

Solano County Grand Jury
Citizen Complaint
November 21, 2000

Donnie Mason

GRAND JURY



HALL OF JUSTICE
800 UNION AVENUE
FAIRFIELD, CALIFORNIA 94533
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SOLANO COUNTY GRAND JURY - CITIZEN COMPLAINT FORM

Your Name DONNIE MASON Driver's License No. MO657909
Home Address 42 CANYON LAKE DR., BOX 37, PORT COSTA, CA., 94569
Work Address SAME
Home Phone 510-787-1436 Work Phone SAME

PERSON OR AGENCY ABOUT WHICH YOUR COMPLAINT IS MADE

Name SEE ATTACHMENT, P. 1
Address _____
Person In Charge (if Agency) _____

Have you filed a complaint with any other government agency; NO
city, county, state, federal?

If your answer is yes:

Name of Agency _____

Date filed _____

Disposition of Case (if Known): _____

Have you made a Claim for Damages against any person/agency? NO

BRIEF SUMMARY OF PROBLEM (Include dates of all events, names of
person(s) or agencies involved, etc.)

SEE ATTACHMENT, P. 1-7

(Attach additional sheets as necessary)

PLEASE ATTACH ANY CORRESPONDENCE OR DOCUMENTS

YOU HAVE REGARDING THIS PROBLEM

TIME AND DATE YOU FIRST LEARNED OF THE PROBLEM SEE ATTACHMENT, P. 8

Other Witnesses (if Known):

Name	Address	Date of Contact

WHOM DO YOU THINK SHOULD BE CONTACTED?

Name	Address	Phone Number
<u>SEE ATTACHMENT, P. 8</u>		

WHAT ACTION DO YOU WANT THE GRAND JURY TO TAKE? BE SPECIFIC.

SEE ATTACHMENT, P. 8

PLEASE READ CAREFULLY

If the above complaint or problem relates to allegations of misconduct which are violations of law, the Grand Jury cannot promise complete confidentiality. In conducting an investigation and pursuing prosecution of the offender, it may be necessary for you to testify under oath as a "material witness". Nonetheless, the Grand Jury, mindful of each citizen's responsibility to the community as a whole, encourages you to submit your comments and concerns.

Date: 11-16-00

Signature: 

Receipt of your complaint will be acknowledged in writing by the Grand Jury.

COMPLAINT ATTACHMENT

CONTENTS

	Page/s
Person or Agency About Which Complaint Is Made -	- - - - - 1
Brief Summary of Problem - - - -	- - - - - 2-7
Time and Date You First Learned of the Problem Whom Do Think Should Be Contacted? What Action Do You Want The Grand Jury To Take?-	- - - - - 8
Extended Explanation - HCD and the Building Industry	- - - - - 9
Extended Explanation - The "Share" Calculation/Determination	- - - - - 10
Extended Explanation - Legal Services	- - - - - 11-13

PERSON OR AGENCY ABOUT WHICH COMPLAINT IS MADE

Governor's Office, Department of Housing and Community Development (HCD)

1800 Third Street

Sacramento, CA. 94252

Person in Charge (if Agency): Director **Richard Mallory**

Deputy Director **Kimberly Dellinger**

Director **Julie Bornstein** (current)

BRIEF SUMMARY OF PROBLEM

Representative Government Consumed

HCD is charged with administration of the State housing element law (SHEL)¹ and the conduit for millions of dollars (State and Federal housing funds) for which localities like Benicia compete. **HCD is imposing bureaucratic estimates of Benicia's future housing needs, as if those estimates were mandatory quotas of housing for which Benicia must perpetually provide land and zoning.** HCD claims this imposition is mandated by the SHEL, and withholds verification of SHEL compliance and full access to housing funds from localities that fail to fully comply, as has been the case for Benicia. Instead of finding support for this HCD claim/imposition, apparent and logical contradictions are found in the SHEL. If this HCD claim/imposition has actually been codified, then such a "law" would surely be found unconstitutional. This HCD claim/imposition ignores our fundamental laws, and appears to ignore the SHEL itself (See, Exhibit A),² to the excessive benefit of the building industry (See Extended Explanation, p. 9), without regard and to the detriment of Benicia residents and property owners. Benicia has not been singled out. HCD's unjust and illegal claim/imposition usurps every city and county jurisdiction in California.

