmental Constraints provision generally states that "the City will ensure standards are not excessive and do not unnecessarily constrain affordable housing and special needs housing" and that "the City will work with interested developers to determine the need and remove or modify standards to facilitate the development of affordable and special needs housing."<sup>45</sup> However, the City must first identify which governmental

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<sup>38</sup> Letter from the City of Mission Viejo, to the HCD (Oct. 13, 2021) (on file with author); City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 42 (October 2021).

<sup>39</sup> Letter from the Public Law Center, to the City of Mission Viejo, 10 (Jun. 7, 2021) (on file with author); Letter from the Public Law Center, to the City of Mission Viejo, 7 (Jun. 21, 2021) (on file with author); Letter from the HCD, to the City of Mission Viejo, 9 (Sep. 7, 2021) (on file with author); and City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 29 to 44 (October 2021).

<sup>40</sup> Cal. Gov. Code Section 65583(a)(5); Cal. Gov. Code Section 65583(a)(6).

<sup>41</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 62 (October 2021).

<sup>42</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 62 to 63 (October 2021).

<sup>43</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 63 (October 2021).

<sup>44</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 63 (October 2021).

<sup>45</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 63 (October 2021).

constraints it plans to mitigate. Then, the City must explain how it will ensure standards do not constrain affordable housing in its governmental constraints analysis. Further, the City should uniformly identify which standards will be removed or modified to facilitate the development of affordable and special needs housing rather than conducting this analysis on a case-by-case basis. This would provide more certainty for affordable housing developers.

Similarly, Program 15. Development Fees could address fees and other exactions as constraints on affordable housing, as “the City shall consider fee waivers, reductions, or subsidies on a case-by-case basis.”<sup>46</sup> However, these changes to development fees should be standardized rather than determined on a case-by-case basis to promote certainty for affordable housing developers. Further, the City should describe what factors will be considered in determining fee discounts and how projects will qualify for a complete waiver, a reduction, or a subsidy.

Program 18. Pre-application Review Program could address several constraints because it gives projects that “include amenities or facilities such as childcare, job training, work stations, and exercise equipment . . . priority when the City Council issues financial assistance or other considerations.”<sup>47</sup> This program should be strengthened to describe how this financial assistance will operate, what “other considerations” includes, and how these incentives will work together with other programs that offer priority to certain types of projects.

### Site Inventory

#### Determining Site Capacity

Here, the City revised its analysis of site capacity to include a minimum density of 30 dwelling units per acre for each site listed on its site inventory.<sup>48</sup> Additionally, the City added more specific analyses of each site that considers factors such as potential and actual governmental constraints, including land use controls and site improvements; realistic development capacity for the site; typical densities of existing or approved residential developments at a similar affordability level; and current or planned availability and accessibility of sufficient water, sewer, and dry utilities.<sup>49</sup> However, the City fails to support several of its assumptions.

First, the City continues to estimate site development based on the assumptions that residentially zoned sites will develop at 100% capacity and that sites subject to the proposed housing overlay zone will develop at 50% capacity.<sup>50</sup> It is assumed that the three nonvacant

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<sup>46</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 67 (October 2021).

<sup>47</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 69 (October 2021).

<sup>48</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 110 (October 2021); Cal. Gov. Code Section 65583.2(c)(1). Throughout the analysis of its site inventory, the City groups multiple parcels into larger “Sites”. While we address our concerns about this practice later in this letter, we will adopt this naming convention for clarity.

<sup>49</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 89 to 106 (October 2021); Cal. Gov. Code Section 65583.2(c)(2).

<sup>50</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 80 (October 2021); Letter from the HCD, to the City of Mission Viejo, 2 to 3 (Sep. 7, 2021) (on file with author).



parcels within Site 2 and Sites 6, 7, 8, 10, and 12 will develop at 50% capacity.<sup>51</sup> The City also expects Sites 1, 5, and 9 and the vacant parcel within Site 2 to develop at 100% capacity while Sites 4 and 11 will add the maximum capacity onto existing units.<sup>52</sup> While the 50% capacity assumption can be justified by the comparison to the Shea Homes and Housing Opportunity Site A projects, respectively developed at 52% and 73% capacity, the City's 100% capacity assumptions remain unsupported.<sup>53</sup>

Second, the City's evidence to support its affordable housing production estimate is insufficient. The City describes the Shea Homes and Housing Opportunity Site A projects and claims that "City-imposed conditions" resulted in a 15% affordable housing mandate.<sup>54</sup> However, the City's analysis of governmental constraints states that "there are no citywide inclusionary requirements."<sup>55</sup> If there are no inclusionary measures to require affordable housing, it is unclear how the City can ensure that development on its sites will actually yield any affordable units, let alone the following high estimates:

- Site 1: 36 affordable units out of 75 total, yielding 48% of the units as affordable;<sup>56</sup>
  - Site 2: 37 affordable units out of 77 total, yielding 48% of the units as affordable;<sup>57</sup>
  - Site 3: 97 affordable units out of 200 total, yielding 48.5% of the units as affordable;<sup>58</sup>
  - Site 4: 151 affordable units out of 311 total, yielding 48.5% of the units as affordable;<sup>59</sup>
  - Site 5: 66 affordable units out of 136 total, yielding 48.5% of the units as affordable;<sup>60</sup>
  - Site 6: 25 affordable units out of 51 total, yielding 49% of the units as affordable;<sup>61</sup>
  - Site 7: 57 affordable units out of 117 total, yielding 48.7% of the units as affordable;<sup>62</sup>
  - Site 8: 283 affordable units out of 584 total, yielding 48.5% of the units as affordable;<sup>63</sup>
  - Site 9: 58 affordable units out of 120 total, yielding 48.3% of the units as affordable;<sup>64</sup>
  - Site 10: 84 affordable units out of 172 total, yielding 48.8% of the units as affordable;<sup>65</sup>
  - Site 11: 315 affordable units out of 650 total, yielding 48.5% of the units as affordable;<sup>66</sup>
- and

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<sup>51</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 89 to 106 (October 2021).

<sup>52</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 89 to 106 (October 2021).

<sup>53</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 90 (October 2021).

<sup>54</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 90 (October 2021).

<sup>55</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 39 (October 2021).

<sup>56</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 89 (October 2021).

<sup>57</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 91 (October 2021).

<sup>58</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 93 (October 2021).

<sup>59</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 95 (October 2021).

<sup>60</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 96 (October 2021).

<sup>61</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 98 (October 2021).

<sup>62</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 99 (October 2021).

<sup>63</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 100 (October 2021).

<sup>64</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 102 (October 2021).

<sup>65</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 103 (October 2021).

<sup>66</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 105 (October 2021).

- Site 12: 36 affordable units out of 280 total, yielding 12.8% of the units as affordable.<sup>67</sup>

To address these density and affordability estimate issues, the City must provide evidence such as typical densities of existing or approved residential developments at a similar affordability level and comparisons to other recent projects with similar zoning, acreage, built density, allowable density, affordability, and presence of other exceptions such as a density bonus.<sup>68</sup> Further, the City should follow HCD's feedback to analyze all development activity in identified nonresidential zones, determine how often residential development occurs, and adjust residential capacity calculation, policies, and programs accordingly, as well as analyze factors such as development trends, performance standards, and other relevant factors.<sup>69</sup>

For all nonvacant sites, the City must also explain how it considered the extent to which existing uses may constitute an impediment to additional residential development, any existing leases or other contracts that would perpetuate the existing use or prevent redevelopment for the site for additional residential development, market conditions, and regulatory or other incentives or standards that encourage additional development on these sites.<sup>70</sup>

### **Inventory of Land**

The City has failed to revise its Housing Sites Inventory chart according to both PLC and HCD comments.<sup>71</sup> First, the City must include the general plan designations for each parcel.<sup>72</sup> Second, the City must list the number of units that can realistically be accommodated on each parcel, not multiple parcels grouped into larger "Sites."<sup>73</sup> Third, the City must indicate whether each parcel, not multiple parcels grouped together into larger "Sites," are adequate to accommodate lower-income, moderate-income, or above-moderate-income housing.<sup>74</sup> Providing this information on an individual basis is important because even if the sites have common owners, or if the owners have discussed redevelopment to housing, or if the City creates a program to promote lot consolidation, the City cannot guarantee that these parcels will actually be bought, consolidated, and developed together.

Additionally, Sites 3, 9 and 12 may have been misidentified. First, Site 3 appears to be located at 28095 Hillcrest, Mission Viejo, CA 92692, which is the Animal Service Center, not the "land directly adjacent and southeasterly" to it.<sup>75</sup> Second, Site 9 is identified as "the Grace Church overflow parking lot site" at APN 809-521-11, but appears to actually be the church

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<sup>67</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 106(October 2021).

<sup>68</sup> Letter from the HCD, to the City of Mission Viejo, Appendix, 2 to 3 (Sep. 7, 2021).

<sup>69</sup> Letter from the HCD, to the City of Mission Viejo, Appendix, 2 to 3 (Sep. 7, 2021).

<sup>70</sup> Letter from the Public Law Center, to the City of Mission Viejo, 7 (Jun. 7, 2021) (on file with author); Letter from the Public Law Center, to the City of Mission Viejo, 7 (Jun. 21, 2021) (on file with author); Letter from the HCD, to the City of Mission Viejo, Appendix, 3 (Sep. 7, 2021); Cal. Gov. Code Section 65583.2(g)(1).

<sup>71</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 82 to 85 (October 2021).

<sup>72</sup> Cal. Gov. Code Section 65583.2(b)(2).

<sup>73</sup> Cal. Gov. Code Section 65583.2(c).

<sup>74</sup> Cal. Gov. Code Section 65583.2(c).

<sup>75</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 92 (October 2021).

itself rather than an overflow parking lot.<sup>76</sup> Third, Site 12, identified as APN 636-022-14 with an identified address at 26941 Cabot Road, is actually located within the City of Laguna Hills.<sup>77</sup> The City must either correct this site information or provide a more detailed map that identifies each site by its APN to provide more clarity.

### **Lower Income Site Size**

Several of the City's parcels are smaller than half an acre or larger than 10 acres and are designated for lower income housing:

- **Site 2:**
  - 839-161-14 = .43 acres
- **Site 3:**
  - 740-112-03 = .20 acres
  - 740-113-01 = .37 acres
  - 740-012-40 = 24.38 acres
- **Site 4:**
  - 740-012-29 = 23.70 acres
- **Site 5:**
  - 782-471-01 = .35 acres
  - 782-471-02 = .20 acres
  - 782-471-03 = .39 acres
  - 782-471-04 = .29 acres
  - 782-471-05 = .33 acres
- **Site 11:**
  - 836-211-45 = 17.00 acres

Although the City acknowledges that several sites are considered “large site[s],” it does not address sites smaller than half an acre and makes no effort to demonstrate that sites of an equivalent size were successfully developed during the prior planning period for an equivalent number of housing units and fails to provide other evidence that these sites can be developed for lower-income housing.<sup>78</sup> To meet these requirements, the City should follow HCD's recommendations to “provide specific examples with the densities, affordability and, if applicable, circumstances leading to parceling or consolidation;” “relate these examples to the sites identified to accommodate the RHNA for lower-income households to demonstrate that these sites can adequately accommodate the City's lower-income housing need;” and then “consider adding or revising programs to include incentives for facilitating development on small sites.”<sup>79</sup> It is not sufficient to merely state that “the City will encourage and facilitate the

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<sup>76</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 102 (October 2021).

<sup>77</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 105 (October 2021).

<sup>78</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 93, 95, 100 (October 2021); Cal. Gov. Code Section 65583.2(c)(2).

<sup>79</sup> Letter from the HCD, to the City of Mission Viejo, Appendix, 4 (Sep. 7, 2021)

subdivision of larger lots or consolidation of smaller lots to facilitate the development of affordable housing” without a program with specific actions to implement this intent.<sup>80</sup>

### **Nonvacant Sites**

Sites with existing uses must meet additional requirements.

### **Existing Residential Uses**

The City identified both Sites 4 and 11 as adequate to accommodate additional residential development and properly included a program to replace any housing units lost due to development.<sup>81</sup> However, the Site 4 analysis fails to explain how it can reasonably estimate that 311 housing units will be added to the existing 400 units.<sup>82</sup> Although the site is 23.7 acres, the City should explain where the existing units are located and identify where additional units can be built.<sup>83</sup> Additionally, in analyzing Site 11, the City should follow HCD’s recommendations to “describe structural conditions or other circumstances and trends demonstrating the redevelopment potential to more intense residential uses.”<sup>84</sup>

### **Presumption of Impeding Additional Residential Development**

Here, the City has failed to provide substantial evidence that demonstrates the existing use on Site 4 is likely to be discontinued during the planning period.<sup>85</sup> Site 4’s existing use is identified as housing geared toward Saddleback College students and anticipates that 311 housing units could be added on to the existing use.<sup>86</sup> As stated above, the City should explain how it envisions 311 units being added to the 400 units that are already there.<sup>87</sup> This information affects the likelihood that the existing use will be discontinued. For example, if the only available space on the property is in the parking lot, it would be highly unlikely that housing would actually be added to this site. However, if there is a significant amount of underutilized green space or amenities that could be replaced with housing, it would be more likely that more housing could fit on the site.

### **Accessory Dwelling Units**

The City first estimated that, “based on recent trends,” approximately 3 to 4 ADUs will be constructed in each year of the planning period.<sup>88</sup> In subsequent drafts, the City used its ADU

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<sup>80</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 110 (October 2021).

<sup>81</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 63 (October 2021).

<sup>82</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 95 (October 2021).

<sup>83</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 95 (October 2021).

<sup>84</sup> Letter from the HCD, to the City of Mission Viejo, Appendix, 3 (Sep. 7, 2021).

<sup>85</sup> Letter from the Public Law Center, to the City of Mission Viejo, 8 (Jun. 7, 2021) (on file with author); Letter from the Public Law Center, to the City of Mission Viejo, 5 (Jun. 21, 2021) (on file with author); Letter from the HCD, to the City of Mission Viejo, Appendix, 3 (Sep. 7, 2021); Cal. Gov. Code Section 65583.2(g)(2).

<sup>86</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 95 (October 2021).

<sup>87</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 95 (October 2021).

<sup>88</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 81 (October 2021).

production from the 5th Cycle, six ADUs, to demonstrate that its ADU standards would not constrain the development of 30 ADUs over the 6th Cycle.<sup>89</sup>

PLC noted that this data is not specific enough to apply to either of HCD's accepted formulas, but that, at best, it would only yield eight ADUs over the 6th Cycle.<sup>90</sup> However, the City has not only failed to provide data that would justify a 30 ADUs estimation, but it has revised its draft to provide even less information and increased its estimate to 35 ADUs.<sup>91</sup> The City's vague claim that "several ADUs [are] in process and numerous [are] in the early planning stage" without providing the appropriate figures is not sufficient.<sup>92</sup> The City must provide specific data that demonstrates how the City can reasonably expect the development of 35 ADUs.

Additionally, PLC previously asked the City to explain how its ADU program will facilitate this heightened ADU production.<sup>93</sup> However, the City has merely revised its ADU program to "consider additional actions such as exploring and pursuing funding options, and tracking the production and affordability of ADUs."<sup>94</sup> These revisions do not actually commit the City to taking any actions to promote ADU production. This program must be revised to commit the City to taking concrete and specific actions such as offering pre-approved floor plans, reducing or eliminating building permit and development fees, expediting procedures, creating an affordability monitoring program with a commitment to taking specific steps if affordable units are not being created, offering incentives for affordability, providing financial assistance for the construction and preservation of ADUs available to the public, and amnesty programs.<sup>95</sup>

### Programs

While the City made several changes to its programs, it failed to follow most of HCD's recommendations. First, the City must include discrete timelines for Programs 1. Housing Rehabilitation and 9. Affordable Housing Outreach.<sup>96</sup> Second, the City must properly revise Programs 7. Density Bonus and Program 8. Accessory Dwelling Units to "include a clear and specific commitment to amend zoning by a date certain."<sup>97</sup> Third, the City must revise Programs 6. Surplus Public Lands and Program 9. Affordable Housing Outreach to describe specific commitments that facilitate the development of its sites within the planning period such as

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<sup>89</sup> Letter from the Public Law Center, to the City of Mission Viejo, 5 to 6 (Jun. 21, 2021) (on file with author).

<sup>90</sup> Letter from the Public Law Center, to the City of Mission Viejo, 5 to 6 (Jun. 21, 2021) (on file with author).

<sup>91</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 80 to 81 (October 2021).

<sup>92</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 81 (October 2021).

<sup>93</sup> Letter from the Public Law Center, to the City of Mission Viejo, 5 to 6 (Jun. 21, 2021) (on file with author).

<sup>94</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 62 (October 2021).

<sup>95</sup> Letter from the Public Law Center, to the City of Mission Viejo, 13 (Jun. 7, 2021) (on file with author); Letter from the Public Law Center, to the City of Mission Viejo, 10 (Jun. 21, 2021) (on file with author); HCD, ADU Handbook, 19 (December 2020); SCAG, Accessory Dwelling Units (ADUs), SCAG Housing Element Digital Workshop, 6 (August 27, 2020).

<sup>96</sup> Letter from the HCD, to the City of Mission Viejo, Appendix, 7 to 8 (Sep. 7, 2021); City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 71 (October 2021).

<sup>97</sup> Letter from the HCD, to the City of Mission Viejo, Appendix, 7 to 8 (Sep. 7, 2021); City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 71 (October 2021).

zoning, outreach with developers, incentives, fee waivers, priority processing and financial assistance.<sup>98</sup> The City must make these changes to meet statutory requirements and follow HCD guidance.<sup>99</sup>

### **Affirmatively Furthering Fair Housing**

#### **Fair Housing Assessment**

Similar to the other issues raised herein, both PLC and HCD previously identified the City's failure to address the requirements to affirmatively further fair housing as inadequacies in the City's previous drafts.<sup>100</sup> While the City's previous drafts simply ignored this requirement entirely, the City has added a few screenshots from HCD's AFFH Data Viewer with explanations and a list of 45 contributing factors to fair housing issues that were identified in a county-wide Analysis of Impediments to Fair Housing Choice.<sup>101</sup> While we appreciate that the City has finally recognized the need to address this requirement in its Housing Element, the City's efforts here are woefully inadequate.

#### **Outreach**

The City references the same inadequate efforts at public participation as satisfying its required outreach under its duty to affirmatively further fair housing.<sup>102</sup> Not only are these efforts inadequate to meet general housing element law requirements, as discussed further below, they fail to satisfy the City's duty to affirmatively further fair housing. The City simply states that meeting notices were "sent to persons and organizations with expertise in affordable housing and supportive services" and "[i]nterested parties had the opportunity to interact with City staff throughout the Housing Element update process and provide direct feedback regarding fair housing issues," but the City does not identify any specific individuals or organizations that were included in this outreach and which, if any actually provided feedback to the City regarding fair housing. In fact, the City does not seem to be identifying any actual outreach efforts regarding fair housing issues, just that those interested in this issue could have reached out to the City at any time.