HCD refuses to find Benicia's housing element compliant with the SHEL until Benicia's legislative body legislates in a very specific manner. To gain HCD approval, the Housing Element **must** include specific commitments that **will** reserve, dedicate and zone enough land for **specific** quantities of **specific** types of housing³ within a **specified** time limit (planning period),⁴ including completion of annexation of land and infill rezonings, if needed, to at least match in quantity and types the entire quota or "share"⁵ of "*needed growth as represented by the regional housing need allocation.*" The "*where and how*" of HCD's quotas are a *fait accompli*,

¹Government Code, Article 10.6, commencing at Section 65580

²For more than two years, members of a grassroots citizens group served as stakeholders on City-formed committees to help create a new Housing Element for Benicia. Over a three-year period (1996-99) our grassroots citizens group had ongoing communication with HCD, including **Director Richard Mallory** and **Deputy Director Kimberly Dellinger**. We worked very hard to get in writing the specific passages of the SHEL upon which HCD was basing its "share" requirements. We requested and eventually received several detailed written responses from Director Mallory and Deputy Director Dellinger. In each exchange with HCD, we researched the information given to us and responded to it in writing. I believe that this written dialogue with HCD Director Mallory and Deputy Director Dellinger (Exhibit A) demonstrates that HCD's "share" requirements are not supported by the SHEL and are, in fact, contradicted by the content, context and intent of that law.

³Types of housing as distinguished by zoning/density (residential-single, residential-medium, residential-high).

⁴Five-year (if not extended) span of time set by State law, within which an amendable Housing Element is applicable. See SHEL, Section 65588; 65588.1).

⁵The "share" is a **bureaucratically determined portion of a bureaucratically determined estimate** of households expected in the State/region, within a specific period of time (upcoming five year planning period). The "share" is a composite of four numbers quantifying (1) very low-, (2) low-, (3) median and (4) above-median income households) and used in the SHEL as a reference to the "regional housing need allocation." (See, Extended Explanation, p. 10)

with befuddled City Council Members telling angry residents and property owners, “*It’s the law, we have to do it.*” Subsequently, for the last decade, Benicia’s elected legislative bodies (Mayor/City Council) have attempted to maintain a housing element that was committed to compliance with HCD’s unjust and illegal claim/imposition. Adherence to this HCD claim/imposition has made a sham of Benicia’s public hearing process by circumventing due process of law, private property rights and other rights that I, as a Benicia property owner, once enjoyed, particularly, most importantly, jurisdiction/governance via elected representatives.⁶ Currently, City of Benicia jurisdiction over zoning, housing and land use for residential growth does not exist, except for the minor authority needed to decide “*where and how*” to accommodate HCD’s quotas of “*needed growth.*” (See, HCD stmt. (5), p. 4)

Representative Government Presumed

Zoning, housing and land use decisions concerning the City of Benicia are lawfully required to be the legislative acts of that jurisdiction’s elected legislative body, but only after that elected body affords due process of law and other rights of the citizenry by holding **fair and impartial** public hearings.

Also, “*Even more than rezoning, the amendment of a general plan, or any element in the plan, is a legislative act which involves the exercise of discretion and which requires a city council to ‘consider economic, environmental and fiscal factors as well as community goals set forth in the general plan.’ (Buena Vista, supra, 218 Cal.App.3rd at 295.)*” (See Winterhawk v. City of Benicia - Appellants’ Opening Brief (AOB) No. A080171, p. 30)

And, “. . . *the Planning Law contemplates that a city council will exercise considerable discretion in meeting its housing needs and that the needs will be met in ways that are appropriate for the individual city and consistent with other goals and policies in the Planning Law. (See, e.g., Section 65580, subd. (e), recognizing local governments’ ‘responsibility’ to consider local conditions when carrying out their responsibilities to meet housing needs, and Section 65852, mandating ‘uniformity’ in each zoning area.)*” (See AOB, p.40)

HCD Claim/Imposition

HCD’s unjust and illegal claim/imposition, with which the City of Benicia has attempted to comply (for the last decade), is captured in the following statements from HCD letters (bold highlighting added):

(1) “. . . (T)here are several areas which, in our opinion, require revisions to bring the element into compliance with State housing law In particular, the housing element should . . .

⁶ See “Sham on Benicians – Where and How,” p. 7.

commercial parcels to high density residential . . . Even if these changes are accomplished, the City will not have adequate land zoned at sufficient densities to accommodate its remaining regional share need . . . If vacant land within the City's sphere of influence is needed to accommodate the regional share, the element should include a plan to annex it, with a time line for annexation and expected zoning designations and residential densities . . . **Programs 3.01 and 3.02** include the phrases 'the City will consider rezoning,' which do not, in our opinion, commit the City to undertake any specific action." (HCD-Nancy J. Jayor (Chief, Division of Housing Policy) letter to City Manager Warren, p. 1; and apndx. pp. 1, 2, 4 (9/4/90)) [Note: The City subsequently amended **programs 3.01 and 3.02** to read, "The City will **initiate** rezoning."]

(2) "We are pleased to find that Benicia's revised draft housing element adequately addresses comments made by this Department . . . and therefore complies with state housing element law.. **Our finding of compliance is based upon the City's commitment to accommodate** its share of the regional housing need . . . by completing the rezoning of vacant low-density residential and commercial land to high-density residential use by the end of 1994, and the availability for residential use of at least a portion of the Sky Valley area . . . The element commits the City to implement Housing **Programs 3.01 and 3.02** to initiate the rezoning of vacant land to facilitate the development" (HCD-Deputy Director Cook letter to City Manager Warren (10/2/92))

(3) "It is now apparent that, barring a policy change by the City Council, Sky Valley will not be available for development during the current planning period, and therefore the City does not currently have adequate sites to accommodate the remaining new construction need of 517 very low-, 376 low, and 152 moderate-income units (total remaining regional share need of 1,045-units). Therefore, Benicia's housing element no longer complies with State housing element law, and will require additional program (s) to provide sites for lower-income housing sufficient to meet Benicia's regional share need." (HCD-Cook letter to City Manager Warren (10/25/93))

(4) ". . . Benicia's draft element, while including commendable revisions, still fails to identify sufficient sites to accommodate its entire regional share need for 893 lower-income households..." (HCD-Deputy Director Dellinger letter to City Manager Giuliani (4/12/96)).

(5) "The statute is clear that a local government is required to identify sites for their entire regional share allocation and that they are to use their zoning and land use powers to provide the necessary sites.... The statute does specifically **mandate local governments to plan and zone land to accommodate needed growth as represented by the regional housing need allocation, but, it also provides significant discretion to local governments regarding where and how to appropriately plan.**" (HCD-Director Mallory letter to Donnie Mason (11/23/98)).

Clearly, HCD's claim is that, pursuant to the SHEL, the "regional housing need allocation" represents a mandated share of "needed growth" for which local governments **must** perpetually provide land and zoning.

HCD Claim/Imposition Contradicted

The SHEL (Section 65583 (a)) does note that a locality's housing element shall include "*an assessment of housing needs*" that shall include "*a quantification of the locality's existing and projected housing needs*" that shall include "*the locality's share of the regional housing need.*" (See, Extended Explanation, p. 10). The SHEL requires localities to include the "*regional housing need allocation*" in their quantified assessment (**estimate**) of future housing needs. Still, no command can be found in the SHEL that requires localities to provide enough land and zoning to equal the entire **estimate** or equal that portion of the estimate referred to by HCD as, "*needed growth as represented by the regional housing need allocation.*" In apparent contradiction the SHEL logically notes, "*It is recognized that the total housing needs identified pursuant to subdivision (a) may exceed available resources and the community's ability to satisfy this need . . .*" (Section 65583 (b)) This apparent contradiction to HCD's claim/imposition does not stand alone, as was demonstrated to HCD. (See, Exhibit A)

HCD Rules + Benicia Contracts To Comply But Fails + Legal Services⁷ Sues = HCD Rules

Benicia committed itself to fulfilling HCD's unjust and illegal claim/imposition by adopting certain Programs in its Housing Element (adopted 7/2/91; amended 10/6/92; amended 4/5/94). As noted in the HCD quotes above, HCD conditionally certified that the 10/6/92 amended Element was compliant with the SHEL, but a year later revoked that certification, a status that the Element has yet to regain from HCD. The HCD-approved Element included plans to develop Sky Valley, along with the HCD-inspired revision of **Program 3.01** that increased the City's commitment from "*will consider rezoning*" to "*will initiate rezoning.*"

On 4/20/93, a City Council Resolution suspended planning for Sky Valley until certain conditions pertaining to the IT hazardous waste facility were satisfied, which prompted HCD to rescind its verification of SHEL compliance (10/25/93). Thereby, apparently **under color of law**, HCD deemed Benicia's housing element legally insufficient because the Element no longer identified enough sites appropriately zoned to equal the "share" number after the loss of Sky Valley. (See, HCD statement (3), p. 4) In numerous letters, HCD sympathized with Benicia for the loss of developable land (Sky Valley), noted that the SHEL did not allow HCD to alter a locality's share in the middle of a planning period,⁸ and claimed that Benicia must still provide enough land/zoning to match all of the specifics of the City's "share." Complying with HCD's claim/imposition would require the City to replace the lost Sky Valley land identified for 300+ high-density units with some other land, an unjust, unrealistic demand with no legitimate foundation.

⁷Legal Services of Northern California; Housing Element Enforcement Project of the Legal Aid Society of Alameda County; Western Center on Law & Poverty. See Extended Explanation, pp. 11-13.

⁸Please note: It is actually of no significance that the SHEL does not allow HCD to alter a locality's share number if, as alleged, the SHEL cannot (and does not) mandate a locality to fully assimilate that share with land and zoning, as is claimed by HCD. The SHEL allows localities to amend their housing element "*as frequently as appropriate.*" See SHEL, Section 65588.