The City "must describe meaningful, frequent, and ongoing public participation with key stakeholders" including, among others, advocacy groups (local, regional, and state level), community members who are lower income, persons and households with special needs, members of protected classes, representative advocacy organizations and other similarly situated parties, fair housing agencies, independent living centers, and homeless service agencies.<sup>103</sup> Furthermore, the City must include in its housing element a description of outreach activities

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<sup>98</sup> Letter from the HCD, to the City of Mission Viejo, Appendix, 8 (Sep. 7, 2021).

<sup>99</sup> Cal. Gov. Code Section 65583(c); HCD, Building Blocks: A Comprehensive Housing-Element Guide, *Program Overview and Quantified Objectives*, <https://hcd.ca.gov/community-development/building-blocks/program-requirements/program-overview.shtml> (last visited Apr. 4, 2021).

<sup>100</sup> Letter from the Public Law Center, to the City of Mission Viejo, 10 to 13 (Jun. 7, 2021) (on file with author); Letter from the HCD, to the City of Mission Viejo, Appendix, 1 to 2, 4, 9 to 10 (Sep. 7, 2021).

<sup>101</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 45 to 50 (October 2021).

<sup>102</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 45 to 46 (October 2021).

<sup>103</sup> HCD, Affirmatively Furthering Fair Housing: Guidance for All Public Entities and for Housing Elements, 21–22 (April 2021).

intended to reach a broad audience; a list of organizations contacted and consulted and for what purpose; a summary of comments and how the comments were considered and incorporated; and a summary of “issues that contributed to lack of participation in the housing element process by all economic segments, particularly people with protected characteristics, if that proves to be the case.”<sup>104</sup>

#### Assessment of Fair Housing

The City’s assessment of fair housing must analyze these five areas: (1) fair housing enforcement and outreach capacity; (2) integration and segregation patterns and trends related to people with protected characteristics; (3) racially or ethnically concentrated areas of poverty (R/ECAPs) or racially concentrated areas of affluence (RCAAs); (4) disparities in access to opportunity for people with protected characteristics, including persons with disabilities; and (5) disproportionate housing needs within the jurisdiction, including displacement risk.<sup>105</sup> The City has failed to adequately address integration and segregation patterns and trends related to people with protected characteristics and has simply ignored the other requirements altogether. This is particularly alarming in that the City has identified two existing residential properties as sites to accommodate additional housing but has not done any analysis about displacement or addressed displacement concerns, which will be a major issue should existing residential uses be demolished to develop higher density developments, as contemplated in the City’s site inventory.

#### Site Inventory

The City has not included any assessment of the site inventory as it relates to fair housing, including patterns of segregation and integration and concentrations of RHNA by income level.<sup>106</sup> The City must also include a site inventory map that identifies the number of sites and assumed affordability of the sites to better analyze fair housing concerns.<sup>107</sup>

#### Identification and Prioritization of Contributing Factors

While the City lists contributing factors identified in a county-wide Analysis of Impediments to Fair Housing, this does not satisfy the requirements to identify fair housing issues and significant contributing factors; prioritize contributing factors, giving highest priority to those factors that deny fair housing choice or access to opportunity or negatively impact fair housing or civil rights compliance; and discuss strategic approaches to inform and strongly connect these contributing factors to goals and actions.<sup>108</sup> The City must actually identify which of the listed contributing factors are relevant to Mission Viejo, prioritize those contributing factors, and develop goals and programs to address them.

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<sup>104</sup> HCD, Affirmatively Furthering Fair Housing: Guidance for All Public Entities and for Housing Elements, 22 (April 2021).

<sup>105</sup> HCD, Affirmatively Furthering Fair Housing: Guidance for All Public Entities and for Housing Elements, 27–28, 62 (April 2021).

<sup>106</sup> HCD, Affirmatively Furthering Fair Housing: Guidance for All Public Entities and for Housing Elements, 45–46 (April 2021).

<sup>107</sup> HCD, Affirmatively Furthering Fair Housing: Guidance for All Public Entities and for Housing Elements, 48 (April 2021).

<sup>108</sup> HCD, Affirmatively Furthering Fair Housing: Guidance for All Public Entities and for Housing Elements, 49 (April 2021).

Goals, Policies, and Actions

Because the City has not conducted an adequate assessment of fair housing issues and has not correctly identified and prioritized contributing factors, it is impossible for the City to have developed adequate goals and programs to affirmatively further fair housing, as required by Housing Element law. Further, it seems that the City has made no revisions to Program 16. Affirmatively Further Fair Housing despite PLC’s and HCD’s comments that the City’s program must “have specific commitment, metrics and milestones as appropriate and must address housing mobility enhancement, new housing choices and affordability in high opportunity areas, place-based strategies for community preservation and revitalization and displacement protection.”<sup>109</sup> The City must first revise its assessment of fair housing as discussed above, then revise its goals and programs to address the identified fair housing issues and to incorporate HCD’s feedback.

**Public Participation**

Throughout the drafting process, the City has failed to demonstrate a diligent effort by the local government to achieve public participation of all economic segments of the community in the development of the housing element.<sup>110</sup>

First, PLC has previously commented that the City failed to give the public sufficient time to review and comment on its Drafts.<sup>111</sup> However, since our last letter on this matter, dated June 21, 2021, the City continued to limit the opportunities for community engagement. The following chart illustrates these limited opportunities:<sup>112</sup>

<b>March 31, 2021</b>	<b>Housing Element Workshop</b>
47 days without community engagement	
<b>May 17, 2021</b>	<b>City says May Draft is made available for public review</b>
<b>May 24, 2021</b>	<b>Planning and Transportation Commission Meeting and Draft Housing Element Update</b>
<b>June 8, 2021</b>	<b>City Council Preliminary Review of Draft Housing Element Update</b>
36 total days to review May Draft before revision	

<sup>109</sup> Letter from the HCD, to the City of Mission Viejo, Appendix, 10 (Sep. 7, 2021). See also Letter from the Public Law Center, to the City of Mission Viejo, 12 to 13 (Jun. 7, 2021) (on file with author).

<sup>110</sup> Cal. Gov. Code Section 65583(c)(9).

<sup>111</sup> Letter from the Public Law Center, to the City of Mission Viejo, 14 to 15 (Jun. 7, 2021) (on file with author).

<sup>112</sup> City of Mission Viejo, *Housing, Housing Element Update*, <https://cityofmissionviejo.org/departments/community-development/planning/housing> (last visited Dec. 22, 2021); City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 4, 111 (October 2021).



<b>June 22, 2021</b>	<b>City Council Meeting</b> <ul style="list-style-type: none"> <li>● <b>Revised June Draft available</b></li> </ul>
16 days to review June Draft before submission to HCD	
<b>July 8, 2021</b>	<b>July Draft Housing Element submitted to HCD for review and comment</b>
80 days without community engagement	
<b>September 7, 2021</b>	<b>Receive comments from HCD</b>
20 days to review comments from HCD before revision	
<b>September 27, 2021</b>	<b>Planning and Transportation Commission Meeting</b> <ul style="list-style-type: none"> <li>● <b>Revised September Draft available</b></li> </ul>
15 days to review September Draft before revision	
<b>October 12, 2021</b>	<b>City Council Meeting</b> <ul style="list-style-type: none"> <li>● <b>Revised October Draft</b></li> </ul>
1 day to review October Draft before submission to HCD	
<b>October 13, 2021</b>	<b>October Draft Housing Element submitted to HCD for review and comment</b>

To meet statutory requirements, the City must regularly and meaningfully engage with the community about revisions to the Draft and about related housing actions for the rest of the planning period.

Second, both PLC and HCD have noted that the City’s summary of public participation is incomplete and inadequate.<sup>113</sup> While the City identified multiple meetings about the Housing Element, it did not describe any efforts to include all economic segments of the community, who attended these meetings, or what public comments were given. Further, although the City added a list of Housing Element Stakeholders, it failed to describe how these stakeholders were contacted, which stakeholders it met with, what comments were received, and how it incorporated these comments into its Draft. Similarly, the City gave a brief summary of comments received about the Draft and its responses, but did not identify who made these

<sup>113</sup> Letter from the Public Law Center, to the City of Mission Viejo, 14 to 15 (Jun. 7, 2021) (on file with author); Letter from the Public Law Center, to the City of Mission Viejo, 8 to 9 (Jun. 21, 2021) (on file with author); Letter from the HCD, to the City of Mission Viejo, Appendix, 10 (Sep. 7, 2021); City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 4, 111 (October 2021).

RE: City of Mission Viejo Adopted 6th Cycle Housing Element  
January 10, 2022  
p. 18

comments or how it addressed these concerns in the Draft. Finally, PLC has sent the City multiple written comments and made a verbal comment at a City Council meeting. However, the City did not include any of these comments in its summary.<sup>114</sup> Because the City did not acknowledge PLC's comments, it is unclear whether it ignored comments made by other interested parties and residents. The City should be required to identify, describe, and address all comments received about its Drafts to properly demonstrate its engagement with all economic segments of the community.

#### Conclusion

The housing element process is a continuous opportunity for jurisdictions to respond to the needs of its residents, including the needs for housing that is accessible to seniors, families, and workers, as well as the needs of extremely-low-, very-low-, and low-income families for affordable housing. We encourage the City to take both HCD and PLC's comments into consideration, meaningfully revise its Draft, and re-adopt a compliant Housing Element. We look forward to working with the City in this effort to ensure that the housing needs of all residents of the City are addressed.

Sincerely,  
**THE PUBLIC LAW CENTER, BY:**



Richard Walker, Housing and Homelessness Prevention Unit, Senior Staff Attorney  
Alexis Mondares, Housing and Homelessness Prevention Unit, Staff Attorney

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<sup>114</sup> City of Mission Viejo, 2nd Revised Draft 6th Cycle Housing Element, 111 to 112 (October 2021).



June 7, 2021

City of Mission Viejo  
City Council  
200 Civic Center  
Mission Viejo, CA 92691  
citycouncil@cityofmissionviejo.org

RE: City of Mission Viejo Draft 6th Cycle Housing Element

Dear City of Mission Viejo Staff,

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. Our services are provided across a range of substantive areas of law, including consumer, family, immigration, housing, and health law. Additionally, PLC provides legal assistance to community organizations. Further, the mission of our Housing and Homelessness Prevention Unit includes preserving and expanding affordable housing. Thus, we write on behalf of individuals in need of affordable housing in Orange County to comment on the City of Mission Viejo (“the City”) Draft 6th Cycle Housing Element.

Government Code Section 65583 requires that a housing element consist of an identification and analysis of existing and projected housing needs and a statement of goals, policies, quantified objectives, financial resources, and scheduled programs for the preservation, improvement, and development of housing.<sup>1</sup> Additionally, the housing element shall identify adequate sites for housing, including rental housing, factory-built housing, mobile homes, and emergency shelters, and shall make adequate provision for the existing and projected needs of all economic segments of the community.<sup>2</sup>

Here, the City’s Draft 6th Cycle Housing Element fails to include a significant amount of information that is essential to meet statutory requirements. In particular, the site inventory is lacking so much information that it is impossible to determine whether the selected sites are suitable for residential development, whether there are any affirmatively furthering fair housing concerns, and whether the sites are adequate to meet the City’s housing need. We urge the City to slow down this process, include all the information required by statute, release a final draft to the public, and provide ample time for public review and comment.

The following comments are based on the incomplete draft released for the City’s Planning and Transportation Commission meeting held on May 24, 2021.

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<sup>1</sup> Cal. Gov. Code Section 65583.

<sup>2</sup> Cal. Gov. Code Section 65583.

### **Emergency Shelters**

The housing element must include the identification of a zone or zones where emergency shelters are allowed as a permitted use without a conditional use or other discretionary permit.<sup>3</sup> The identified zone or zones shall include sufficient capacity to accommodate the need for emergency shelter.<sup>4</sup> A local government with an existing ordinance or ordinances that comply with these requirements shall not be required to take additional action to identify zones for emergency shelters.<sup>5</sup> The housing element must only describe how existing ordinances, policies, and standards are consistent with these requirements.<sup>6</sup>

Here, the City has already indicated that emergency shelters are permitted by-right in the Business Park district and generally claims that 165 acres and “some vacant parcels and buildings in these zones . . . could accommodate shelters.”<sup>7</sup> However, the City does not describe how these vacant parcels and buildings would be able to accommodate the need for emergency shelter.

### **Assessing Emergency Shelter Need**

The need for emergency shelter shall be assessed based on the capacity necessary to accommodate the most recent homeless point-in-time count conducted before the start of the planning period, the need for emergency shelter based on number of beds available on a year-round and seasonal basis, the number of shelter beds that go unused on an average monthly basis within a one-year period, and the percentage of those in emergency shelters that move to permanent housing solutions.<sup>8</sup>

Although the City’s point-in-time count indicates that there are 22 unsheltered people within the jurisdiction, the City did not address the other factors to determine the overall need. Because the most recent point-in-time count is from January 2019, it is important that the City analyze its housing need more specifically and determine whether the Business Park area is sufficient to meet the need.

### **Special Housing Needs**

The housing element must analyze special housing needs, such as those of the elderly; persons with disabilities, including a developmental disability;<sup>9</sup> large families; farmworkers; families with female heads of households; and families and persons in need of emergency

<sup>3</sup> Cal. Gov. Code Section 65583(a)(4)(A).

<sup>4</sup> Cal. Gov. Code Section 65583(a)(4)(A).

<sup>5</sup> Cal. Gov. Code Section 65583(a)(4)(D).

<sup>6</sup> Cal. Gov. Code Section 65583(a)(4)(D).

<sup>7</sup> City of Mission Viejo, Draft Housing Element, 45 (May 2021).

<sup>8</sup> Cal. Gov. Code Section 65583(a)(7).

<sup>9</sup> “‘Developmental disability’ means a disability that originates before an individual attains 18 years of age, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include intellectual disability, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability, but shall not include other handicapping conditions that are solely physical in nature.” Cal. Welfare and Institutions Code Section 4512.

shelter.<sup>10</sup> An analysis of special housing needs by a city or county may include an analysis of the need for frequent user coordinated care housing services.<sup>11</sup>

Here, the City of Mission Viejo provided an analysis of each special housing needs group which includes persons with disabilities (including developmental disabilities), the elderly, large households, female-headed households with children, homeless people, and farm workers. Although the City provides an analysis of special housing needs groups, the City does not address the housing needs of such groups, or solutions to meet the needs of these groups. For example, the City provides a detailed list of current resources for developmentally disabled persons, but as for meeting the future needs of this group, the City responds “through programs that facilitate new affordable housing development, preservation of existing low- and moderate-income housing, and equal housing opportunity”. The City’s program is vague and does not provide a quantifiable, measurable solution to these special housing needs. The same issue applies to the elderly and homeless people.

Regarding large households and farm workers, the City does not provide a solution to these groups’ special housing needs as their needs are “less of a concern” due to the low number of persons belonging to this population in comparison to other special needs groups. In terms of female-headed households, the City explains that Chapter 6 Housing Plan will be used to meet the needs of low- and moderate-income households. However, the City does not identify a measurable or quantifiable goal for the housing needs of female-headed households. In conclusion, we cannot properly assess how the needs of special housing needs will be met by the City of Mission Viejo. The City can rectify this by providing programs that commit to meeting the housing needs of above identified groups.

### Constraints

#### Governmental Constraints

The housing element must contain an analysis of potential and actual governmental constraints upon the maintenance, improvement, or development of housing for all income levels, including the types of housing identified in Section 65583(c)(1),<sup>12</sup> and for persons with disabilities,<sup>13</sup> including land use controls, building codes and their enforcement, site improvements, fees and other exactions required of developers, local processing and permit procedures, and any locally adopted ordinances that directly impact the cost and supply of residential development.<sup>14</sup>

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<sup>10</sup> Cal. Gov. Code Section 65583(a)(7).

<sup>11</sup> Cal. Gov. Code Section 65583(a)(7).

<sup>12</sup> “Housing for all income levels, including multifamily rental housing, factory-built housing, mobilehomes, housing for agricultural employees, supportive housing, single-room occupancy units, emergency shelters, and transitional housing.” Cal. Gov. Code Section 65583(c)(1).

<sup>13</sup> “‘Developmental disability’ means a disability that originates before an individual attains 18 years of age, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include intellectual disability, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability, but shall not include other handicapping conditions that are solely physical in nature.” Cal. Welfare and Institutions Code Section 4512; Cal. Gov. Code Section 65583(a)(7).

<sup>14</sup> Cal. Gov. Code Section 65583(a)(5).

The analysis shall also demonstrate local efforts to remove governmental constraints that hinder the locality from meeting its share of the RHNA and from meeting the need for housing for persons with disabilities, supportive housing, transitional housing, and emergency shelters.<sup>15</sup>

Here, the City claims that its General Plan is not a constraint because “adequate sites with appropriate densities have been identified and zoned” to meet its RHNA.<sup>16</sup> After reciting residential general plan designations, the City references a chart on a separate page where one could presumably find the number of adequate sites.<sup>17</sup> The City uses this information to generally conclude that the General Plan is not a constraint to the Housing Element. However, the chart is largely blank, with only the RHNA requirement numbers incorporated. The City must include the missing information and then provide a more thorough explanation to effectively demonstrate that the General Plan is not a constraint to housing development.

The City also acknowledges that development fees impact the cost of housing. Again, the City generally claims that it “strives to keep such fees to a minimum and actively pursues other sources of revenue to fund public improvements that are coordinated with private development.”<sup>18</sup> However, the City does not explain how it keeps fees to a minimum and does not describe what sources of revenue it utilizes. Without these details, the City has not shown that development fees are not a constraint and has not shown that it has made concrete efforts to remove these constraints. The City should include this information and revise this analysis.

### **Nongovernmental Constraints**

The housing element must also analyze potential and actual nongovernmental constraints upon the maintenance, improvement, or development of housing for all income levels, including the availability of financing, the price of land, the cost of construction, the requests to develop housing at densities below those anticipated in the analysis required by Section 65583.2(c), and the length of time between receiving approval for a housing development and submittal of an application for building permits for that housing development that hinder the construction of a locality’s share of the RHNA.<sup>19</sup>

The analysis shall also demonstrate local efforts to remove nongovernmental constraints that create a gap between the locality’s planning for the development of housing for all income levels and the construction of that housing.<sup>20</sup>

Here, the City only identifies construction costs, land costs, and the cost and availability of financing as market constraints that may affect housing development. When addressing these constraints, the City generally explains what construction costs are, how land value fluctuates, and how the “Great Recession” made financing a home difficult for certain socio-economic groups. Rather than attempting to address these issues, the City simply claims these constraints are beyond City influence and exempts itself from meeting the statutory requirement to

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<sup>15</sup> Cal. Gov. Code Section 65583(a)(5).

<sup>16</sup> City of Mission Viejo, Draft Housing Element, 30 (May 2021).

<sup>17</sup> City of Mission Viejo, Draft Housing Element, 30 (May 2021).

<sup>18</sup> City of Mission Viejo, Draft Housing Element, 41 (May 2021).

<sup>19</sup> Cal. Gov. Code Section 65583(a)(6).

<sup>20</sup> Cal. Gov. Code Section 65583(a)(6).

demonstrate local effort to remove nongovernmental constraints. The City must describe actions it will take to remove nongovernmental constraints, such as creating or promoting funding programs to mitigate construction and land costs and help residents finance their homes.