On 4/5/94, as seems reasonable and appropriate, Benicia amended its Housing Element, to reflect the loss of residential development planned for Sky Valley, including the loss of sites for the 300+ high-density units. The Element still contained more HCD-inspired “share” commitments than would be accomplished. For instance, **Program 3.01** committed the City to **initiate** the upzoning of enough lower density infill sites to accommodate 140 high-density housing units by 12/31/94, but a **specific** amount of rezonings was clearly implied and expected by HCD (See HCD statement (2), p. 4), rezonings which the City failed to initiate or complete. Under the weight of HCD’s claim/imposition the City committed to comply, in writing (i.e. **Program 3.01**), and thereby provided the fertile ground in which Legal Services planted the Winterhawk lawsuit and reaped the Stipulated Settlement Agreement.

On 5/4/95, Legal Services filed suit (Winterhawk v. Benicia (L004789)). The lawsuit alleged noncompliance with State law (HCD’s version of the SHEL), resulting from the City’s alleged failure to timely fulfill some of its HCD-inspired share commitments, including **Program 3.01**.

On 12/5/95, Benicia settled the Winterhawk lawsuit out of court with a Stipulated Settlement Agreement (SSA), and a Stipulated Judgment was approved by the Superior Court a few days later. Many Benicians were amazed and angry when they discovered the SSA was an offer made by the City. The SAA states: “*The City agrees to rezone . . . sufficient sites in the City to accommodate 180 low or very low income multi-family units . . . the sites shall be selected exclusively from the site inventory identified in Attachment A and shall be rezoned to the densities specified . . .*” Also, “*Benicia shall amend housing element **Programs 3.01 and 3.02** to reflect these commitments to rezone, and delete the existing language from both programs: ‘If substantial resistance is met by an owner of a parcel, it is foreseeable that such a property would not be rezoned within this time frame.’* (SSA, p. 3) Importantly, actual housing element text changes would include amending **Program 3.01** from “*The City will initiate rezoning*” to “*The City will rezone,*” and the raising of the number of high-density units from 140 to 180.

Benicians Storm City Hall

On 4/16/96 the Benicia City Council held the first public hearing on the SSA-derived text changes to the City’s zoning ordinances, land use element and housing element. However, attempted adoption of those changes was met with insurmountable community opposition to the amount and locations of the high-density infill that would result from those text changes. Many from the audience made it known that we did not believe we were getting a fair or impartial public hearing, nor did we expect to get fair or impartial public hearings in the future, considering that proposed text changes to be adopted that night committed the City to “**will rezone,**” how much and where (i.e. **Program 3.01**). In other words, the proposed process did not take into account whether or not additional high-density housing was actually needed nor what good planning called for, nor what the community or the affected property owners might have to say at the required public hearings. **The SSA-specified rezonings were to be automatic within the specified time line in order to match the specifics of HCD’s supposedly mandated “share” number, thus making a sham of the required public hearings.**

A Deal's A Deal, But . . .

The City then did an about-face and spent the next three years and about \$700,000 on legal costs and fees in an attempt to have the SSA annulled by the courts. That unsuccessful battle started 10/10/96 when the City filed a Motion to Set Aside the Judgment in the Winterhawk v. City of Benicia, et al. Litigation (L004789). Generally, the City's Motion was based on California law providing that (1) a city may not contract away its right to exercise its police power in the future, and (2) under the constitutional separation of powers doctrine, a court does not have authority to compel a city to exercise its legislative authority (including its authority to rezone property) in a particular manner. The City's argument was that owners of property that is subject to being rezoned under the terms of the Stipulated Settlement Agreement are entitled to due process of law, including a fair and impartial hearing process.

We understand the City's legal challenge of the SSA fell short of the California Appellate Court because the City filed the Appeal late. An unofficial written statement from the Appellate Court indicates the Court would not have favored the City's Motions had it officially heard the case. Apparently, and understandably, the courts need to be really impressed before they will void such contractual agreements as the SSA; timely, applicable arguments would have helped.

Benicia Presumed Guilty - Stands Mute

The SHEL makes it clear that HCD certification of a housing element is a **rebuttable presumption of compliance** with the SHEL. (See, SHEL, Section 65589.3) The City's Motions did not include a rebuttal of the "presumption of noncompliance" that stems from HCD's refusal to certify Benicia's housing element. The City's Motions did not in any way refute HCD's decertification of the City's housing element nor rebut HCD's unjust and illegal claim/imposition, to which challenges and rebuttals are offered herein. Absent such challenges and rebuttals, one can see how the City of Benicia, Legal Services and the courts involved to this point have allowed HCD's refusal to certify to stand as a **presumption of noncompliance** with the SHEL. It appears no Court has yet considered findings that HCD is imposing an unjust and illegal version of law (upon which the SSA stands).

Sham on Benicians - Where and How

On 11/16/99, the Benicia City Council held a supposedly fair and impartial public hearing and then moved to rezone the first sites to satisfy the SSA. Benicia residents and property owners are now suffering the consequences of a lawsuit/settlement based on the City's alleged failure to timely fulfill commitments rooted in HCD's unjust and illegal claim/imposition. Concessions via the SSA have solidified HCD's policies and secured that powerful Department's ability to dictate the zoning, housing and land use fate of Benicia, planning period after planning period after planning period. As goes Benicia, so goes every other City and County in the State.

TIME AND DATE YOU FIRST LEARNED OF THE PROBLEM

The evening of 11/16/99, during the Benicia City Council meeting. (See Sham on Benicians – Where and How, p. 7) Please note that I did file a Complaint with the Solano County Grand Jury, which was received in the Jury Assembly Room on 07/09/96. The Problem, as outlined herein, was the major part of that earlier Complaint, but could not be addressed by the Grand Jury, at that time, because of the ongoing litigation (Winterhawk v. City of Benicia), according to a letter I received from the Grand Jury Foreman.

WHOM DO YOU THINK SHOULD BE CONTACTED?

- (1) State Attorney General
- (2) Federal Bureau of Investigation

WHAT ACTION DO YOU WANT THE GRAND JURY TO TAKE? BE SPECIFIC.

Redress Needed

- (1) Stop HCD's illegal imposition of growth quotas on Benicia.
- (2) The Winterhawk lawsuit and subsequent Stipulated Settlement Agreement (SSA) are built on HCD's unjust and illegal claim/imposition. I respectfully request that the Solano Grand Jury use all means available and necessary to stop the City of Benicia from implementing the SSA; investigate and indict as applicable;
- (3) I respectfully request that the Solano Grand Jury take all other actions and notify all other persons and authorities deemed appropriate in this matter. HCD's unjust and illegal claim/imposition, the economic and social consequences, but more importantly the political consequences suffered by residents and property owners of Benicia, Solano County and other cities and counties throughout California are issues that have yet to be addressed by any judicial or legislative body. Surely, a sincere investigation by any unbiased, competent legal authority would find that this **HCD claim/imposition illegally interferes with the rights and the representative form of government guaranteed to us by the State of California Constitution and the United States Constitution and must be stopped immediately.** Such authority could also find that this HCD claim/imposition is contradicted by the SHEL itself.

Relief from this tyranny and plunder is long, long overdue. This is a complex, multi-level governmental problem, but I believe the Solano County Grand Jury and District Attorney have the authority, ability and duty to immediately intervene on behalf of all the residents and property owners of Benicia and Solano County.

Extended Explanation - HCD and the Building Industry

HCD approval of a locality's housing element is not a prerequisite to adoption of the Element. However, aside from offering some protection from lawsuits,⁹ adopting an HCD-approved housing element opens the door to **the money** (including grants, low-interest loans and tax credits), billions of tax dollars that can flow through city and county governments from HCD and HUD (Federal) to the building industry and their investors, particularly to development corporations that construct or include so-called "affordable housing."¹⁰ I believe this process is carried out at the expense of the economic and social but mostly the political well being of the existing and future residents and property owners of Benicia, Solano County and California.

I understand many of HCD's personnel do come from the building industry. A review of the circulation of HCD letters reveals an accurate list of those who impact the situation, or who support and/or benefit from HCD's unjust and illegal claim/imposition. Circulation of an April 12, 1996 HCD letter includes:

Bob Cervantes, Governor's Office of Planning and Research
Juan Acosta, California Building Industry Association
Kerry Harrington Morrison, Ca. Association of Realtors
Marc Brown, California Rural Legal Assistance Foundation
Rob Wiener, California Coalition for Rural Housing
Susan DeSantis, The Planning Center
Dara Schur, Legal Services of Northern Calif.
David Booher, California Housing Council
Sue Hestor, Attorney at Law
Gary Hambly, Building Industry Association
Gary Binger, Association of Bay Area Governments
Clark Blasdell, Northbay Economic Development
S. Lynn Martinez, Legal Services of Solano County.

From HCD's web site (<http://housing.hcd.ca.gov/hcd23.html>) I know that HCD has it's own "Division of Legislation" that "develops housing related legislation." I do not know how much of the current SHEL comes from HCD, but as the SHEL has been amended over the years, HCD has taken latitude when it comes to interpretation. Such latitude, however, does not arise from clearly stated prerogatives, but rather stems from complex language resulting from the amendment process. City and County elected officials advise that they do not comprehend the SHEL and leave it to their Staff to decipher, and Staff then leaves it to HCD, the supposed experts on the SHEL. **A review of the SHEL by any unbiased, competent authority will reveal that the SHEL can yield an interpretation that is, unlike HCD's interpretation, consonant with the established constitutional system of self-governance and recognized rights.**

⁹HCD certification of a locality's Housing Element is considered a rebuttable presumption of compliance with the SHEL. See SHEL, Section 65589.3

¹⁰Research indicates that construction costs of "affordable housing" are always substantially higher than conventional construction costs.