#### **Site Inventory**

The housing element must include an inventory of land suitable and available for residential development, including vacant sites and sites having realistic and demonstrated potential for redevelopment during the planning period to meet the locality's housing need for a designated income level.<sup>21</sup>

Table B-1 is a summary of residential sites that is missing information, but claims there are adequate sites to meet the housing need for each income level.<sup>22</sup> However, the City's site inventory states that the listed sites will be able to provide 898 very low-income units and 535 low-income units, but does not provide any sites for moderate- or above moderate-income units.<sup>23</sup> The City must clarify where the missing sites are counted or add more sites to meet the housing need. Without this information, this site inventory is inadequate to meet the City's RHNA obligation and the City must create a program addressing an inadequate site inventory.

#### **Determining Site Capacity**

Based on the information provided in the site inventory, a city or county shall determine whether each site in the inventory can accommodate the development of some portion of its share of the regional housing need by income level during the planning period.<sup>24</sup>

The number of units that can be accommodated on each site shall be adjusted as necessary based on the potential and actual governmental constraints upon maintenance, improvement, or development of housing, including land use controls and site improvements; the realistic development capacity for the site; typical densities of existing or approved residential developments at a similar affordability level in that jurisdiction; and the current or planned availability and accessibility of sufficient water, sewer, and dry utilities.<sup>25</sup>

Here, the City estimated site capacity "based on 80% of the maximum allowable density while sites zoned for mixed-use assume 50% of residential capacity" and "sites with allowable densities of at least 30 units/acre are considered suitable for all income categories based on default density."<sup>26</sup> The City did not take any of the other factors into account. To obtain an accurate count of units that can accommodate the City's RHNA, the City must do a more thorough analysis of the sites and provide that information in its housing element.

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<sup>21</sup> Cal. Gov. Code Section 65583(a)(3); Cal. Gov. Code Section 65583.2(a).

<sup>22</sup> City of Mission Viejo, Draft Housing Element, 83 (May 2021).

<sup>23</sup> City of Mission Viejo, Draft Housing Element, 92 (May 2021).

<sup>24</sup> Cal. Gov. Code Section 65583.2(c).

<sup>25</sup> Cal. Gov. Code Section 65583.2(c)(2).

<sup>26</sup> City of Mission Viejo, Draft Housing Element, 83 (May 2021).

### **Site Inventory**

The inventory of land must include the following: (1) a listing of properties by assessor parcel number;<sup>27</sup> (2) the size of each property;<sup>28</sup> (3) the general plan designation and zoning of each property;<sup>29</sup> (4) a description of existing or planned water, sewer, and other dry utilities supply, the availability and access to distribution facilities;<sup>30</sup> (5) whether the utilities are available and accessible to support housing development or if there is an existing general plan program or other mandatory program or plan, including a program or plan of a public or private entity providing water or sewer service, to secure sufficient water, sewer, and dry utilities supply to support housing development;<sup>31</sup> (6) a map that shows the location of the sites included in the inventory;<sup>32</sup> (7) the number of units that can realistically be accommodated on that site,<sup>33</sup> and (8) whether the site is adequate to accommodate lower income housing, moderate-income housing, or above moderate-income housing.<sup>34</sup>

Here, the City's site inventory is incomplete. The inventory fails to include the general plan designation, the size for each individual parcel, the total number of units that can realistically be accommodated on each site, and whether each site is adequate to accommodate very low-, low-, moderate-, or above moderate-income units. Additionally, the map provided does not indicate the location of each individual site included in the inventory.

Without this information, the public cannot properly assess the site inventory. Specifically, the public cannot identify whether sites are adequate for lower income housing or whether the site selection raises any affirmatively furthering fair housing concerns. The City must include this information and allow the public adequate time for review and comment before submitting to the Department of Housing and Community Development ("HCD").

### **Lower Income Sites**

If a jurisdiction designates sites that are smaller than half an acre, or larger than ten acres to accommodate its lower income housing needs, the sites must satisfy extra criteria.<sup>35</sup> If a site is smaller than half an acre or larger than ten acres, it cannot be deemed adequate to accommodate lower income housing unless the locality can demonstrate that sites of an equivalent size were successfully developed during the prior planning period for an equivalent number of lower income housing units as projected for the site.<sup>36</sup> Alternatively, the locality may provide other evidence to HCD that the site is adequate to accommodate lower income housing.<sup>37</sup> The following identified sites are smaller than half an acre:

- APN 784-661-02: 0.42 acres

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<sup>27</sup> Cal. Gov. Code Section 65583.2(b)(1).

<sup>28</sup> Cal. Gov. Code Section 65583.2(b)(2).

<sup>29</sup> Cal. Gov. Code Section 65583.2(b)(2).

<sup>30</sup> Cal. Gov. Code Section 65583.2(b)(5)(A-B).

<sup>31</sup> Cal. Gov. Code Section 65583.2(b)(5)(A-B).

<sup>32</sup> Cal. Gov. Code Section 65583.2(b)(7).

<sup>33</sup> Cal. Gov. Code Section 65583.2(c).

<sup>34</sup> Cal. Gov. Code Section 65583.2(c).

<sup>35</sup> Cal. Gov. Code Section 65583.2(c).

<sup>36</sup> Cal. Gov. Code Section 65583.2(c)(2).

<sup>37</sup> Cal. Gov. Code Section 65583.2(c)(2).



- APN 784-661-22: 0.29 acres

The City generally states that parcels in this area of the inventory are for very low- and low-income sites. However, the City does not demonstrate that it has previous experience developing sites of this size for any lower income housing units and does not attempt to provide any other evidence that the site is adequate for lower income housing. Without this justification, the City cannot include these sites in its inventory.

#### Calculating the Number of Lower Income Units

To determine the number of lower income units, the jurisdiction shall do either of the following: (1) provide an analysis demonstrating how the adopted densities accommodate this need, including, but not limited to, factors such as market demand, financial feasibility, or information based on development project experience within a zone or zones that provide housing for lower income households;<sup>38</sup> or (2) fall into a density deemed appropriate to accommodate housing for lower income households.<sup>39</sup>

As stated above, the City calculated site capacity based on limited information.<sup>40</sup> For lower income sites, the City must include additional information and meet one of these requirements.

#### Nonvacant Sites

For non vacant sites, the jurisdiction shall specify the additional development potential for each site within the planning period and explain the methodology used to determine the development potential.<sup>41</sup> The methodology shall consider multiple factors, including: (1) the extent to which existing uses may constitute an impediment to additional residential development; (2) the jurisdiction's past experience with converting existing uses to higher density residential development; (3) the current market demand for the existing use; (4) an analysis of any existing leases or other contracts that would perpetuate the existing use or prevent redevelopment of the site for additional residential development; (5) development trends; (6) market conditions; and (7) regulatory or other incentives or standards to encourage additional residential development on these sites.<sup>42</sup>

Here, the City claims "the level of development described in the RHNA reflects anticipated development potential given feasible methods for addressing [environmental constraints]."<sup>43</sup> However, the City does not explain "feasible methods" and does not address any other potential factors that influence development potential. Without any of this information, the nonvacant sites cannot be included on the City's site inventory.

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<sup>38</sup> Cal. Gov. Code Section 65583.2(c)(3)(A).

<sup>39</sup> Cal. Gov. Code Section 65583.2(c)(3)(B).

<sup>40</sup> City of Mission Viejo, Draft Housing Element, 83 (May 2021).

<sup>41</sup> Cal. Gov. Code Section 65583.2(g)(1).

<sup>42</sup> Cal. Gov. Code Section 65583.2(g)(1).

<sup>43</sup> City of Mission Viejo, Draft Housing Element, 35 (May 2021).

#### Nonvacant Sites for 50% or More of Housing Need

If the jurisdiction is relying on nonvacant sites to accommodate 50% or more of its housing need for lower income households, the methodology used to determine additional development potential shall demonstrate that the existing use identified does not constitute an impediment to additional residential development during the planning period.<sup>44</sup>

Again, the City did not allocate portions of the RHNA to individual parcels. Without specific allocations to individual sites, it is impossible to determine whether the City must address this requirement.

#### Presumption of Impeding Additional Residential Development

An existing use shall be presumed to impede additional residential development, absent findings based on substantial evidence that the use is likely to be discontinued during the planning period.<sup>45</sup>

Most of the sites on the City's inventory have an existing use. However, the City did not provide substantial evidence to demonstrate the existing use is likely to be discontinued over the next 8 years. Without this information, there is no reason to believe these sites are adequate to meet the City's RHNA allocation. Thus, these sites should not be included in the site inventory.

#### Accessory Dwelling Units

A jurisdiction may count an ADU for purposes of identifying adequate sites for housing.<sup>46</sup> The number of ADUs identified is based on the number of ADUs developed in the prior housing element planning period, whether or not the units are permitted by right; the need for these units in the community; the resources or incentives available for their development; and any other relevant factors determined by HCD.<sup>47</sup> To estimate the number of ADUs that will be developed in the planning period, a jurisdiction must generally use a three-part approach addressing (1) development trends, (2) anticipated affordability, and (3) resources and incentives.<sup>48</sup>

When assessing development trends, a jurisdiction must consider the number of ADUs developed in the prior housing element planning period, whether or not the units are permitted by right;<sup>49</sup> the need for these units in the community;<sup>50</sup> the availability of ADUs and JADUs that will be part of the rental stock, rather than used as offices or guest houses;<sup>51</sup> and more recent trends.<sup>52</sup>

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<sup>44</sup> Cal. Gov. Code Section 65583.2(g)(2).

<sup>45</sup> Cal. Gov. Code Section 65583.2(g)(2).

<sup>46</sup> Cal. Gov. Code § 65852.2(m); Cal. Gov. Code § 65583.1(a).

<sup>47</sup> Cal. Gov. Code Section 65583.1(a).

<sup>48</sup> HCD, ADU Handbook, 19 (December 2020).

<sup>49</sup> Cal. Gov. Code § 65583.1(a); HCD, ADU Handbook, 19 (December 2020).

<sup>50</sup> Cal. Gov. Code § 65583.1(a).

<sup>51</sup> HCD, Accessory Dwelling Units (ADU) and Junior Accessory Dwelling Units (JADUs), *Requisite Analysis*, <https://hcd.ca.gov/community-development/building-blocks/site-inventory-analysis/accessory-dwelling-units.shtml> (last visited Mar. 21, 2021).

<sup>52</sup> HCD, ADU Handbook, 19 (December 2020).

HCD Staff has stated that the following two approaches would be accepted without further analysis or incentives: (1) average ADU applications from the beginning of the 5<sup>th</sup> Cycle to 2017, multiplied by five; or (2) average ADU applications from 2018, multiplied by eight. If jurisdictions anticipate a higher ADU production, HCD will require more analysis and incentives to show the higher production can be met.

Here, in its site inventory, the City claims that 30 ADUs will be constructed during the planning period.<sup>53</sup> The City explains that an unknown number of ADUs were previously approved and that the City expects this record to continue due to a lack of “any unreasonable constraints.”<sup>54</sup> However, the City’s explanation for this ADU count is filled with placeholders and does not provide enough information for the public to determine whether this ADU estimate follows HCD’s recommended formulas. Additionally, the City does not take into account any of the other factors listed by the statute. The City must provide this information before submitting a housing element to HCD or must remove ADUs as credit towards their RHNA allocation.

### Programs

The housing element must include programs that allow the jurisdiction to achieve its stated housing goals and objectives. Programs must set forth a schedule of actions during the planning period, each with a timeline for implementation.<sup>55</sup> The jurisdiction may recognize that certain programs are ongoing, such that there will be beneficial impacts of the programs within the planning period, that the local government is undertaking or intends to undertake to implement the policies and achieve the goals and objectives of the housing element.<sup>56</sup> The jurisdiction may do so through the administration of land use and development controls, the provision of regulatory concessions and incentives, the utilization of appropriate federal and state financing and subsidy programs when available, and the utilization of moneys in a low- and moderate-income housing fund of an agency if the locality has established a redevelopment project area pursuant to the Community Redevelopment Law.<sup>57</sup>

To make adequate provision for the housing needs of all economic segments of the community, the program shall address housing issues such as inadequate site inventories, meeting lower income housing needs, removing constraints, maintaining affordable housing, promoting affirmatively furthering fair housing, preserving assisted housing developments, encouraging accessory dwelling units, and facilitating public participation. To make these programs most effective, HCD recommends jurisdictions include the following: definite time frames for implementation; an identification of agencies and officials responsible for implementation; a description of the local government’s specific role in program implementation; a description of the specific action steps to implement the program; proposed measurable outcomes; demonstration of a firm commitment to implement the program; and an identification of specific funding sources, where appropriate.<sup>58</sup>

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<sup>53</sup> City of Mission Viejo, Draft Housing Element, 92(May 2021).

<sup>54</sup> City of Mission Viejo, Draft Housing Element, 47-48 (May 2021).

<sup>55</sup> Cal. Gov. Code Section 65583(c).

<sup>56</sup> Cal. Gov. Code Section 65583(c).

<sup>57</sup> Cal. Gov. Code Section 65583(c).

<sup>58</sup> HCD, Building Blocks: A Comprehensive Housing-Element Guide, *Program Overview and Quantified Objectives*, <https://hcd.ca.gov/community-development/building-blocks/program-requirements/program-overview.shtml> (last visited Apr. 4, 2021).

### **Inadequate Site Inventory**

If a jurisdiction cannot identify adequate sites to accommodate its share of the RHNA for all income levels, its housing element must include a program to identify sites that can be developed for housing within the planning period.<sup>59</sup>

As stated above, if the City cannot revise its site inventory to clearly demonstrate that the identified sites are adequate to accommodate its share of the RHNA, the City must create a program to address an inadequate site inventory. Before submitting the draft to HCD, the City should include more specific information to avoid this requirement or draft the necessary program.

### **Addressing Constraints**

The housing element shall include a program to address and, where appropriate and legally possible, remove governmental and nongovernmental constraints to the maintenance, improvement, and development of housing, including housing for all income levels and housing for persons with disabilities.<sup>60</sup> The program shall remove constraints to, and provide reasonable accommodations for housing designed for, intended for occupancy by, or with supportive services for, persons with disabilities.<sup>61</sup>

Transitional housing and supportive housing shall be considered a residential use of property and shall be subject only to those restrictions that apply to other residential dwellings of the same type in the same zone.<sup>62</sup> Supportive housing<sup>63</sup> shall be a use by right in all zones where multifamily and mixed uses are permitted, as provided in Article 11 (commencing with Section 65650).<sup>64</sup>

As discussed above, the City cited governmental and nongovernmental constraints to the development of housing in the City. However, the City failed to precisely identify how these constraints operate within the City, and did not provide analysis regarding how to remove these constraints. As part of the requisite analysis of these constraints, the City must describe programs to remove or mitigate these constraints in its next housing element draft.

### **Affirmatively Furthering Fair Housing**

The housing element shall include a program to promote and affirmatively further fair housing opportunities and promote housing throughout the community or communities for all persons regardless of race, religion, sex, marital status, ancestry, national origin, color, familial

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<sup>59</sup> Cal. Gov. Code Section 65583(c)(1)(B).

<sup>60</sup> Cal. Gov. Code Section 65583(c)(3).

<sup>61</sup> Cal. Gov. Code Section 65583(c)(3).

<sup>62</sup> Cal. Gov. Code Section 65583(c)(3).

<sup>63</sup> Cal. Gov. Code section 65650(a); “‘Supportive housing’ means housing with no limit on length of stay, that is occupied by the target population, and that is linked to onsite or offsite services that assist the supportive housing resident in retaining the housing, improving their health status, and maximizing their ability to live and, when possible, work in the community.” Cal. Health and Safety Code Section 50675.14(b)(2).

<sup>64</sup> Cal. Gov. Code Section 65583(c)(3).

status, or disability, and other characteristics protected by the California Fair Employment and Housing Act and any other state and federal fair housing and planning law.<sup>65</sup>

Affirmatively furthering fair housing includes taking meaningful action to “overcome patterns of segregation and foster inclusive communities” and to “address significant disparities in housing needs and in access to opportunity.”<sup>66</sup> These actions must be in addition to combatting discrimination.<sup>67</sup>

#### Fair Housing Assessment

The housing element shall include a program to affirmatively further fair housing.<sup>68</sup> The program shall include an assessment of fair housing in the jurisdiction that shall include all of the following components:

- A summary of fair housing issues in the jurisdiction and an assessment of the jurisdiction’s fair housing enforcement and fair housing outreach capacity.<sup>69</sup>
- An analysis of available federal, state, and local data and knowledge to identify integration and segregation patterns and trends, racially or ethnically concentrated areas of poverty, disparities in access to opportunity, and disproportionate housing needs within the jurisdiction, including displacement risk.<sup>70</sup>
- An assessment of the contributing factors for the fair housing issues.<sup>71</sup>
- An identification of the jurisdiction’s fair housing priorities and goals, giving highest priority to those factors that limit or deny fair housing choice or access to opportunity, or negatively impact fair housing or civil rights compliance, and identifying the metrics and milestones for determining what fair housing results will be achieved.<sup>72</sup>
- Strategies and actions to implement those priorities and goals, which may include, but are not limited to, enhancing mobility strategies and encouraging development of new affordable housing in areas of opportunity, as well as place-based strategies to encourage community revitalization, including preservation of existing affordable housing, and protecting existing residents from displacement.<sup>73</sup> Strategies and actions must have specific timelines and objectives.<sup>74</sup>

A jurisdiction that completes or revises an assessment of fair housing<sup>75</sup>, or an analysis of impediments to fair housing choice<sup>76</sup>, may incorporate relevant portions of that assessment or

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<sup>65</sup> Cal. Gov. Code Section 65583(c)(5).

<sup>66</sup> Cal. Gov. Code Section 8899.50(a)(1).

<sup>67</sup> Cal. Gov. Code Section 8899.50(a)(1).

<sup>68</sup> Cal. Gov. Code Section 65583(c)(10)(A).

<sup>69</sup> Cal. Gov. Code Section 65583(c)(10)(A)(i).

<sup>70</sup> Cal. Gov. Code Section 65583(c)(10)(A)(ii).

<sup>71</sup> Cal. Gov. Code Section 65583(c)(10)(A)(iii).

<sup>72</sup> Cal. Gov. Code Section 65583(c)(10)(A)(iv).

<sup>73</sup> Cal. Gov. Code Section 65583(c)(10)(A)(v).

<sup>74</sup> HCD, AFFH Guidance Memo 10–12 (April 2021).

<sup>75</sup> Pursuant to Subpart A (commencing with Section 5.150) of Part 5 of Subtitle A of Title 24 of the Code of Federal Regulations, as published in Volume 80 of the Federal Register, Number 136, page 42272, dated July 16, 2015. Cal. Gov. Code Section 65583(c)(10)(B).

<sup>76</sup> In accordance with the requirements of Section 91.225 of Title 24 of the Code of Federal Regulations in effect before August 17, 2015. Cal. Gov. Code Section 65583(c)(10)(B).

revised assessment of fair housing or analysis or revised analysis of impediments to fair housing into its housing element.<sup>77</sup>

The City's fair housing program does not meet the requirement to affirmatively further fair housing. While the City refers to Orange County's 2020 Analysis of Impediments (AI) to Fair Housing, the City does not incorporate sufficient information from the AI to create a satisfactory fair housing assessment or program. The City has provided neither a summary of fair housing issues nor an assessment of the City's fair housing enforcement and outreach capacity. The City has not used federal, state, or local data or knowledge to analyze the areas specified in Section 65583(c)(10)(A)(ii). And the City does not assess contributing factors for fair housing issues. Additionally, HCD's Guidance Memo provides that the City must establish that the community outreach and site inventory analyses address the obligation to affirmatively further fair housing,<sup>78</sup> which the City has not done. Because the City's housing element does not contain the analysis that Section 65583(c)(10)(A) and HCD's Guidance demand, the City does not have an adequate fair housing program. To comply with the requirement to affirmatively further fair housing, the City must include a summary of fair housing issues, an assessment of the City's fair housing enforcement and outreach capacity, an analysis of the areas specified in Section 65583(c)(10)(A)(ii), and an assessment of contributing factors to fair housing issues. Also, the City has to undertake outreach and site selection while considering the obligation to affirmatively further fair housing. These portions of the fair housing assessment must direct the City as it determines fair housing priorities and goals.

The City's goals and policies to affirmatively further fair housing do not satisfy housing element requirements. The City does include a goal and several policies to promote equal housing opportunity. However, the City fails to relate its goal and policies to an assessment of contributing factors for fair housing issues. According to Section 65583(c)(10)(A)(iv), contributing factors must inform the City's goals and policies. But because the City did not determine and prioritize contributing factors, the City could not tie them to goals and policies. Policy 5.1 provides that the City will prohibit discrimination. This policy is insufficient because to affirmatively further fair housing, the City must do more than just combat discrimination. Because the City's goal and policies do not relate to an assessment of contributing factors, and Policy 5.1 only commits the City to enforce anti-discrimination laws, the City's goal and policies do not comply with Section 65583(c)(10)(A). To satisfy the statutory requirement, the City must base goals and policies on an assessment of contributing factors for fair housing issues. Furthermore, these goals and policies need to go beyond enforcement of anti-discrimination laws.

Finally, the City's programs do not meet HCD's requirement for specific timetables and measurable objectives. The City plans numerous actions to satisfy its obligation to affirmatively further fair housing. Nevertheless, many of these actions do not have specific timelines with measurable objectives. For example, the City plans to conduct multifaceted fair housing outreach, but does not specify when the outreach will occur or the amount of outreach the City must provide to reach its goal. Other actions similarly lack the requisite specificity. Because the City's program fails to include specific timelines with measurable objectives, the City's Draft is

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<sup>77</sup> Cal. Gov. Code Section 65583(c)(10)(B).

<sup>78</sup> HCD, AFFH Guidance Memo 10-12 (April 2021).

inadequate. We suggest that the City include a specific timetable and concrete objectives for each action.

For complying with the affirmatively furthering fair housing requirements of State housing element law, we recommend that the City review HCD's AFFH Guidance Memo released April 2021.

### **Accessory Dwelling Units**

The housing element shall include a program to develop a plan that incentivizes and promotes the creation of accessory dwelling units that can be offered at affordable rent, as defined in Health and Safety Code Section 50053, for very low, low-, or moderate-income households.<sup>79</sup>

The housing element must include a plan that incentivizes and promotes the creation of ADUs that can offer affordable rents for very low, low-, or moderate-income households.<sup>80</sup> Resources and incentives include policies and programs to encourage ADUs, such as:

- Prototype plans;<sup>81</sup>
- Reduce or eliminate building permit/development fees;<sup>82</sup>
- Expedited procedures;<sup>83</sup>
- Affordability monitoring programs;<sup>84</sup>
- Incentives for affordability;<sup>85</sup>
- Financing – construction & preservation;<sup>86</sup>
- Outreach, promotion, and educational materials;<sup>87</sup> and
- Amnesty programs (SB 13).

Here, the City is currently amending its Development Code to further promote ADUs, and is providing brochures at permitting counters and other locations. However, the City has not provided evidence that these actions alone will sufficiently incentivize increased ADU production. The City should continue to develop programs to encourage ADU production, and should include more details about these plans in its next draft. For example, the City can further encourage ADU production by streamlining the ADU permitting and construction process, such as by providing suggested ADU floor plans to minimize design time and costs.

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<sup>79</sup> Cal. Gov. Code Section 65583(c)(7).

<sup>80</sup> HCD, ADU Handbook, 19 (December 2020); Cal. Gov. Code § 65583.1(a); Cal. Health and Safety Code § 50504.5.

<sup>81</sup> HCD, ADU Handbook, 19 (December 2020).

<sup>82</sup> SCAG, Accessory Dwelling Units (ADUs), SCAG Housing Element Digital Workshop, 6 (August 27, 2020).

<sup>83</sup> HCD, ADU Handbook, 19 (December 2020).

<sup>84</sup> HCD, ADU Handbook, 19 (December 2020).

<sup>85</sup> SCAG, Accessory Dwelling Units (ADUs), SCAG Housing Element Digital Workshop, 6 (August 27, 2020).

<sup>86</sup> SCAG, Accessory Dwelling Units (ADUs), SCAG Housing Element Digital Workshop, 6 (August 27, 2020).

<sup>87</sup> SCAG, Accessory Dwelling Units (ADUs), SCAG Housing Element Digital Workshop, 6 (August 27, 2020).

### **Public Participation**

The housing element shall include a program that demonstrates a diligent effort by the local government to achieve public participation of all economic segments of the community in the development of the housing element, and the program shall describe this effort.<sup>88</sup>

Under AB 686, the housing element must also include a summary of fair housing outreach and capacity, and a description of meaningful, frequent, and ongoing community participation, consultation, and coordination that is integrated with broader stakeholder outreach.<sup>89</sup> Examples of stakeholders that should be included are: community-based and other organizations that represented protected class members, public housing authorities, housing and community development providers, lower income community members, households that include persons in protected classes, fair housing agencies, independent living centers, regional centers, homeless services agencies, and churches and community service organizations that serve ethnic and linguistic minorities.<sup>90</sup> Cities should hold in-person meetings across the jurisdiction to ensure outreach is accessible to different communities and consider varying work hours and hold meetings at different times of the day and different days of the week.<sup>91</sup> Additionally, jurisdictions make drafts of the housing element available to the public for review and comment with ample time before submission to HCD.<sup>92</sup>

The City's 6<sup>th</sup> Cycle Housing Element was first presented to public at the Planning and Transportation Commission on May 24, 2021 with the following purpose: "to review the draft Housing Element and solicit comments from the Commission and interested stakeholders" so City Staff can incorporate revisions to the draft before the City Council meeting on June 8, 2021.<sup>93</sup> This means that the opportunity to review the draft and provide comments that could be incorporated into the draft before the City Council reviewed was only a few days.

Since then, the City has made changes to the draft and plans to present it to the City Council on June 8, 2021 where City Staff will "recommend that the City Council provide comments to staff and direct staff to submit the draft Housing Element Update, with draft housing sites inventory, to HCD for review and comment."<sup>94</sup> This means the public had from May 24<sup>th</sup> to June 4<sup>th</sup> (10 days) to review the first draft and provide written comment to the City. Then, the public had from June 4<sup>th</sup> to June 8<sup>th</sup> (4 days) to review the second draft and provide comments before the City Council may direct the City to submit to HCD.

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<sup>88</sup> Cal. Gov. Code Section 65583(c)(9).

<sup>89</sup> HCD, Affirmatively Furthering Fair Housing: Guidance for All Public Entities and for Housing Elements, 10 (April 2021).

<sup>90</sup> HCD, Affirmatively Furthering Fair Housing: Guidance for All Public Entities and for Housing Elements, 11 (April 2021).

<sup>91</sup> HCD, Affirmatively Furthering Fair Housing: Guidance for All Public Entities and for Housing Elements, 10 (April 2021).

<sup>92</sup> HCD, Affirmatively Furthering Fair Housing: Guidance for All Public Entities and for Housing Elements, 10 (April 2021).

<sup>93</sup> The City of Mission Viejo, Planning and Transportation Commission Staff Report, *Preliminary consideration of a draft update to the City of Mission Viejo General Plan Housing Element for the 2021-2029 planning period pursuant to the requirements of state law*, 2 (May 14, 2021).

<sup>94</sup> The City of Mission Viejo, City Council Agenda Report, *Preliminary Consideration of Draft Update to the City of Mission Viejo General Plan Housing Element for the 2021-2029 Planning Period Pursuant to the Requirements of State Law*, 3 (June 8, 2021).



This demonstrates that the City has failed to provide the public with sufficient time to review its draft 6<sup>th</sup> Cycle Housing Element. The City must slow the drafting process down to allow the public the requisite time for review and comment and to allow City Staff to incorporate this feedback.

Additionally, the City stated that specific special-interest groups and organizations received notices for public hearings, and that copies of the housing element were distributed to interested individuals and parties, and were available for review. However, the City did not provide specific hearing dates, information about how many people and organizations received copies of the housing element, or information about which people and groups participated in the hearings. The City should provide quantifiable information about public participation in the housing element drafting process in its next draft.

### Conclusion

The housing element process is an opportunity for jurisdictions to meet the needs of California's residents, including needs for housing that is accessible to seniors, families, and workers and the needs of extremely low-, very low-, and low-income families for affordable housing. We appreciate the opportunity to provide feedback on the City's Draft. However, we encourage the City to make revisions to the Draft and ensure that it contains all of the required information, including much of the information regarding its site inventory and assessment of fair housing, and then provide the public with an opportunity to review and provide feedback once all of the necessary information has been included. It is our hope that Mission Viejo will take this opportunity to meaningfully identify sites for the development of affordable housing, to provide for a more inclusive community, and to accommodate the housing needs of its most vulnerable populations.

Sincerely,

**THE PUBLIC LAW CENTER, BY:**



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Richard Walker, Housing and Homelessness Prevention Unit, Senior Staff Attorney  
Shannon Talbot, Housing and Homelessness Prevention Unit, Summer Clerk  
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June 21, 2021

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cityclerk@cityofmissionviejo.org

RE: City of Mission Viejo Draft 6th Cycle Housing Element

Dear City of Mission Viejo City Council and City Staff,

Public Law Center (“PLC”) previously submitted written comments based on the incomplete draft released for the City’s Planning and Transportation Commission meeting held on May 24, 2021 and provided those directly to the City Council of the City of Mission Viejo by email on June 7, 2021. Our June 7, 2021 letter is attached and we provide a few supplemental comments below based on the most recent version of the City’s Draft 6th Cycle Housing Element.

The City’s current Draft 6th Cycle Housing Element still fails to include a significant amount of information that is essential to meet statutory requirements. In particular, the site inventory is still lacking so much information that it is impossible to determine whether the selected sites are suitable for residential development, whether there are any affirmatively furthering fair housing concerns, and whether the sites are adequate to meet the City’s housing needs. We urge the City to include all required information and release a final draft to the public with time for public review and comment.

#### **Emergency Shelters**

The City’s emergency shelter accommodation analysis does not implement our previous comment letter’s feedback. Therefore, we refer the City to our previous comment letter, which we have attached to this one.

#### **Assessing Emergency Shelter Need**

The City’s emergency shelter need analysis has not changed since the City’s last draft housing element. Therefore, we refer the City to our previous comment letter, which we have attached to this one.

#### **Special Housing Needs**

The City’s special housing needs analysis does not implement our previous comment letter’s feedback. Therefore, we refer the City to our previous comment letter, which we have attached to this one.

### **Constraints**

#### **Governmental Constraints**

The City's analysis of governmental constraints has not changed since the City's last draft housing element. Therefore, we refer the City to our previous comment letter, which we have attached to this one.

#### **Nongovernmental Constraints**

The City's analysis of nongovernmental constraints has not changed since the City's last draft housing element. Therefore, we refer the City to our previous comment letter, which we have attached to this one.

### **Site Inventory**

The housing element must include an inventory of land suitable and available for residential development, including vacant sites and sites having realistic and demonstrated potential for redevelopment during the planning period to meet the locality's housing need for a designated income level.<sup>1</sup>

Table B-1 is a summary of residential sites that is missing information, but claims there are adequate sites to meet the housing need for each income level.<sup>2</sup> According to Table B-1, the City maintains adequate sites to supply: 674 very low income units, 401 low income units, 397 moderate income units and 745 above moderate units. The Housing Element also explains "very few vacant developable sites remain in Mission Viejo, the largest potential for additional housing is found in underutilized residential or commercial properties."<sup>3</sup> Table B-3<sup>4</sup> is the reference for underutilized, potential sites; however the page is blank and provides no table or information for how many potential units can be developed on said sites. The City must clarify where the underutilized sites are counted and located. Without this information, this site inventory is inadequate to meet the City's RHNA obligation and the City must create a program addressing an inadequate site inventory.

#### **No Net Loss Requirements**

Government Code section 65863 ensures that jurisdictions accommodate their RHNA throughout the planning period. To accomplish this, HCD recommends that a jurisdiction create a buffer in the housing element inventory of at least 15 to 30 percent more capacity than required.<sup>5</sup> The City's Draft appears to include no buffer as its sites accommodate exactly enough units to accommodate the City's RHNA.<sup>6</sup> This is also problematic considering that nearly 50% of the City's RHNA is allocated to housing for households with very low and low incomes. Unless the City is donating land or providing significant funding toward affordable housing, it is unlikely that the market will support the development of housing complexes where 50% or more of the units are affordable to very-low- and low-income families. With the development of just a

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<sup>1</sup> Cal. Gov. Code Section 65583(a)(3); Cal. Gov. Code Section 65583.2(a).

<sup>2</sup> City of Mission Viejo, Draft Housing Element, 83 (June 2021).

<sup>3</sup> City of Mission Viejo, Draft Housing Element, 73 (June 2021)

<sup>4</sup> City of Mission Viejo, Draft Housing Element, 75 (June 2021)

<sup>5</sup> See HCD's October 2, 2019 Memorandum regarding No Net Loss, Page 5, available at:

<https://www.hcd.ca.gov/community-development/housing-element/housing-element-memos/docs/sb-166-final.pdf>

<sup>6</sup> City of Mission Viejo, Draft Housing Element, Table B-2 (June 2021)

few of the housing element sites, the City may quickly run out of inventory to cover its RHNA without any buffer. We encourage the City to adopt a buffer in line HCD's recommendation of 15 to 30 percent.

### **Determining Site Capacity**

The City's site capacity analysis has not changed since the City's last draft housing element. Therefore, we refer the City to our previous comment letter, which we have attached to this one.

### **Site Inventory**

The inventory of land must include the following: (1) a listing of properties by assessor parcel number;<sup>7</sup> (2) the size of each property;<sup>8</sup> (3) the general plan designation and zoning of each property;<sup>9</sup> (4) a description of existing or planned water, sewer, and other dry utilities supply, the availability and access to distribution facilities;<sup>10</sup> (5) whether the utilities are available and accessible to support housing development or if there is an existing general plan program or other mandatory program or plan, including a program or plan of a public or private entity providing water or sewer service, to secure sufficient water, sewer, and dry utilities supply to support housing development;<sup>11</sup> (6) a map that shows the location of the sites included in the inventory;<sup>12</sup> (7) the number of units that can realistically be accommodated on that site;<sup>13</sup> and (8) whether the site is adequate to accommodate lower income housing, moderate-income housing, or above moderate-income housing.<sup>14</sup>

Here, the City's site inventory is incomplete. The inventory fails to include the general plan designation, the size for each individual parcel, the total number of units that can realistically be accommodated on each site, and whether each site is adequate to accommodate very-low-, low-, moderate-, or above-moderate-income units. Additionally, the map provided does not indicate the location of each individual site included in the inventory.

Although the City added a Housing Sites Inventory Summary<sup>15</sup>, the City's site inventory is still incomplete for the same reasons listed in the above. The newly added Housing Sites Inventory helps determine whether the site will be rezoned or part of an overlay, but information is missing related to the issues listed above.

Without this information, the public cannot properly assess the site inventory. Specifically, the public cannot identify whether sites are adequate for lower income housing or whether the site selection raises any affirmatively furthering fair housing concerns. The City

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<sup>7</sup> Cal. Gov. Code Section 65583.2(b)(1).

<sup>8</sup> Cal. Gov. Code Section 65583.2(b)(2).

<sup>9</sup> Cal. Gov. Code Section 65583.2(b)(2).

<sup>10</sup> Cal. Gov. Code Section 65583.2(b)(5)(A-B).

<sup>11</sup> Cal. Gov. Code Section 65583.2(b)(5)(A-B).

<sup>12</sup> Cal. Gov. Code Section 65583.2(b)(7).

<sup>13</sup> Cal. Gov. Code Section 65583.2(c).

<sup>14</sup> Cal. Gov. Code Section 65583.2(c).

<sup>15</sup> City of Mission Viejo, Draft Housing Element, 77 (June 2021)

must include this information and allow the public adequate time for review and comment before submitting to the Department of Housing and Community Development (“HCD”).

### **Lower Income Sites**

The City did not demonstrate that sites of an equivalent size were successfully developed during the prior planning period to accommodate low-income sites, since the City’s last draft housing element. Therefore, we refer the City to our previous comment letter, which we have attached to this one.

### **Calculating the Number of Lower Income Units**

The City’s calculation of the number of low income units did not change based on our previous comment letter’s feedback. Therefore, we refer the City to our previous comment letter, which we have attached to this one.

### **Nonvacant Sites**

The City’s nonvacant site analysis did not change based on our previous comment letter’s feedback. Therefore, we refer the City to our previous comment letter, which we have attached to this one.

### **Nonvacant Sites for 50% or More of Housing Need**

The City’s nonvacant sites account for 50% or more of housing needs analysis did not change based on our previous comment letter’s feedback. Therefore, we refer the City to our previous comment letter, which we have attached to this one.

### **Presumption of Impeding Additional Residential Development**

An existing use shall be presumed to impede additional residential development, absent findings based on substantial evidence that the use is likely to be discontinued during the planning period.<sup>16</sup>

The city provides seven different scenarios for housing development on existing-use sites in the City Staff Report<sup>17</sup>. This report is a result of the deliberations that occurred during the previous City Council meeting held on June 8, 2021. The Council Members considered various options for which sites may belong in the site inventory. After last meeting, the City released seven scenarios of potential sites, which included acreage, zoning, and unit capacity. However, including these seven scenarios does not demonstrate that existing use of the parcel is likely to be discontinued over the next 8 years. Additionally, some sites were recommended to be removed from the site inventory by the City’s Planning Commission which makes it difficult to navigate which sites will remain on the site inventory and which sites will be removed. Finally, the City Council Meeting on June 8, 2021 addressed issues that some property owners listed on the site inventory did not want to be rezoned to accommodate residential housing. The city will need to finalize these details before presenting the public with a Housing Element to review to prevent confusion.

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<sup>16</sup> Cal. Gov. Code Section 65583.2(g)(2).

<sup>17</sup> Mission Viejo Agenda Report pg. 519

The City must provide more information to determine if the listed sites are adequate to meet the City's RHNA allocation. Only sites that may be used to accommodate residential development should be included in the site inventory. Additionally, the City must provide substantial evidence to demonstrate the existing use is likely to be discontinued over the next 8 years or find alternative sites.