Extended Explanation - The “Share” Calculation/Determination

Benicia’s “share” is determined for each approaching five-year planning period by a regional Council of Governments (COG), the Association of Bay Area Governments (ABAG), under HCD direction and subject to HCD approval, as outlined in the SHEL, **Section 65584**: Using data provided by the Governor’s Office (Department of Finance) and in consultation with the regional COGs, HCD determines a “*regional share*” of a predicted “*statewide need for housing*” for each of California’s seven regions. Based upon HCD-provided data relative to that predicted statewide need for housing, the regional COG “*shall determine the existing¹¹ and projected housing need for its region,*” and HCD “*shall ensure that this determination is consistent with the statewide housing need,*” and “*may revise the determination of the council of governments if necessary to obtain this consistency.*” When that ‘consistency’ has been achieved, the appropriate regional COG, under HCD direction, “*shall determine the share for each city or county.*”

However, for good reason, there is no command in the SHEL that directs local governments to “*use their zoning and land use powers to provide the necessary sites*” to match the HCD/COG determination as claimed by HCD. The SHEL notes that the HCD/COG **determination** (identified as the locality’s “*share*”) must be included in the locality’s assessment (**estimate**) of future housing needs. (See **Section 65583 (a) (1)**) And, the locality’s completed assessment (which includes the HCD/COG determination) must certainly be **considered** when planning residential growth, but **only along with** a significant checklist of other important analyses, documentation and determinations that **must** be given **equal consideration** (See **Section 65580 (e)**). For example, the locality must compile an “*inventory of resources and constraints relevant to the meeting of these needs*” (**65583**) and must consider “*economic, environmental and fiscal factors as well as community goals set forth in the general plan.*” (See p. 3, para. 3) **Contrary to law and reason, HCD has imposed the HCD/COG determination (a bureaucratic estimate of Benicia’s future housing needs) upon Benicia as if that estimate were a State-mandated quota of growth.**

The SHEL notes that “*local and state governments have a responsibility to use the powers vested in them to facilitate the improvement and development of housing to make adequate provision for the housing needs of all economic segments of the community.*” (**65580 (d)**), and that “*in carrying out this responsibility, local governments also have the responsibility... to cooperate with other local governments and the state in addressing regional housing needs.*” (**65580 (e)**). However, such requirements are far short of HCD’s claim/imposition that requires local governments to “*plan and zone land to accommodate needed growth as represented by the regional housing need allocation.*” Such a claim/imposition conspicuously ignores our established system of self- governance, including due process of law and private property rights. Such a claim/imposition is the logical equivalent of a disfranchised citizenry, and HCD personnel and many others should know better.

¹¹The manner in which words like ‘existing’ and ‘need’ and ‘share’ are used by HCD can easily mislead one to think an actual need that must be lawfully met is being discussed. According to ABAG documents and its “Regional Housing Need Determination” (RHND) formula, the term “existing need” has nothing to do with the existing housing needs of existing households, but is instead a function of the difference between a locality’s actual vacancy rate and the theoretically optimum vacancy rate, a rate determined by HCD.

Extended Explanation - Legal Services

Relying on HCD's unjust and illegal claim/imposition as a foundation, Legal Services (LS) has aggressively worked to mold Benicia's zoning, housing and land use to its liking. Documents received from HCD with a Public Records Act request show that for the last ten years LS has maintained a barrage of written communications to HCD and the City of Benicia. This barrage conveys what Benicia's Housing Element fails to do in order to meet the LS "fair share" version of HCD's unjust and illegal claim/imposition. The following events demonstrate LS' relentless and successful attempt to force Benicia to commit to their demands:

March 15, 1993: Solano County Legal Aid (SCLA) Attorney Martinez writes to HCD (40 pg. "City of Benicia Infill Site Analysis" attached, w/cc: Benicia Planning Director, Planning Commission, Benicia City Council): ". . . please accept the enclosed record as a good faith attempt to document the unavailability of infill sites cited by the City of Benicia as available in its housing Element adopted October 6, 1992. **For the past two years**, our office has attempted to convey our concerns to the City regarding both the lack of existing housing for very low and low income persons and the unavailability of land within the City on which to build low and very low income housing in the future. As you are aware, ABAG has identified the need for 517 very low income units and 376 low income units from 1988 to 1995." And, ". . . it is our position that the City of Benicia is not in compliance with the state housing element law and may have misled your department into finding compliance by citing unavailable infill sites as available for residential development."

March 16, 1993: SCLA writes to Benicia Planning Director (w/cc: Planning Commission, HCD, City Manager, City Attorney, Benicia Housing Authority): "Our office has repeatedly offered to participate in formulating the Affordable Housing Program, drafting the Inclusionary Zoning Ordinance and working with a non-profit affordable housing developer. In fact, Commissioner Berman suggested on several occasions during Planning Commission meetings that the City utilize our services and allow us to participate in developing the housing program and the inclusionary zoning ordinance. . . . Our goal is - and has always been - to obtain low and very low income housing within the City of Benicia."