### **Accessory Dwelling Units**

A jurisdiction may count an ADU for purposes of identifying adequate sites for housing.<sup>18</sup> The number of ADUs identified is based on the number of ADUs developed in the prior housing element planning period, whether or not the units are permitted by right; the need for these units in the community; the resources or incentives available for their development; and any other relevant factors determined by HCD.<sup>19</sup> To estimate the number of ADUs that will be developed in the planning period, a jurisdiction must generally use a three-part approach addressing (1) development trends, (2) anticipated affordability, and (3) resources and incentives.<sup>20</sup>

When assessing development trends, a jurisdiction must consider the number of ADUs developed in the prior housing element planning period, whether or not the units are permitted by right;<sup>21</sup> the need for these units in the community;<sup>22</sup> the availability of ADUs and JADUs that will be part of the rental stock, rather than used as offices or guest houses;<sup>23</sup> and more recent trends.<sup>24</sup>

HCD Staff has stated that the following two approaches would be accepted without further analysis or incentives: (1) average ADU applications from the beginning of the 5<sup>th</sup> Cycle to 2017, multiplied by five; or (2) average ADU applications from 2018, multiplied by eight. If jurisdictions anticipate a higher ADU production, HCD will require more analysis and incentives to show the higher production can be met.

Here, the City claims that 30 ADUs will be constructed during the planning period.<sup>25</sup> The City explains that "six ADUs were approved by the City during 2014-2020," and because of this history, the City does not consider its ADU standards to "present any unreasonable constraints."<sup>26</sup> However, this would be an average of one ADU approved per year, yet the City predicts that this rate will almost quadruple during the next planning cycle. The City has not provided enough data regarding the average number of ADU applications from the beginning of the 5<sup>th</sup> Cycle to determine whether this estimate is reasonable. Therefore, the data provided by

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<sup>18</sup> Cal. Gov. Code § 65852.2(m); Cal. Gov. Code § 65583.1(a).

<sup>19</sup> Cal. Gov. Code Section 65583.1(a).

<sup>20</sup> HCD, ADU Handbook, 19 (December 2020).

<sup>21</sup> Cal. Gov. Code § 65583.1(a); HCD, ADU Handbook, 19 (December 2020).

<sup>22</sup> Cal. Gov. Code § 65583.1(a).

<sup>23</sup> HCD, Accessory Dwelling Units (ADU) and Junior Accessory Dwelling Units (JADUs), *Requisite Analysis*, <https://hcd.ca.gov/community-development/building-blocks/site-inventory-analysis/accessory-dwelling-units.shtml> (last visited Mar. 21, 2021).

<sup>24</sup> HCD, ADU Handbook, 19 (December 2020).

<sup>25</sup> City of Mission Viejo, Draft Housing Element, 92 (May 2021).

<sup>26</sup> City of Mission Viejo, Draft Housing Element, 37-38 (May 2021).

the City is insufficient to estimate ADU production for the upcoming period. Furthermore, the City does not take into account any of the other factors listed by the statute. Without further explanation, there is no reason to believe that 30 ADUs will be constructed in the upcoming planning period.

The City must sufficient provide data to support its ADU estimate or thoroughly explain, with analysis and incentives, why it believes its allocation of 30 ADUs is appropriate.

### **Programs**

The housing element must include programs that allow the jurisdiction to achieve its stated housing goals and objectives. Programs must set forth a schedule of actions during the planning period, each with a timeline for implementation.<sup>27</sup> The jurisdiction may recognize that certain programs are ongoing, such that there will be beneficial impacts of the programs within the planning period, that the local government is undertaking or intends to undertake to implement the policies and achieve the goals and objectives of the housing element.<sup>28</sup> The jurisdiction may do so through the administration of land use and development controls, the provision of regulatory concessions and incentives, the utilization of appropriate federal and state financing and subsidy programs when available, and the utilization of moneys in a low- and moderate-income housing fund of an agency if the locality has established a redevelopment project area pursuant to the Community Redevelopment Law.<sup>29</sup>

To make adequate provision for the housing needs of all economic segments of the community, the program shall address housing issues such as inadequate site inventories, meeting lower income housing needs, removing constraints, maintaining affordable housing, promoting affirmatively furthering fair housing, preserving assisted housing developments, encouraging accessory dwelling units, and facilitating public participation. To make these programs most effective, HCD recommends jurisdictions include the following: definite time frames for implementation; an identification of agencies and officials responsible for implementation; a description of the local government's specific role in program implementation; a description of the specific action steps to implement the program; proposed measurable outcomes; demonstration of a firm commitment to implement the program; and an identification of specific funding sources, where appropriate.<sup>30</sup>

### **Inadequate Site Inventory**

The City's site inventory did not make adequate changes based on our previous feedback. Therefore, we refer the City to our previous comment letter, which we have attached to this one.

### **Addressing Constraints**

The housing element shall include a program to address and, where appropriate and legally possible, remove governmental and nongovernmental constraints to the maintenance,

<sup>27</sup> Cal. Gov. Code Section 65583(c).

<sup>28</sup> Cal. Gov. Code Section 65583(c).

<sup>29</sup> Cal. Gov. Code Section 65583(c).

<sup>30</sup> HCD, Building Blocks: A Comprehensive Housing-Element Guide, *Program Overview and Quantified Objectives*, <https://hcd.ca.gov/community-development/building-blocks/program-requirements/program-overview.shtml> (last visited Apr. 4, 2021).

improvement, and development of housing, including housing for all income levels and housing for persons with disabilities.<sup>31</sup> The program shall remove constraints to, and provide reasonable accommodations for housing designed for, intended for occupancy by, or with supportive services for, persons with disabilities.<sup>32</sup>

Transitional housing and supportive housing shall be considered a residential use of property and shall be subject only to those restrictions that apply to other residential dwellings of the same type in the same zone.<sup>33</sup> Supportive housing<sup>34</sup> shall be a use by right in all zones where multifamily and mixed uses are permitted, as provided in Article 11 (commencing with Section 65650).<sup>35</sup>

The City cited governmental and nongovernmental constraints to the development of housing in the City. The City also described two programs, Efficient Processing and Development Fees, which it will implement to mitigate governmental constraints.<sup>36</sup> The City claims the Efficient Processing program will “streamline review times for affordable housing projects.”<sup>37</sup> Similarly, under the Development Fees program, “the City shall consider fee waivers or subsidies on a case-by-case basis.”<sup>38</sup> However, the City does not convincingly describe how these programs will actually mitigate constraints, and the City does not describe how it will assess whether these programs are working as intended. For example, the City could analyze data regarding current review times and then describe how the Efficient Processing program will shorten that time.

Furthermore, the City does not provide any analysis regarding its plans to mitigate nongovernmental constraints. As part of the requisite analysis of these constraints, the City must provide further analysis and data regarding how its programs will remove or mitigate constraints. The City must also describe additional programs to remove or mitigate these constraints in its next housing element draft.

### **Affirmatively Furthering Fair Housing**

The City’s affirmatively furthering fair housing program has not changed since the City’s last draft housing element. Therefore, we refer the City to our previous comment letter, which we have attached to this one.

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<sup>31</sup> Cal. Gov. Code Section 65583(c)(3).

<sup>32</sup> Cal. Gov. Code Section 65583(c)(3).

<sup>33</sup> Cal. Gov. Code Section 65583(c)(3).

<sup>34</sup> Cal. Gov. Code section 65650(a); “‘Supportive housing’ means housing with no limit on length of stay, that is occupied by the target population, and that is linked to onsite or offsite services that assist the supportive housing resident in retaining the housing, improving their health status, and maximizing their ability to live and, when possible, work in the community.” Cal. Health and Safety Code Section 50675.14(b)(2).

<sup>35</sup> Cal. Gov. Code Section 65583(c)(3).

<sup>36</sup> City of Mission Viejo, Draft Housing Element, 60 (June 2021).

<sup>37</sup> City of Mission Viejo, Draft Housing Element, 60 (June 2021).

<sup>38</sup> City of Mission Viejo, Draft Housing Element, 60 (June 2021).



### **Accessory Dwelling Units**

The City's analysis of its ADU programs has not changed since the City's last draft housing element. Therefore, we refer the City to our previous comment letter, which we have attached to this one.

### **Public Participation**

The housing element shall include a program that demonstrates a diligent effort by the local government to achieve public participation of all economic segments of the community in the development of the housing element, and the program shall describe this effort.<sup>39</sup>

Under AB 686, the housing element must also include a summary of fair housing outreach and capacity, and a description of meaningful, frequent, and ongoing community participation, consultation, and coordination that is integrated with broader stakeholder outreach.<sup>40</sup> Examples of stakeholders that should be included are: community-based and other organizations that represented protected class members, public housing authorities, housing and community development providers, lower income community members, households that include persons in protected classes, fair housing agencies, independent living centers, regional centers, homeless services agencies, and churches and community service organizations that serve ethnic and linguistic minorities.<sup>41</sup> Cities should hold in-person meetings across the jurisdiction to ensure outreach is accessible to different communities and consider varying work hours and hold meetings at different times of the day and different days of the week.<sup>42</sup> Additionally, jurisdictions make drafts of the housing element available to the public for review and comment with ample time before submission to HCD.<sup>43</sup>

Since our previous comment letter, the City made changes to the draft and presented it to City Council on June 8, 2021.<sup>44</sup> The City also plans to present it to the City Council on June 22, 2021, where the Council's recommended action is to "authorize staff to submit the Draft Housing Element to [HCD] for review and comment."<sup>45</sup> This means the public had from May 24 to June 4 (10 days) to review the first draft and provide written comment to the City. Then, the public had from June 4 to June 22 (18 days) to review the second draft and provide comments before the City Council may direct the City to submit to HCD. Neither Draft, however, was even a complete Draft.

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<sup>39</sup> Cal. Gov. Code Section 65583(c)(9).

<sup>40</sup> HCD, Affirmatively Furthering Fair Housing: Guidance for All Public Entities and for Housing Elements, 10 (April 2021).

<sup>41</sup> HCD, Affirmatively Furthering Fair Housing: Guidance for All Public Entities and for Housing Elements, 11 (April 2021).

<sup>42</sup> HCD, Affirmatively Furthering Fair Housing: Guidance for All Public Entities and for Housing Elements, 10 (April 2021).

<sup>43</sup> HCD, Affirmatively Furthering Fair Housing: Guidance for All Public Entities and for Housing Elements, 10 (April 2021).

<sup>44</sup> The City of Mission Viejo, City Council Agenda Report, *Preliminary Consideration of Draft Update to the City of Mission Viejo General Plan Housing Element for the 2021-2029 Planning Period Pursuant to the Requirements of State Law*, 6 (June 8, 2021).

<sup>45</sup> The City of Mission Viejo, City Council Agenda Report, *Preliminary Consideration of Draft Update to the City of Mission Viejo General Plan Housing Element for the 2021-2029 Planning Period Pursuant to the Requirements of State Law (Continued from the 6/08/21 City Council Meeting)*, 8 (June 22, 2021).

This demonstrates that the City has failed to provide the public with sufficient time to review its draft 6th Cycle Housing Element. The City must allow the public the requisite time for review and comment and to allow City Staff to incorporate this feedback. If the City Council does authorize City Staff to submit the Draft to HCD for review, then the public will never have seen a complete draft with all of the required information to allow for meaningful feedback.

Additionally, the City stated that specific special-interest groups and organizations received notices for public hearings, and that copies of the housing element were distributed to interested individuals and parties, and were available for review.<sup>46</sup> However, the City did not provide specific hearing dates, information about how many people and organizations received copies of the housing element, or information about which people and groups participated in the hearings. The City should provide quantifiable information about public participation in the housing element drafting process in its next draft.

**Conclusion**

The housing element process is an opportunity for jurisdictions to meet the needs of California's residents, including needs for housing that is accessible to seniors, families, and workers and the needs of extremely low-, very low-, and low-income families for affordable housing. We encourage Mission Viejo to take this opportunity to expand its outreach to key stakeholders, meaningfully revise its Draft, and provide the public sufficient opportunity to provide input on the Draft.

Sincerely,

**THE PUBLIC LAW CENTER, BY:**



Alexis Mondares, Housing and Homelessness Prevention Unit, Legal Fellow  
Richard Walker, Housing and Homelessness Prevention Unit, Senior Staff Attorney  
Shannon Talbot, Housing and Homelessness Prevention Unit, Summer Clerk  
Lana Rayan, Housing and Homelessness Prevention Unit, Summer Clerk  
Adam Snider, Housing and Homelessness Prevention Unit, Summer Clerk  
William Shuldiner, Housing and Homelessness Prevention Unit, Summer Clerk

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<sup>46</sup> City of Mission Viejo, Draft Housing Element, 4 (June 2021).



July 28, 2021

Colin Cross, Land Use & Planning Analyst  
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RE: City of Mission Viejo Draft 6th Cycle Housing Element

Dear Mr. Cross,

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. Our services are provided across a range of substantive areas of law, including consumer, family, immigration, housing, and health law. Additionally, PLC provides legal assistance to community organizations. Further, the mission of our Housing and Homelessness Prevention Unit includes preserving and expanding affordable housing. Thus, we write on behalf of individuals in need of affordable housing in Orange County to comment on the City of Mission Viejo (“the City”) Draft 6th Cycle Housing Element.

PLC has provided to the City three comment letters related to its Draft 6th Cycle Housing Element, all of which have been included as attachments to this letter. Two of the letters, dated June 7, 2021 and June 21, 2021, directly comment on the Draft 6th Cycle Housing Element. While a few of the issues raised in these letters have been addressed by the City, mainly that it has now included some of the information in its site inventory that was previously missing, the majority of the comments have not been addressed and are still applicable to the Draft 6th Cycle Housing Element submitted to HCD. In addition to these comments, we provide below additional comments specifically regarding Site C of the City’s Site Inventory and refer HCD to the July 27, 2021 comment letter from the Mission Viejo Planning Partnership regarding additional issues related to the City’s Housing Policies and Programs and Site Inventory.

PLC’s third letter dated July 12, 2021 specifically addressed concerns regarding the City’s public outreach and participation as it relates to the Draft 6th Cycle Housing Element as well as generally in the City. After having submitted the July 12 letter and provided verbal comment at the July 13, 2021 City Council Meeting, the City’s attorney reached out to PLC at the July 13 City Council Meeting to address the concerns raised in our July 12 letter. To further address the City’s in-person response and the general lack of outreach and opportunities for public participation, we provide additional comments on this issue below.

### Site C

On June 22, 2021, the City Council approved Site C to be included in its site inventory.<sup>1</sup> Site C is owned by the City's Housing Authority and is comprised of six individual parcels (740-112-03, 740-112-39, 740-113-xx, 740-112-02, 740-012-240, and 740-012-36), totaling 32.80 acres.<sup>2</sup> The City assumes Site C will be developed at "full capacity based on residential zoning" and will allocate 48% of the 984 projected units to very low- and low-income units. However, there are a number of reasons why Site C cannot be considered suitable for residential development.

First, Site C has been identified in the 4th, 5th, and now 6th Housing Element Cycles. Second, the City has provided inconsistent information for this site across each cycle. Third, factors such as landslide risk, flood risk, environmental and wildlife conservation, and constructing infrastructure could raise the cost of development and deter affordable housing developers. These factors reduce the likelihood that this site will actually be able to accommodate 477 very low- and low-income units.<sup>3</sup>

### Previously Identified Site

Site C has been identified in the 4th, 5th, and now 6th Housing Element Cycles. As a vacant site that has been included in two or more consecutive planning periods and has not been approved to develop a portion of the City's housing need, Site C cannot be deemed adequate to accommodate a portion of the housing need for lower income households unless the site is subject to a program in the housing element that requires rezoning within three years of the beginning of the planning period to allow residential use for housing developments in which at least 20% of the units are affordable to lower income individuals and families.<sup>4</sup> However, the City's housing element does not specify whether this site is subject to such a program. To continue to designate Site C as adequate for lower income housing, the City must provide the requisite information or create the required program.

### Inconsistent Information

Further, the information provided about this site has been inconsistent. For previous planning periods, the City listed the site as only 8.5 acres.<sup>5</sup> However, the City has increased the boundaries of the site to 32.8 acres for a total capacity of 984 dwelling units.<sup>6</sup> The City should explain how the remainder of the land suddenly became available for development when only a limited number of acres were available during the previous two cycles and confirm how much space is actually available for residential development.

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<sup>1</sup> City of Mission Viejo, *Housing, Public Meetings, June 22, 2021, Draft Housing Sites Inventory*, <https://cityofmissionviejo.org/departments/community-development/planning/housing> (last visited Jul. 9, 2021).

<sup>2</sup> City of Mission Viejo, *Housing, Public Meetings, June 22, 2021, Draft Housing Sites Inventory*, <https://cityofmissionviejo.org/departments/community-development/planning/housing> (last visited Jul. 9, 2021); City of Mission Viejo, *Housing Element Draft*, 74 (June 2021).

<sup>3</sup> City of Mission Viejo, *Housing Element Draft*, 74 (June 2021).

<sup>4</sup> Cal. Gov. Code Section 65583.2(c).

<sup>5</sup> City of Mission Viejo, *Housing Element*, 80 (Mar. 4, 2013).

<sup>6</sup> City of Mission Viejo, *Housing Element Draft*, 74 (June 2021).

If the site remains listed at 32.8 acres, the site cannot be deemed adequate to accommodate lower income housing unless the locality can demonstrate that sites of an equivalent size were successfully developed during the prior planning period for an equivalent number of lower income housing units as projected for Site C.<sup>7</sup> Alternatively, the locality may provide other evidence to HCD that the site is adequate to accommodate lower income housing.<sup>8</sup> Given the difficulties of developing the same site when it was only listed at 8.5 acres and that there has been little development within the jurisdiction, it is unlikely that the City will be able to meet this statutory requirement.

### **Challenges to Development**

Site C has been vacant for over ten years. In 2007, the City rezoned Site C as surplus land for affordable housing.<sup>9</sup> In 2011, there were several efforts to develop Site C.<sup>10</sup> However, the loss of funding rendered the project infeasible and in 2017, the City terminated the project. In 2018, the City solicited new proposals from developers and approved a negotiation agreement with a developer. However, this project was again cancelled due to lack of adequate funding. Numerous issues with Site C contribute to extremely high development costs.

### **Historical Landslide Site**

Site C is located on a steep hillside, making it prone to landslides. According to the California Department of Conservation, the parcels included in Site C lie within liquefaction and landslide zones.<sup>11</sup> The Earthquake Zones of Required Investigation map shows that Site C and the surrounding areas are in blue landslide zones with orange liquefaction zones overlapping.<sup>12</sup> The Landslide Inventory map shows a history of multiple landslides in the same area.<sup>13</sup>

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<sup>7</sup> Cal. Gov. Code Section 65583.2(c)(2).

<sup>8</sup> Cal. Gov. Code Section 65583.2(c)(2).