April 26, 1993: SCLA (Lynn Martinez) writes to HCD: "As a result of our April 2, 1993 conversation, it was my understanding that, legally, all the City has to do is 'accommodate the ABAG need.' **If the infill sites are not rezoned, the City needs to 'accommodate the need.'** If something happens to prevent development of Sky Valley, the City needs to 'accommodate the need.' Therefore, it is your position that the City must rezone enough infill sites to accommodate the ABAG requirements. You stated that if it finds that the City is acting in bad faith, HCD will revoke its finding of compliance. You further stated, however, that the evidence of bad faith must be very convincing and in the case of Benicia, HCD may find bad faith if the City hasn't rezoned the infill sites by **January, 1995** or found alternative sites if Sky Valley is not developed. We also spoke again on April 7, 1993 - At that time, you also asked me about some 'rumors' you had heard about the delay of the Sky Valley project. I told you that several days earlier, the Sky Valley developers announced to the City Council that they were requesting that the City halt the Sky Valley development process until the IT issue was resolved."

May 4, 1995: Legal Services (LS) files the Winterhawk lawsuit, using HCD's unjust and illegal claim/imposition and Benicia's allegedly delinquent fulfillment thereof.¹² As evidence of noncompliance, LS points to HCD's refusal to verify Benicia's Housing Element as compliant with the SHEL, and points to allegedly unfulfilled programs in the City's own Housing Element, including **Program 3.01** (infill upzoning for 140 high-density housing units before 12/31/94).

December 5, 1995: Benicia settles the LS Winterhawk lawsuit out-of-court with a Stipulated Settlement Agreement (SSA), thereby setting the stage (commitments to reserve/dedicate/rezone and make available as dictated) for development of 300+ "affordable" housing units, particularly high-density infill development by "*nonprofit housing developers in Northern California.*"¹³ Again, SSA-derived text changes state flatly that the City "*will rezone.*"

April 11, 1996: Benicia Planning Commission holds first public hearing on SSA-derived text changes to Benicia's zoning ordinances, land use element and housing element. It is significant that, although the SSA was an offer made by the City, during the proceedings, City Staff noted that Legal Services had been calling in additional text changes that day.

November 16, 1999: Benicia City Council holds a supposedly fair and impartial public hearing and then moves to rezone the first sites to satisfy the SSA.

Comrades and Conflicts

Richard Judd/Goldfarb & Lipman (G&L), the legal counsel hired to defend the City in the Winterhawk case who helped formulate the City's offer (SSA), had a well-established history of working on housing projects throughout the Bay Area. **G&L** were listed as part of the "development team" (with **Judd** as the contact person) on an application for **HOME**¹⁴ funds that was filed with HCD in **September, 1995**, four months after the **Winterhawk lawsuit** was filed (5/4/95) and three months before the SSA was signed (12/5/95). The HOME funds application was submitted by the **Affordable Housing Affiliation**¹⁵ (AHA) and the Rural California Housing Corporation (RCHC) for a 10 million dollar "affordable" housing project (Rockridge) in Benicia. AHA is the development corporation mentioned throughout the Winterhawk lawsuit. For example, "*In July, 1994, AHA withdrew its application for HOME funds because the application for funds would not have met the funder's criteria since the housing element was out of state compliance.*"¹⁶

¹²Program 3.01 ("initiate rezoning") completion date was 12/31/94, but the 1991-95 planning period had been extended to 1997 and is currently extended to 2001.

¹³Stipulated Settlement Agreement, p. 8, ln. 26-27.

¹⁴HOME funds being exactly the sort of tax money withheld, in effect, by HCD from local jurisdictions that do not codify the HCD misrepresentation of the SHEL into their housing elements.

¹⁵AHA was created in May 1993 "to generate development of low and very-low income housing in Benicia." In April of 1994, AHA, "a non-profit affordable housing organization," incorporated and "immediately started applying for government grants to begin development of its housing projects."

¹⁶Winterhawk, p. 7, Ln. 17-20

S. Lynn Martinez was Attorney for the Winterhawk plaintiffs and AHA's Vice President when RCHC/AHA applied for the HOME funds. It seems that by serving on the development team for the AHA/RCHC housing project (Rockridge) in Benicia, G&L/Judd would have had a financial interest in a 10 million dollar business deal along with opposing counsel (S. Lynn Martinez) at the time of the Winterhawk lawsuit/SSA. Even if there was not an attorney-client relationship or a common financial interest between **G&L/Judd** and **AHA/Martinez** at the time of the **Winterhawk lawsuit/SSA**, it seems G&L/Judd had impermissible financial interests in the outcome of the SSA. How could G&L/Judd have undivided loyalty and fiduciary responsibility to the City in this action when every project resulting from the SSA represented potential financial gain for G&L/Judd?

Legal Services & HCD - Armed And Dangerous

HCD cannot sue localities that do not or cannot obey its demands. Legal Services filled that void and thereby promoted HCD's unjust and illegal claim/imposition.