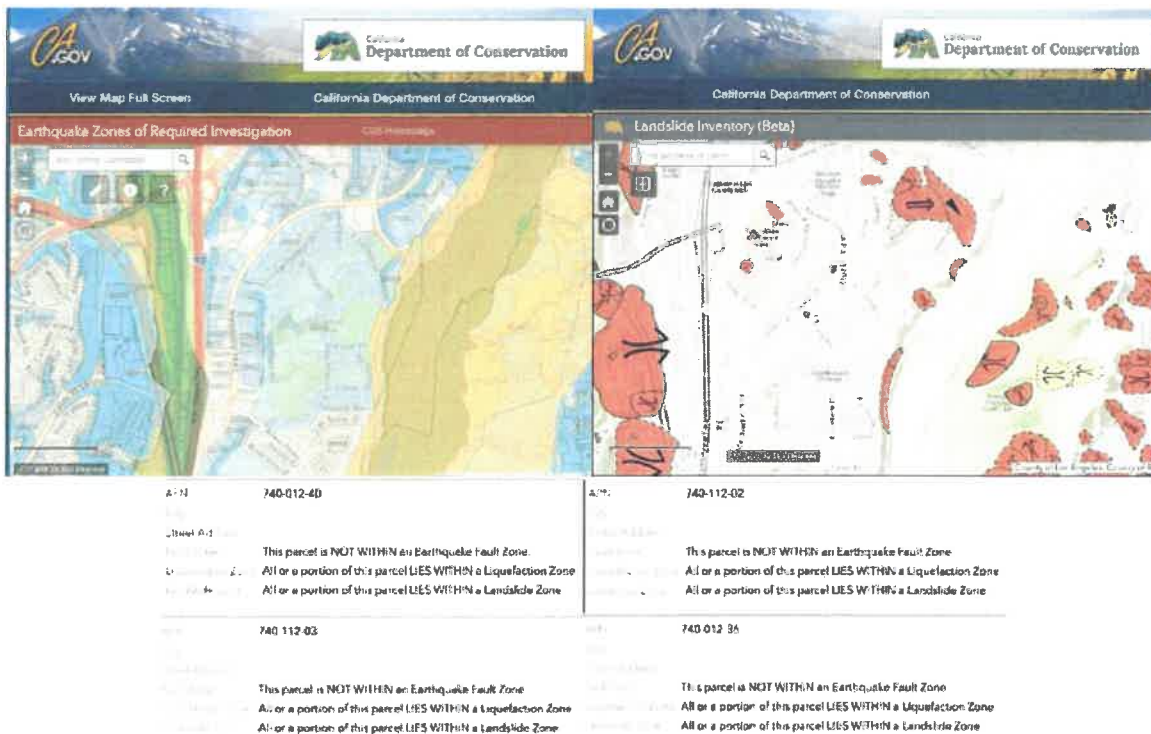
<sup>9</sup> City of Mission Viejo, Housing Element, 71 (Mar. 4, 2013).

<sup>10</sup> City of Mission Viejo, Housing Element, 71 (Mar. 4, 2013).

<sup>11</sup> Cal. Dept. of Conservation, *Earthquake Zones of Required Investigation*, <https://maps.conservation.ca.gov/cgs/EQZApp/> (last visited Jul. 22, 2021).

<sup>12</sup> Cal. Dept. of Conservation, *Earthquake Zones of Required Investigation*, <https://maps.conservation.ca.gov/cgs/EQZApp/> (last visited Jul. 22, 2021).

<sup>13</sup> Cal. Dept. of Conservation, *Landslide Inventory*, <https://maps.conservation.ca.gov/cgs/lsi/> (last visited Jul. 22, 2021).



To safely develop housing on this site, a developer would need to stabilize the land before beginning construction. According to a developer familiar with the site, historic landslides likely mean the underlying soils are unstable. As a result, simply building a road to Site C would require that the hillside be retained and the road stabilized. Then, the original unstable soil at Site C would have to be excavated and removed to allow trucks to dump new fill in the area. Although the City is moving dirt from a freeway expansion project to Site C in an attempt at making the project more affordable, actually grading the site is significantly more work and more costly than just delivering excess soil to the project.<sup>14</sup> The high cost of this stabilization effort would reduce the likelihood that a large amount of affordable housing could be built here.

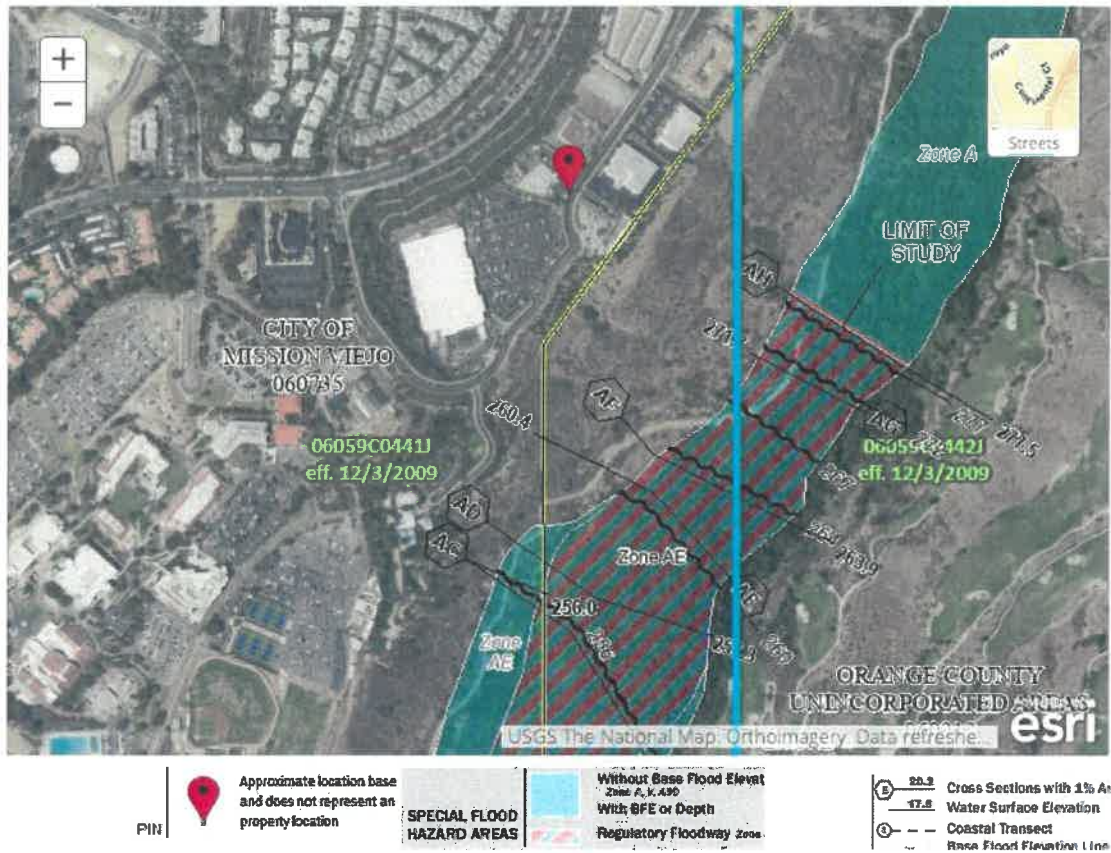
### Flood Risk Zone

Site C and the surrounding areas are also located in a flood zone. According to the FEMA flood map below, zones A and AE are all high risk areas.<sup>15</sup> Some of these areas have a 1 in 4 chance of flooding over a 30-year period.<sup>16</sup> A developer might be required to mitigate this risk by elevating the housing development or using alternative methods, again adding to the cost of development.

<sup>14</sup> City of Mission Viejo, City Council Meeting, 2:01:40, 2:10:10 (Jun. 22, 2021).

<sup>15</sup> FEMA, *FEMA Flood Map Service Center*, <https://msc.fema.gov/portal/home> (last visited Jul. 22, 2021); Shawnee County, *Definitions of FEMA Flood Zone Designations*, <https://snmapmod.snco.us/fmm/document/fema-flood-zone-definitions.pdf> (last visited Jul. 22, 2021).

<sup>16</sup> Shawnee County, *Definitions of FEMA Flood Zone Designations*, <https://snmapmod.snco.us/fmm/document/fema-flood-zone-definitions.pdf> (last visited Jul. 22, 2021).



### Environment and Wildlife Conservation

Two conservation plans and a watershed restoration effort could affect this land and require high mitigation fees. First, Site C is located within the Natural Community Conservation Plan & Habitat Conservation Plan area, which the City enrolled in in 1994, to protect and manage plant and animal populations found within the Central and Coastal Subregion.<sup>17</sup> Second, San Juan Creek connects with the Arroyo Trabuco Creek at the bottom of Site C. However, the Southern Orange County Habitat Conservation Plan conserves the Arroyo Toad habitat in the San Juan Creek on Rancho Mission Viejo lands.<sup>18</sup> Third, San Juan Creek is a watershed important to the recovery of trout species, headed by multiple conservation organizations.<sup>19</sup> Given the various conservation efforts in the area, developers may be liable for high mitigation fees, contributing to the high cost of housing development.

<sup>17</sup> County of Orange Environmental Management Agency, *Natural Community Conservation Plan & Habitat Conservation Plan, County of Orange Central & Coastal Subregion, Parts I & II: NCCP/HCP* (July 17, 1995); California Department of Fish and Wildlife, *NCCP Plan Summary – County of Orange (Central/Coastal) NCCP/HCP*, <https://wildlife.ca.gov/Conservation/Planning/NCCP/Plans/Orange-Coastal> (last visited Jul. 11, 2021).

<sup>18</sup> U.S. Fish and Wildlife Service, *Arroyo Toad 5-Year Review: Summary and Evaluation*, 35, 52 (Aug. 2009).

<sup>19</sup> CalFish, *San Juan Creek*, <https://www.calfish.org/ProgramsData/ConservationandManagement/CaliforniaCoastalMonitoring/MonitoredRivers/SouthCoast/SanJuanCreek.aspx> (last visited Jul. 11, 2021).

### Infrastructure

At the June 22, 2021 City Council meeting, City Manager Dennis Wilberg acknowledged local problems that would affect residential development such as lack of water, lack of electricity, and utility scarcities.<sup>20</sup> The developer with knowledge of the site observed that there is no infrastructure at Site C. Although there are numerous wet utilities off Center Drive, water does not flow upward. This means storm and sewer lines would likely need to be ejected via pump, which would raise the cost of development and make it even more unlikely that affordable housing will be developed there.

### Likelihood of Developing Affordable Housing

The City is attempting to place 44% of its lower income RHNA allocation on a site that has a history of failed projects and numerous development challenges that raise the cost of development.<sup>21</sup> Despite this, Elaine Lister, the City's Director of Community Development, claims that nonprofits and developers have said there is development potential on this site.<sup>22</sup> The City does not provide any information about these nonprofits and developers, the details of their opinions about the site, or how Site C will actually be developed during the 6th Cycle when the challenges on the site have remained the same during previous housing elements. At this point, it is extremely unlikely that 44% of the City's lower income housing need could be accommodated on this site, let alone 299 very low-income units.<sup>23</sup> The City should take this site off its site inventory or provide a more realistic estimate of how many affordable units will be built there.

### Public Participation

In response to our July 12 letter, City Attorney William "Bill" Curley, pulled PLC Senior Staff Attorney Richard Walker aside at the July 13 City Council Meeting to address the concerns raised in our letter. The City's response, via City Attorney Curley, largely focused on three main points: the City's behavior has been presented out of context, the City's behavior has been misinterpreted, and the City's behavior was justified.

First, with regard to the City's behavior having been presented out of context, we certainly invite HCD to reach out to the City to obtain their perspective on the set of events described in our July 12 letter. Additionally, while not all events described in our letter related directly to the housing element update process, HCD can access for itself the videos of some of the public meetings described therein to observe the events in their context. Additionally, regardless of context and any history the City may have with a specific individual or organization, the tone and word-choice used by City staff when addressing members of the public should always be conducted in a professional manner that encourages and promotes public participation. However, the events discussed in our July 12 letter have, at a minimum, had the effect of chilling public participation and more likely, have created or contributed to a hostile environment as it relates to public engagement in the City.

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<sup>20</sup> City of Mission Viejo, City Council Meeting, 2:01:40, 2:10:10 (Jun. 22, 2021).

<sup>21</sup> City of Mission Viejo, Housing Element Draft, 23, 74 (June 2021).

<sup>22</sup> City of Mission Viejo, City Council Meeting, 1:56:25 (Jun. 22, 2021).

<sup>23</sup> City of Mission Viejo, Housing Element Draft, 74 (June 2021).



Second, with regards to misinterpreting the City's behavior, it certainly is possible that some of the comments made to members of the Mission Viejo Planning Partnership at their May 12, 2021 meeting with City staff were in fact made out of levity and in an attempt at humor, such as the City Attorney's reference to himself that he is "beloved" and requesting to be referred to as "beloved." However, we are reluctant to believe that referring to the affordable housing advocates as "zealots" was a compliment, as was claimed by the City in response to our July 12 letter. Additionally, taking into consideration the City's general demeanor in the meeting and the fact that it summarily dismissed any recommendations made by Mission Viejo Planning Partnership members, the City's post factum claim that the comment was intended as a compliment is, at a minimum, suspect, and most likely is an attempt to backpedal its inappropriate treatment of key stakeholders in the housing element update process. For additional insights into the conduct of the City at this meeting, we refer HCD to the Mission Viejo Planning Partnership.

Third, the City claims that its behavior was justified because it was inappropriate for the Mission Viejo Planning Partnership to request an individual, private meeting; that their request was inappropriately aggressive; and that this attempt to engage in the housing element update process was too late. These claims fail to justify the City's hostile approach to attempts at public participation and mischaracterize the Mission Viejo Planning Partnership's request and timing as inappropriate.

The City has a responsibility to implement a robust public participation program when updating its housing element and to reach out directly to key stakeholders, including affordable housing advocates and advocates for individuals experiencing homelessness and other marginalized communities.<sup>24</sup> It is common practice for jurisdictions to hold stakeholder meetings, such as the one requested by Mission Viejo Planning Partnership. Where the City was dismissing the request as inappropriate, it should have been welcoming the meeting since it is the City who is obligated to affirmatively engage key stakeholders, not the other way around.

Next, the Mission Viejo Planning Partnership certainly was not "too late" to participate in the housing element update process, as was represented to them. At the time of Mission Viejo Planning Partnership's request for a stakeholder meeting, the City had previously only held one meeting related to the update of the housing element for the 6th Cycle, a joint study session on March 31, 2021. The next meetings the City would hold addressing the housing element update would be on May 24, and June 8 and 22.<sup>25</sup> Indeed, if the May 12 meeting with Mission Viejo Planning Partnership was too late to participate in the housing element update process, when exactly was the appropriate time for the public to participate in the process and which, of all the comments received at the three subsequent hearings about the Draft Housing Element, were even taken into consideration? Not only was Mission Viejo Planning Partnership timely in their request for a stakeholder meeting, but it is never "too late" to participate in the housing element

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<sup>24</sup> See, for example, HCD, Building Blocks: A Comprehensive Housing-Element Guide, *Public Participation*, <https://hcd.ca.gov/community-development/building-blocks/getting-started/public-participation.shtml> (last visited July 28, 2021) ("Engage advocates or groups with housing interests early in the process, so they can share their ideas on how to meet need the housing needs of those they represent.") and HCD, *Affirmatively Furthering Fair Housing: Guidance for All Public Entities and for Housing Elements*, 11 (April 2021).

<sup>25</sup> City of Mission Viejo, Housing Element Draft, 4 (June 2021).

process as the City is required to have a program specifically addressing public participation and HCD even recommends annual meetings throughout the housing element cycle.<sup>26</sup>

Finally, even if the City was correct in describing Mission Viejo Planning Partnership's approach toward the City as aggressive, such an approach was understandable, if not justified. First, at the time of Mission Viejo Planning Partnership's request for a meeting, the City had only held one public meeting where the housing element update was discussed and was already releasing a Draft for review and discussion at an upcoming City meeting. There were no other efforts to include the public in the update process. Second, the City has a history of not complying with Housing Element law to such an extent that litigation was required to enforce those laws.<sup>27</sup> And, as mentioned previously, regardless of Mission Viejo Planning Partnership's approach, the City should conduct itself in a manner that encourages and not chills public participation in the housing element update process.

Even if it were not for the City's hostile approach to public participation in the housing element update process, the City still would not have complied with the public participation requirements of State Housing Element law. The housing element shall include a program that demonstrates a diligent effort by the local government to achieve public participation of all economic segments of the community in the development of the housing element, and the program shall describe this effort.<sup>28</sup> HCD recommends that the local government describe who was invited to participate, who actually participated, general comments received, and how comments were incorporated into the housing element.<sup>29</sup> The Draft Housing Element dedicates a single page to describe "Citizen Participation," but does not sufficiently describe who was invited to participate, who actually participated, general comments received, and how comments were incorporated into the housing element.<sup>30</sup> PLC submitted at least two comment letters prior to the City's submission of its Draft Housing Element and there is no mention of these comments or how they were incorporated. This is likely because our comments, and those of seemingly all other public participants, were ignored by the City. Additionally, the few public hearings that were held during Planning and Transportation Commission and City Council meetings do not demonstrate a diligent effort to achieve public participation in any capacity, let alone of all economic segments of the community.

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<sup>26</sup> HCD, Building Blocks: A Comprehensive Housing-Element Guide, *Public Participation*, <https://hcd.ca.gov/community-development/building-blocks/getting-started/public-participation.shtml> (last visited July 28, 2021) (Develop a public participation infrastructure that includes the following resources to promote sustainable community involvement: . . . Annual meetings where stakeholders can gather to celebrate successes in housing development, learn about local land-use and development issues, voice concerns, and develop a vision for future housing development.); HCD, Affirmatively Furthering Fair Housing: Guidance for All Public Entities and for Housing Elements, 10 (April 2021) (requiring "ongoing" efforts to engage the public and conduct outreach to key stakeholders).

<sup>27</sup> See *Mejia, et al. v. City of Mission Viejo, et al.*, Case No. 06-CC05478, Petition filed April 26, 2006 alleging the City's Housing Element did not comply with State law with subsequent writ issued by the Orange County Superior Court on March 13, 2007 finding that the City's Housing Element did not substantially comply with State Housing Element law.

<sup>28</sup> Cal. Gov. Code Section 65583(c)(9).

<sup>29</sup> HCD, Building Blocks: A Comprehensive Housing-Element Guide, *Public Participation*, <https://hcd.ca.gov/community-development/building-blocks/getting-started/public-participation.shtml> (last visited July 28, 2021).

<sup>30</sup> City of Mission Viejo, Housing Element Draft, 4 (June 2021).

Additionally, under AB 686, the housing element must also include a summary of fair housing outreach and capacity, and a description of meaningful, frequent, and ongoing community participation, consultation, and coordination that is integrated with broader stakeholder outreach.<sup>31</sup> Examples of stakeholders that should be included are: community-based and other organizations that represented protected class members, public housing authorities, housing and community development providers, lower income community members, households that include persons in protected classes, fair housing agencies, independent living centers, regional centers, homeless services agencies, and churches and community service organizations that serve ethnic and linguistic minorities.<sup>32</sup> Cities should hold in-person meetings across the jurisdiction to ensure outreach is accessible to different communities and consider varying work hours and hold meetings at different times of the day and different days of the week.<sup>33</sup> Additionally, jurisdictions make drafts of the housing element available to the public for review and comment with ample time before submission to HCD.<sup>34</sup> The City has not only failed to conduct this outreach required by AB 6868, but has failed to do any assessment of fair housing as part of its housing element update and has not included an adequate program to affirmatively further fair housing, as more fully addressed in our attached letters.

### Conclusion

Since the City has not provided adequate and meaningful opportunity for public participation in the housing element update process, HCD should find that its Draft 6th Cycle Housing Element is inadequate and should require the City make a diligent effort to engage the public and key stakeholders in the process with an approach that is open to and genuinely considers their input. Additionally, as further described herein and in our previous letters, the City's Site Inventory, including Site C, is inadequate to meet the City's RHNA, and the City fails to comply with its obligation to affirmatively further fair housing and perform an analysis of fair housing, among other issues identified in our previous letters, for which the HCD should find the Draft inadequate.

Please do not hesitate to reach out with questions or concerns.

Sincerely,  
**THE PUBLIC LAW CENTER, BY:**



Richard Walker, Housing and Homelessness Prevention Unit, Senior Staff Attorney  
Alexis Mondares, Housing and Homelessness Prevention Unit, Legal Fellow  
Lana Rayan, Housing and Homelessness Prevention Unit, Summer Clerk

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<sup>31</sup> HCD, Affirmatively Furthering Fair Housing: Guidance for All Public Entities and for Housing Elements, 10 (April 2021).

<sup>32</sup> HCD, Affirmatively Furthering Fair Housing: Guidance for All Public Entities and for Housing Elements, 11 (April 2021).

<sup>33</sup> HCD, Affirmatively Furthering Fair Housing: Guidance for All Public Entities and for Housing Elements, 10 (April 2021).

<sup>34</sup> HCD, Affirmatively Furthering Fair Housing: Guidance for All Public Entities and for Housing Elements, 10 (April 2021).



July 12, 2021

City of Mission Viejo  
City Council  
200 Civic Center  
Mission Viejo, CA 92691  
citycouncil@cityofmissionviejo.org  
cityclerk@cityofmissionviejo.org

Dear City of Mission Viejo City Council and City Staff:

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. Our services range across several substantive areas of law, including consumer, family, immigration, housing, and health. Additionally, PLC provides legal assistance to community organizations. 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 needed 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 this crisis. Therefore, we write on behalf of Mission Viejo residents in need of affordable housing regarding the City of Mission Viejo’s (“the City”) public participation efforts during the 6th Cycle Housing Element update.

State law requires that local governments make a diligent effort to achieve public participation of all economic segments of the community when updating their Housing Element.<sup>3</sup> Under AB 686, cities must demonstrate meaningful, frequent, and ongoing community participation, consultation, and coordination that is integrated with broader outreach to stakeholders, including community-based and other organizations that represent protected class members, lower income community members, and community service organizations that serve ethnic and linguistic minorities.<sup>4</sup>

However, public participation is more than another requirement to be met. Local governments have the opportunity to learn about their communities’ needs and use the information to create better housing for years to come. Meaningful community engagement

<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* (last visited July 8, 2021).

<sup>3</sup> Cal. Gov. Code Section 65583(c)(9).

<sup>4</sup> HCD, *Affirmatively Furthering Fair Housing: Guidance for All Public Entities and for Housing Elements*, 11 (April 2021).

builds trust and satisfaction, increasing the likelihood that residents will support new housing strategies and new housing developments. To achieve this, the City must rethink how it communicates with residents and make good-faith efforts to include residents from historically marginalized communities.

Unfortunately, the City has undermined its public participation efforts by repeatedly demonstrating hostility towards residents and advocates throughout its Housing Element draft process.

On May 12, 2021, the Mission Viejo Planning Partnership (“MVPP”), a group of Mission Viejo residents who advocate for working individuals’ need for affordable housing, met with City officials, including William Curley, the City Attorney, and Dennis Wilberg, the City Manager. MVPP members raised concerns stemming from a lack of affordable housing within the City. One member said he commutes each day from Corona to Mission Viejo for work. Another MVPP member said that her grandchildren, all born and raised in the City, could no longer afford to live there. After MVPP members shared their stories, Wilberg and Curley introduced themselves and expressed condescension and disdain towards advocates. Curley finished his introduction by instructing MVPP members multiple times to refer to him as the “beloved” city attorney.

Throughout this meeting, MVPP members felt that Curley and Wilberg only intended to talk at them, not to them, and had no intention of using this meeting to listen to the community’s needs. On several occasions, Curley discouraged MVPP members from making comments and emphasized that they were “late to the party” and their input would have little to no impact on the planning process. Because the City did not record this meeting, the following is MVPP’s near verbatim transcription of a comment made by Curley: “We talk to the whole community. You’re trying to create a niche. You want special status. Absent Council direction to work with an ad hoc group, I need it to be clear that you have no special status. You’re intruding to tell us clever ways to do things. We’ve heard it all. Zealots like you see the beauty of what they are proposing, but don’t see the downside.”

Lastly, when an advocate attempted to engage Wilberg and Curley in a discussion regarding the City’s calculation of the cost of affordable housing, the advocate was told that his figures were “wrong” and that his suggestions “won’t work here.” MVPP members had the impression that Wilberg and Curley’s dismissal of this advocate’s comments was based on the assumption that the advocate did not possess adequate knowledge about these issues due to his race (Hispanic/Latino), but that MVPP should assume that Wilberg and Curley, as white males, did.

Despite MVPP’s continued efforts to provide diverse perspectives on the City’s housing need and repeated emphasis that they were attempting to help the City meet their RHNA in creative ways, Curley continued to note that MVPP was late to the game, called MVPP zealots who did not have the full picture, and declared that he was not being arrogant.

The City's treatment of community advocates during this meeting demonstrates a complete failure to make the required diligent<sup>5</sup> effort to obtain and incorporate participation from stakeholders that represent diverse segments of the community. Rather than making a careful effort to incorporate feedback from an advocacy group composed of diverse residents, Wilberg and Curley willfully created a hostile environment to discourage these diverse opinions from being expressed. Their behavior actively hampers the City from conducting meaningful outreach and ensures that City residents and advocates will be reluctant to participate in further efforts.

While this meeting was particularly offensive, it is part of a larger pattern of the City creating a hostile environment and discouraging participation at public meetings.

On April 27, 2021, Mark Neely attended the City Council meeting to share his experience as a Black resident of Mission Viejo.<sup>6</sup> Neely told the City Council that he has been stopped by police officers twelve times while walking and driving because officers said he "looked suspicious." Most recently, Neely was stopped in Mission Viejo while driving and claims he was not breaking any laws. Further, Neely noted that no one on the City Council looks like him and asked the City to learn about the issues that affect black residents. In response, the City Council asked the Chief of Police to talk to Neely and broadly claimed that a new diversity committee is "making some good efforts in making everyone feel safe, welcome, and a part of the community."<sup>7</sup> Further, after Neely left to speak with the Sheriff's Department, Councilmember Ed Sachs made the following statement:

"I'm conflicted about Mr. Neely coming to the City of Mission Viejo and I can't tell you if his experiences of being pulled over 12 times or whatever are real or not. I'm not going to argue that point. But police are not going out looking to kill black people. It's just not happening. It's just not going on. Are there a few bad eggs in every carton? Yeah, probably. But I know that the process that you go through to be an Orange County Sheriff's deputy is rigorous and includes psychological testing, etcetera. There is the concern of people resisting arrest. My children had the talk. My parents gave me the talk. It's not about race, it's not about color, it's not about ethnicity. It's about respect. It's about obeying the law. My father spent a lot of time telling me if you're pulled over by the police, obey his directions. It's simple. If there's an issue, we'll go to court. We'll address it there. But you don't address it on the street cause you're not going to win that. And I don't mean you're going to get shot and killed, you're just not going to win that. It's gonna escalate and you're going to be the loser. Mr. Neely, I'm sorry you have the experiences you say you have. Like I said, I'm not going to deny those things. But I will ask you what would you have had that police officer do? Let that girl go and stab another person? Possibly kill them? Doesn't make sense. So that the facts of the matter are that FBI statistics are out there. You should take the time to look at the facts. The last three years, there were more unarmed white people shot at by police than blacks in every year for the last three years. It's a fact. Some deny it. It's a shame. Each one had their own circumstance and each one of those was adjudicated by their departments and accountability was held. So I just - Mission Viejo

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<sup>5</sup> Diligent: careful and using a lot of effort; done in a careful and detailed way. Cambridge Dictionary, *Diligent*, <https://dictionary.cambridge.org/us/dictionary/english/diligent> (last visited Jul. 9, 2021).

<sup>6</sup> City of Mission Viejo, City Council Meeting, 34:30 (April 27, 2021).

<sup>7</sup> City of Mission Viejo, City Council Meeting, 40:03 (April 27, 2021).

is not the City that you portend it to be. And I know that our Chief of Police went out to speak to you and I don't think you afforded him the respect he deserves.”<sup>8</sup>

While the dismissive treatment of this resident's legitimate concerns shows that Curley is not the only City official who is comfortable demeaning residents, Councilmember Sachs' commentary on the relationship between police officers and the black community in response to Mr. Neely's concerns is particularly alarming. Allowing a City representative to directly tell a resident from a marginalized community that their concerns are baseless, shameful, and disrespectful informs other members of marginalized communities that their voices are unimportant and unwelcome.

In contrast, this message to marginalized communities was reinforced by the City's lack of response during the City Council meeting on June 22, 2021. A public commenter used his allotted time to comment about how LGBTQ+ people were damaging society and asked the City to remove all LGBTQ+ and Pride month content, which he referred to as “propaganda,” from its malls and stores. The commenter went on to say that same-sex marriage should be illegal and compared homosexuality to incest, bestiality, and adultery. After the commenter finished speaking, Mayor Kelly merely thanked him for his comment and moved on. At no time did Mayor Kelly, or any other Councilmember, attempt to dissociate the City from the speaker's offensive, demeaning and homophobic comments. Nor did Mayor Kelly, or any other Councilmember, attempt to reinforce its support of this protected class and marginalized community. While the City may wish to promote free speech and encourage commenters to participate in meetings, the City Council's decision to chastise some commenters but not others again informs members of marginalized communities that they do not matter.

Furthermore, the City Council also allowed City Attorney Curley to explicitly mock and insult public commenters at the City Council meeting on May 25, 2021. First, Cathy Schlicht, a former City Council member, noted that Curley read public comments aloud in a theatrical tone, made faces, rolled his eyes, and added commentary that changed the intended message of the public comments. Second, when the City invited public comments concerning voting and election transparency, Gale Reavis, a disabled senior citizen and former Mayor, said she was concerned about the City's lack of progress in educating the electorate about cumulative voting. Curley interrupted her to claim that her memory was wrong and added that “memories change over time.”<sup>9</sup> While remarking on a commenter's memory would be rude under any circumstance, making a baseless claim that Reavis' memory is unreliable is ageist and discriminatory. These comments will deter older residents and residents from vulnerable groups from engaging in public participation to avoid being publicly humiliated and insulted.

The City must not forget its statutory obligation to affirmatively further fair housing.<sup>10</sup> The City can affirmatively further fair housing by taking meaningful actions to foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics.<sup>11</sup> The City does not, however, affirmatively further fair housing when it fails to

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<sup>8</sup> City of Mission Viejo, City Council Meeting, 52:35 (April 27, 2021).

<sup>9</sup> City of Mission Viejo, City Council Meeting, 5:33 (May 25, 2021).

<sup>10</sup> Cal. Gov. Code Section 8899.50.

<sup>11</sup> Cal. Gov. Code Section 8899.50(a).

foster and maintain compliance with civil rights laws.<sup>12</sup> These obligations equally apply to the required public outreach related to the housing element.<sup>13</sup>

Consequently, the City should recognize residents that belong to historically marginalized populations and create outreach programs and materials that specifically cater to their needs. To do so, the City should partner with community organizations to connect with diverse groups of residents and learn about their communities. After assessing any cultural differences residents have, the City can adapt programs and materials to better serve groups such as immigrants, seniors, and multigenerational households.

Additionally, PLC provided comment letters regarding the City's 6th Cycle Draft Housing Element on both June 7, 2021 and June 21, 2021. Both letters addressed concerns with the City's failure to allow for meaningful public feedback on its Draft and failure to engage residents and stakeholders that represent or serve lower income households and marginalized members of the community. It is disconcerting that the City has already submitted its 6th Cycle Draft Housing Element to the Department of Housing and Community Development without taking any steps to address these concerns or without providing an opportunity for public review and comment on the site inventory selected by the City Council on June 22.

PLC requests that the City take steps to allow for meaningful public participation and that the City affirmatively reach out to stakeholders that include and represent lower income residents and members of marginalized communities to revise the City's 6th Cycle Draft Housing Element to incorporate these diverse viewpoints. PLC further requests that the City include PLC in future efforts to develop its 6th Cycle housing element update. We would appreciate the City giving us notice of any public meetings regarding the Housing Element. Through the collaboration with PLC, affordable housing advocates, and diverse communities, we believe the City can develop creative solutions to California's affordable housing crisis.

If you have any questions or would like to explore other opportunities to collaborate, please feel free to contact us at [rwalker@publiclawcenter.org](mailto:rwalker@publiclawcenter.org) or [amondares@publiclawcenter.org](mailto:amondares@publiclawcenter.org).

Sincerely,



Richard Walker, Housing and Homelessness Prevention Unit, Senior Staff Attorney  
Alexis Mondares, Housing and Homelessness Prevention Unit, Legal Fellow  
Shannon Talbot, Housing and Homelessness Prevention Unit, Summer Clerk  
Lana Rayan, Housing and Homelessness Prevention Unit, Summer Clerk  
Adam Snider, Housing and Homelessness Prevention Unit, Summer Clerk

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<sup>12</sup> Cal. Gov. Code Section 8899.50(a).

<sup>13</sup> HCD, Affirmatively Furthering Fair Housing: Guidance for All Public Entities and for Housing Elements, 21–22 (April 2021).





July 28, 2021

Colin Cross, Land Use & Planning Analyst  
California Department of Housing and Community Development  
2020 West El Camino Avenue  
Sacramento, CA 95833  
HousingElements@hcd.ca.gov  
Colin.Cross@hcd.ca.gov

RE: City of Mission Viejo Draft 6th Cycle Housing Element

Dear Mr. Cross,

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. Our services are provided across a range of substantive areas of law, including consumer, family, immigration, housing, and health law. Additionally, PLC provides legal assistance to community organizations. Further, the mission of our Housing and Homelessness Prevention Unit includes preserving and expanding affordable housing. Thus, we write on behalf of individuals in need of affordable housing in Orange County to comment on the City of Mission Viejo (“the City”) Draft 6th Cycle Housing Element.

PLC has provided to the City three comment letters related to its Draft 6th Cycle Housing Element, all of which have been included as attachments to this letter. Two of the letters, dated June 7, 2021 and June 21, 2021, directly comment on the Draft 6th Cycle Housing Element. While a few of the issues raised in these letters have been addressed by the City, mainly that it has now included some of the information in its site inventory that was previously missing, the majority of the comments have not been addressed and are still applicable to the Draft 6th Cycle Housing Element submitted to HCD. In addition to these comments, we provide below additional comments specifically regarding Site C of the City’s Site Inventory and refer HCD to the July 27, 2021 comment letter from the Mission Viejo Planning Partnership regarding additional issues related to the City’s Housing Policies and Programs and Site Inventory.

PLC’s third letter dated July 12, 2021 specifically addressed concerns regarding the City’s public outreach and participation as it relates to the Draft 6th Cycle Housing Element as well as generally in the City. After having submitted the July 12 letter and provided verbal comment at the July 13, 2021 City Council Meeting, the City’s attorney reached out to PLC at the July 13 City Council Meeting to address the concerns raised in our July 12 letter. To further address the City’s in-person response and the general lack of outreach and opportunities for public participation, we provide additional comments on this issue below.

### **Site C**

On June 22, 2021, the City Council approved Site C to be included in its site inventory.<sup>1</sup> Site C is owned by the City's Housing Authority and is comprised of six individual parcels (740-112-03, 740-112-39, 740-113-xx, 740-112-02, 740-012-240, and 740-012-36), totaling 32.80 acres.<sup>2</sup> The City assumes Site C will be developed at "full capacity based on residential zoning" and will allocate 48% of the 984 projected units to very low- and low-income units. However, there are a number of reasons why Site C cannot be considered suitable for residential development.

First, Site C has been identified in the 4th, 5th, and now 6th Housing Element Cycles. Second, the City has provided inconsistent information for this site across each cycle. Third, factors such as landslide risk, flood risk, environmental and wildlife conservation, and constructing infrastructure could raise the cost of development and deter affordable housing developers. These factors reduce the likelihood that this site will actually be able to accommodate 477 very low- and low-income units.<sup>3</sup>

### **Previously Identified Site**

Site C has been identified in the 4th, 5th, and now 6th Housing Element Cycles. As a vacant site that has been included in two or more consecutive planning periods and has not been approved to develop a portion of the City's housing need, Site C cannot be deemed adequate to accommodate a portion of the housing need for lower income households unless the site is subject to a program in the housing element that requires rezoning within three years of the beginning of the planning period to allow residential use for housing developments in which at least 20% of the units are affordable to lower income individuals and families.<sup>4</sup> However, the City's housing element does not specify whether this site is subject to such a program. To continue to designate Site C as adequate for lower income housing, the City must provide the requisite information or create the required program.

### **Inconsistent Information**

Further, the information provided about this site has been inconsistent. For previous planning periods, the City listed the site as only 8.5 acres.<sup>5</sup> However, the City has increased the boundaries of the site to 32.8 acres for a total capacity of 984 dwelling units.<sup>6</sup> The City should explain how the remainder of the land suddenly became available for development when only a limited number of acres were available during the previous two cycles and confirm how much space is actually available for residential development.

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<sup>1</sup> City of Mission Viejo, *Housing, Public Meetings, June 22, 2021, Draft Housing Sites Inventory*, <https://cityofmissionviejo.org/departments/community-development/planning/housing> (last visited Jul. 9, 2021).

<sup>2</sup> City of Mission Viejo, *Housing, Public Meetings, June 22, 2021, Draft Housing Sites Inventory*, <https://cityofmissionviejo.org/departments/community-development/planning/housing> (last visited Jul. 9, 2021); City of Mission Viejo, *Housing Element Draft*, 74 (June 2021).

<sup>3</sup> City of Mission Viejo, *Housing Element Draft*, 74 (June 2021).

<sup>4</sup> Cal. Gov. Code Section 65583.2(c).

<sup>5</sup> City of Mission Viejo, *Housing Element*, 80 (Mar. 4, 2013).

<sup>6</sup> City of Mission Viejo, *Housing Element Draft*, 74 (June 2021).

If the site remains listed at 32.8 acres, the site cannot be deemed adequate to accommodate lower income housing unless the locality can demonstrate that sites of an equivalent size were successfully developed during the prior planning period for an equivalent number of lower income housing units as projected for Site C.<sup>7</sup> Alternatively, the locality may provide other evidence to HCD that the site is adequate to accommodate lower income housing.<sup>8</sup> Given the difficulties of developing the same site when it was only listed at 8.5 acres and that there has been little development within the jurisdiction, it is unlikely that the City will be able to meet this statutory requirement.

### **Challenges to Development**

Site C has been vacant for over ten years. In 2007, the City rezoned Site C as surplus land for affordable housing.<sup>9</sup> In 2011, there were several efforts to develop Site C.<sup>10</sup> However, the loss of funding rendered the project infeasible and in 2017, the City terminated the project. In 2018, the City solicited new proposals from developers and approved a negotiation agreement with a developer. However, this project was again cancelled due to lack of adequate funding. Numerous issues with Site C contribute to extremely high development costs.

### **Historical Landslide Site**

Site C is located on a steep hillside, making it prone to landslides. According to the California Department of Conservation, the parcels included in Site C lie within liquefaction and landslide zones.<sup>11</sup> The Earthquake Zones of Required Investigation map shows that Site C and the surrounding areas are in blue landslide zones with orange liquefaction zones overlapping.<sup>12</sup> The Landslide Inventory map shows a history of multiple landslides in the same area.<sup>13</sup>

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<sup>7</sup> Cal. Gov. Code Section 65583.2(c)(2).

<sup>8</sup> Cal. Gov. Code Section 65583.2(c)(2).

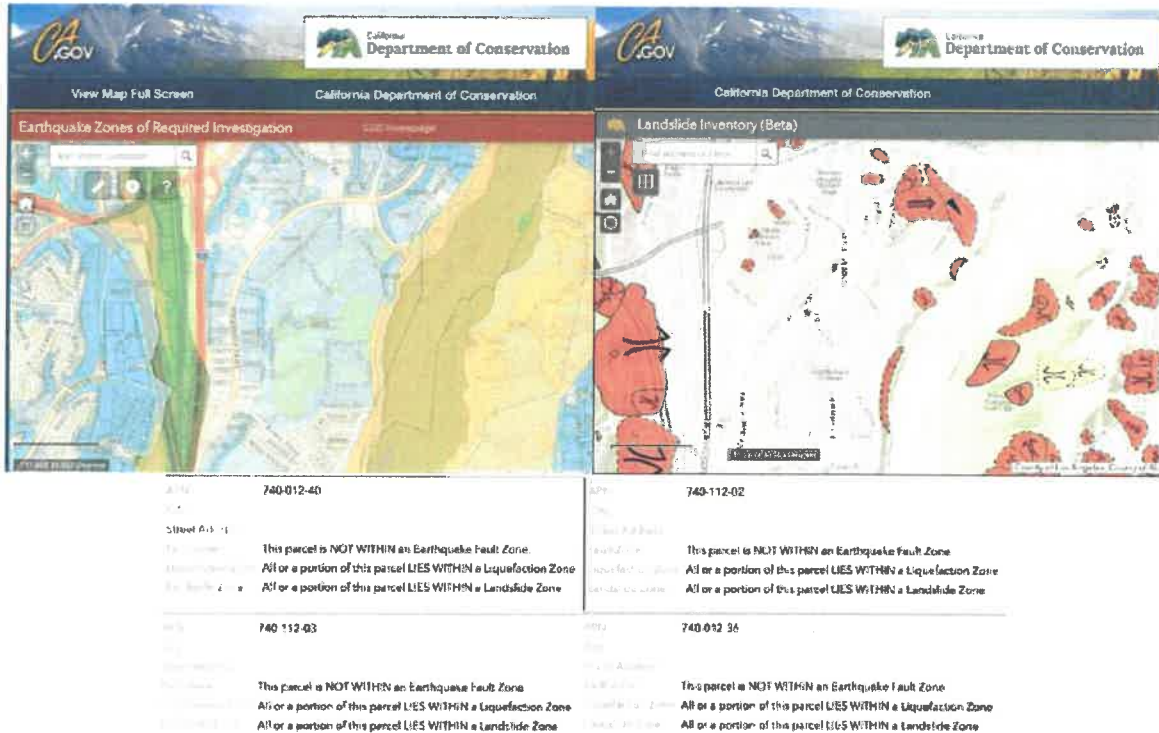
<sup>9</sup> City of Mission Viejo, Housing Element, 71 (Mar. 4, 2013).

<sup>10</sup> City of Mission Viejo, Housing Element, 71 (Mar. 4, 2013).

<sup>11</sup> Cal. Dept. of Conservation, *Earthquake Zones of Required Investigation*, <https://maps.conservation.ca.gov/cgs/EQZApp/> (last visited Jul. 22, 2021).

<sup>12</sup> Cal. Dept. of Conservation, *Earthquake Zones of Required Investigation*, <https://maps.conservation.ca.gov/cgs/EQZApp/> (last visited Jul. 22, 2021).

<sup>13</sup> Cal. Dept. of Conservation, *Landslide Inventory*, <https://maps.conservation.ca.gov/cgs/lsl/> (last visited Jul. 22, 2021).



To safely develop housing on this site, a developer would need to stabilize the land before beginning construction. According to a developer familiar with the site, historic landslides likely mean the underlying soils are unstable. As a result, simply building a road to Site C would require that the hillside be retained and the road stabilized. Then, the original unstable soil at Site C would have to be excavated and removed to allow trucks to dump new fill in the area. Although the City is moving dirt from a freeway expansion project to Site C in an attempt at making the project more affordable, actually grading the site is significantly more work and more costly than just delivering excess soil to the project.<sup>14</sup> The high cost of this stabilization effort would reduce the likelihood that a large amount of affordable housing could be built here.

### Flood Risk Zone

Site C and the surrounding areas are also located in a flood zone. According to the FEMA flood map below, zones A and AE are all high risk areas.<sup>15</sup> Some of these areas have a 1 in 4 chance of flooding over a 30-year period.<sup>16</sup> A developer might be required to mitigate this risk by elevating the housing development or using alternative methods, again adding to the cost of development.

<sup>14</sup> City of Mission Viejo, City Council Meeting, 2:01:40, 2:10:10 (Jun. 22, 2021).

<sup>15</sup> FEMA, *FEMA Flood Map Service Center*, <https://msc.fema.gov/portal/home> (last visited Jul. 22, 2021); Shawnee County, *Definitions of FEMA Flood Zone Designations*, <https://snmapmod.snco.us/fmm/document/fema-flood-zone-definitions.pdf> (last visited Jul. 22, 2021).

<sup>16</sup> Shawnee County, *Definitions of FEMA Flood Zone Designations*, <https://snmapmod.snco.us/fmm/document/fema-flood-zone-definitions.pdf> (last visited Jul. 22, 2021).



**Environment and Wildlife Conservation**

Two conservation plans and a watershed restoration effort could affect this land and require high mitigation fees. First, Site C is located within the Natural Community Conservation Plan & Habitat Conservation Plan area, which the City enrolled in in 1994, to protect and manage plant and animal populations found within the Central and Coastal Subregion.<sup>17</sup> Second, San Juan Creek connects with the Arroyo Trabuco Creek at the bottom of Site C. However, the Southern Orange County Habitat Conservation Plan conserves the Arroyo Toad habitat in the San Juan Creek on Rancho Mission Viejo lands.<sup>18</sup> Third, San Juan Creek is a watershed important to the recovery of trout species, headed by multiple conservation organizations.<sup>19</sup> Given the various conservation efforts in the area, developers may be liable for high mitigation fees, contributing to the high cost of housing development.

<sup>17</sup> County of Orange Environmental Management Agency, *Natural Community Conservation Plan & Habitat Conservation Plan, County of Orange Central & Coastal Subregion, Parts I & II: NCCP/HCP* (July 17, 1995); California Department of Fish and Wildlife, *NCCP Plan Summary – County of Orange (Central/Coastal) NCCP/HCP*, <https://wildlife.ca.gov/Conservation/Planning/NCCP/Plans/Orange-Coastal> (last visited Jul. 11, 2021).

<sup>18</sup> U.S. Fish and Wildlife Service, *Arroyo Toad 5-Year Review: Summary and Evaluation*, 35, 52 (Aug. 2009).

<sup>19</sup> CalFish, *San Juan Creek*, <https://www.calfish.org/ProgramsData/ConservationandManagement/CaliforniaCoastalMonitoring/MonitoredRivers/SouthCoast/SanJuanCreek.aspx> (last visited Jul. 11, 2021).

### Infrastructure

At the June 22, 2021 City Council meeting, City Manager Dennis Wilberg acknowledged local problems that would affect residential development such as lack of water, lack of electricity, and utility scarcities.<sup>20</sup> The developer with knowledge of the site observed that there is no infrastructure at Site C. Although there are numerous wet utilities off Center Drive, water does not flow upward. This means storm and sewer lines would likely need to be ejected via pump, which would raise the cost of development and make it even more unlikely that affordable housing will be developed there.

### Likelihood of Developing Affordable Housing

The City is attempting to place 44% of its lower income RHNA allocation on a site that has a history of failed projects and numerous development challenges that raise the cost of development.<sup>21</sup> Despite this, Elaine Lister, the City's Director of Community Development, claims that nonprofits and developers have said there is development potential on this site.<sup>22</sup> The City does not provide any information about these nonprofits and developers, the details of their opinions about the site, or how Site C will actually be developed during the 6th Cycle when the challenges on the site have remained the same during previous housing elements. At this point, it is extremely unlikely that 44% of the City's lower income housing need could be accommodated on this site, let alone 299 very low-income units.<sup>23</sup> The City should take this site off its site inventory or provide a more realistic estimate of how many affordable units will be built there.

### Public Participation

In response to our July 12 letter, City Attorney William "Bill" Curley, pulled PLC Senior Staff Attorney Richard Walker aside at the July 13 City Council Meeting to address the concerns raised in our letter. The City's response, via City Attorney Curley, largely focused on three main points: the City's behavior has been presented out of context, the City's behavior has been misinterpreted, and the City's behavior was justified.

First, with regard to the City's behavior having been presented out of context, we certainly invite HCD to reach out to the City to obtain their perspective on the set of events described in our July 12 letter. Additionally, while not all events described in our letter related directly to the housing element update process, HCD can access for itself the videos of some of the public meetings described therein to observe the events in their context. Additionally, regardless of context and any history the City may have with a specific individual or organization, the tone and word-choice used by City staff when addressing members of the public should always be conducted in a professional manner that encourages and promotes public participation. However, the events discussed in our July 12 letter have, at a minimum, had the effect of chilling public participation and more likely, have created or contributed to a hostile environment as it relates to public engagement in the City.

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<sup>20</sup> City of Mission Viejo, City Council Meeting, 2:01:40, 2:10:10 (Jun. 22, 2021).

<sup>21</sup> City of Mission Viejo, Housing Element Draft, 23, 74 (June 2021).

<sup>22</sup> City of Mission Viejo, City Council Meeting, 1:56:25 (Jun. 22, 2021).

<sup>23</sup> City of Mission Viejo, Housing Element Draft, 74 (June 2021).

Second, with regards to misinterpreting the City's behavior, it certainly is possible that some of the comments made to members of the Mission Viejo Planning Partnership at their May 12, 2021 meeting with City staff were in fact made out of levity and in an attempt at humor, such as the City Attorney's reference to himself that he is "beloved" and requesting to be referred to as "beloved." However, we are reluctant to believe that referring to the affordable housing advocates as "zealots" was a compliment, as was claimed by the City in response to our July 12 letter. Additionally, taking into consideration the City's general demeanor in the meeting and the fact that it summarily dismissed any recommendations made by Mission Viejo Planning Partnership members, the City's post factum claim that the comment was intended as a compliment is, at a minimum, suspect, and most likely is an attempt to backpedal its inappropriate treatment of key stakeholders in the housing element update process. For additional insights into the conduct of the City at this meeting, we refer HCD to the Mission Viejo Planning Partnership.

Third, the City claims that its behavior was justified because it was inappropriate for the Mission Viejo Planning Partnership to request an individual, private meeting; that their request was inappropriately aggressive; and that this attempt to engage in the housing element update process was too late. These claims fail to justify the City's hostile approach to attempts at public participation and mischaracterize the Mission Viejo Planning Partnership's request and timing as inappropriate.

The City has a responsibility to implement a robust public participation program when updating its housing element and to reach out directly to key stakeholders, including affordable housing advocates and advocates for individuals experiencing homelessness and other marginalized communities.<sup>24</sup> It is common practice for jurisdictions to hold stakeholder meetings, such as the one requested by Mission Viejo Planning Partnership. Where the City was dismissing the request as inappropriate, it should have been welcoming the meeting since it is the City who is obligated to affirmatively engage key stakeholders, not the other way around.

Next, the Mission Viejo Planning Partnership certainly was not "too late" to participate in the housing element update process, as was represented to them. At the time of Mission Viejo Planning Partnership's request for a stakeholder meeting, the City had previously only held one meeting related to the update of the housing element for the 6th Cycle, a joint study session on March 31, 2021. The next meetings the City would hold addressing the housing element update would be on May 24, and June 8 and 22.<sup>25</sup> Indeed, if the May 12 meeting with Mission Viejo Planning Partnership was too late to participate in the housing element update process, when exactly was the appropriate time for the public to participate in the process and which, of all the comments received at the three subsequent hearings about the Draft Housing Element, were even taken into consideration? Not only was Mission Viejo Planning Partnership timely in their request for a stakeholder meeting, but it is never "too late" to participate in the housing element

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<sup>24</sup> See, for example, HCD, Building Blocks: A Comprehensive Housing-Element Guide, *Public Participation*, <https://hcd.ca.gov/community-development/building-blocks/getting-started/public-participation.shtml> (last visited July 28, 2021) ("Engage advocates or groups with housing interests early in the process, so they can share their ideas on how to meet need the housing needs of those they represent.") and HCD, *Affirmatively Furthering Fair Housing: Guidance for All Public Entities and for Housing Elements*, 11 (April 2021).

<sup>25</sup> City of Mission Viejo, *Housing Element Draft*, 4 (June 2021).

process as the City is required to have a program specifically addressing public participation and HCD even recommends annual meetings throughout the housing element cycle.<sup>26</sup>

Finally, even if the City was correct in describing Mission Viejo Planning Partnership's approach toward the City as aggressive, such an approach was understandable, if not justified. First, at the time of Mission Viejo Planning Partnership's request for a meeting, the City had only held one public meeting where the housing element update was discussed and was already releasing a Draft for review and discussion at an upcoming City meeting. There were no other efforts to include the public in the update process. Second, the City has a history of not complying with Housing Element law to such an extent that litigation was required to enforce those laws.<sup>27</sup> And, as mentioned previously, regardless of Mission Viejo Planning Partnership's approach, the City should conduct itself in a manner that encourages and not chills public participation in the housing element update process.

Even if it were not for the City's hostile approach to public participation in the housing element update process, the City still would not have complied with the public participation requirements of State Housing Element law. The housing element shall include a program that demonstrates a diligent effort by the local government to achieve public participation of all economic segments of the community in the development of the housing element, and the program shall describe this effort.<sup>28</sup> HCD recommends that the local government describe who was invited to participate, who actually participated, general comments received, and how comments were incorporated into the housing element.<sup>29</sup> The Draft Housing Element dedicates a single page to describe "Citizen Participation," but does not sufficiently describe who was invited to participate, who actually participated, general comments received, and how comments were incorporated into the housing element.<sup>30</sup> PLC submitted at least two comment letters prior to the City's submission of its Draft Housing Element and there is no mention of these comments or how they were incorporated. This is likely because our comments, and those of seemingly all other public participants, were ignored by the City. Additionally, the few public hearings that were held during Planning and Transportation Commission and City Council meetings do not demonstrate a diligent effort to achieve public participation in any capacity, let alone of all economic segments of the community.

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<sup>26</sup> HCD, Building Blocks: A Comprehensive Housing-Element Guide, *Public Participation*, <https://hcd.ca.gov/community-development/building-blocks/getting-started/public-participation.shtml> (last visited July 28, 2021) (Develop a public participation infrastructure that includes the following resources to promote sustainable community involvement: . . . Annual meetings where stakeholders can gather to celebrate successes in housing development, learn about local land-use and development issues, voice concerns, and develop a vision for future housing development.); HCD, *Affirmatively Furthering Fair Housing: Guidance for All Public Entities and for Housing Elements*, 10 (April 2021) (requiring "ongoing" efforts to engage the public and conduct outreach to key stakeholders).

<sup>27</sup> See *Mejia, et al. v. City of Mission Viejo, et al.*, Case No. 06-CC05478, Petition filed April 26, 2006 alleging the City's Housing Element did not comply with State law with subsequent writ issued by the Orange County Superior Court on March 13, 2007 finding that the City's Housing Element did not substantially comply with State Housing Element law.

<sup>28</sup> Cal. Gov. Code Section 65583(c)(9).

<sup>29</sup> HCD, Building Blocks: A Comprehensive Housing-Element Guide, *Public Participation*, <https://hcd.ca.gov/community-development/building-blocks/getting-started/public-participation.shtml> (last visited July 28, 2021).

<sup>30</sup> City of Mission Viejo, Housing Element Draft, 4 (June 2021).



Additionally, under AB 686, the housing element must also include a summary of fair housing outreach and capacity, and a description of meaningful, frequent, and ongoing community participation, consultation, and coordination that is integrated with broader stakeholder outreach.<sup>31</sup> Examples of stakeholders that should be included are: community-based and other organizations that represented protected class members, public housing authorities, housing and community development providers, lower income community members, households that include persons in protected classes, fair housing agencies, independent living centers, regional centers, homeless services agencies, and churches and community service organizations that serve ethnic and linguistic minorities.<sup>32</sup> Cities should hold in-person meetings across the jurisdiction to ensure outreach is accessible to different communities and consider varying work hours and hold meetings at different times of the day and different days of the week.<sup>33</sup> Additionally, jurisdictions make drafts of the housing element available to the public for review and comment with ample time before submission to HCD.<sup>34</sup> The City has not only failed to conduct this outreach required by AB 686, but has failed to do any assessment of fair housing as part of its housing element update and has not included an adequate program to affirmatively further fair housing, as more fully addressed in our attached letters.

### Conclusion

Since the City has not provided adequate and meaningful opportunity for public participation in the housing element update process, HCD should find that its Draft 6th Cycle Housing Element is inadequate and should require the City make a diligent effort to engage the public and key stakeholders in the process with an approach that is open to and genuinely considers their input. Additionally, as further described herein and in our previous letters, the City's Site Inventory, including Site C, is inadequate to meet the City's RHNA, and the City fails to comply with its obligation to affirmatively further fair housing and perform an analysis of fair housing, among other issues identified in our previous letters, for which the HCD should find the Draft inadequate.

Please do not hesitate to reach out with questions or concerns.

Sincerely,

**THE PUBLIC LAW CENTER, BY:**



Richard Walker, Housing and Homelessness Prevention Unit, Senior Staff Attorney  
Alexis Mondares, Housing and Homelessness Prevention Unit, Legal Fellow  
Lana Rayan, Housing and Homelessness Prevention Unit, Summer Clerk

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<sup>31</sup> HCD, Affirmatively Furthering Fair Housing: Guidance for All Public Entities and for Housing Elements, 10 (April 2021).

<sup>32</sup> HCD, Affirmatively Furthering Fair Housing: Guidance for All Public Entities and for Housing Elements, 11 (April 2021).

<sup>33</sup> HCD, Affirmatively Furthering Fair Housing: Guidance for All Public Entities and for Housing Elements, 10 (April 2021).

<sup>34</sup> HCD, Affirmatively Furthering Fair Housing: Guidance for All Public Entities and for Housing Elements, 10 (April 2021).