Exhibit A

Exhibit A - Written Dialogue with HCD: "Share" Requirements

The following letters demonstrate that the SHEL itself contradicts HCD's claims:

10/23/96 (p. 1) To HCD:

Public Records Act (PRA) Request for copies of all written communications between HCD, the City of Benicia, Legal Services and developers, including applications for HOME funds.

10/23/96 (p. 2-3) To HCD/L. Frazier, Legal Department:

Questions concerning the regional housing need allocation (RHNA).

11/20/96 (p. 4) From HCD/L. Frazier, Legal Department:

Response to 10/23/96 PRA Request.

5/6/97 (pp. 5-8) To HCD/R. Mallory, Director:

Request for recertification of Benicia's Housing Element; HCD claim concerning RHNA unfounded.

7/10/97 (pp. 9-11) From HCD/K. Dellinger, Deputy Director:

Response to written inquires/meeting concerning RHNA.

9/25/97 (pp. 12-14) To HCD/K. Dellinger, Deputy Director:

Response to 7/10/97 HCD/Dellinger letter and further questions concerning RHNA.

10/2/97 (p. 15) To HCD/K. Dellinger, Deputy Director:

Repeated request for clarification concerning RHNA.

4/22/98 (pp. 16-22) To HCD/K. Dellinger, Deputy Director:

Response to HCD review of Benicia's Draft Housing Element in HCD letter to City of Benicia dated 2/13/98; repeated request for clarification concerning RHNA.

6/17/98 (pp. 23-25) To HCD/K. Dellinger, Deputy Director:

Request for written response to previous correspondence concerning RHNA.

7/13/98 (pp. 26-28) To HCD/K. Dellinger, Deputy Director:

Repeated request for written response to previous correspondence concerning RHNA.

7/17/98 (pp. 29-30) From HCD/K. Dellinger, Deputy Director:

Response to previous correspondence concerning RHNA.

10/26/98 (pp. 31-32) To HCD/K. Dellinger, Deputy Director:

Response to 7/17/98 HCD/Dellinger letter; request for specific responses to important questions raised in previous letters concerning RHNA.

10/28/98 (pp. 33-34) To HCD/K. Dellinger, Deputy Director:

Additional information to 10/26/98 letter.

11/23/98 (pp. 35-36) From HCD/R. Mallory, Director:

Response to previous correspondence to HCD/Dellinger concerning RHNA.

2/12/99 (pp. 37-40) To HCD/R. Mallory, Director:

Response to 11/23/98 HCD/Mallory letter; HCD position concerning RHNA not supported by law; request for review and reconsideration.

4/14/99 (pp. 41-42) From HCD/J. Nevis, Acting Director:

Response to previous correspondence; refusal to alter HCD position concerning RHNA.

Department of Housing and Community Development
Division of Housing Policy Development
1800 THIRD STREET, Room 430
P. O. Box 952053
Sacramento, Ca. 94252-2053
(916) 323-3176 Fax (916) 323-6625

October 23, 1996

Re: Public Records Act requests for documents, correspondence, letters.

Greetings,
Please direct my Public Records Act request to the appropriate
authorities.

Each document requested herein is a separate request under the Public
Records Act. Please send as many of the requested documents as soon as
possible.

As allowed by the Public Records Act, I do hereby request from the
Department of Housing and Community Development (HCD) the following
documents, correspondence and/or letters:

1. All applications for HOME funds by the Affordable Housing Affiliation (AHA) of
Benicia and all accompanying documents.
2. All correspondence between HCD and AHA or it's Officers, Agents or Board of
Directors.
3. AHA's application for the status of "Community Housing Development
Organization" and/or all related documents, correspondence or letters.
4. All correspondence between HCD and Legal Services of Northern California, or
it's Attorneys concerning Benicia (1990 - current).
5. All correspondence between HCD and the City of Benicia concerning AHA and/or
HOME funds.

Sincerely,

Donnie Mason
Donnie Mason

Department of Housing and Community Development
Division of Housing Policy Development
1800 THIRD STREET, Room 430
P. O. Box 952053
Sacramento, Ca. 94252-2053
(916) 323-3176 Fax (916) 323-6625

October 23, 1996

Re: Questions. *c/o L. Frazier-Legal Department

Background includes:

The current housing Element of the General Plan was adopted by the City Council on July 2, 1991, amended on October 6, 1992 to incorporate revisions recommended by the Department of Housing and Community Development (HCD) and amended on April 5, 1994 to incorporate the results of a housing condition survey of the City. On March 18, 1993 HCD certified the Housing Element, as amended on October 6, 1992, as consistent with the Housing Element Guidelines contained in California Government Code Section 65580 et seq. On April 20, 1993 the City Council adopted Resolution No. 93-57 suspending planning for the Sky Valley development until certain conditions pertaining to the IT hazardous waste facility were satisfied, and on October 25, 1993 HCD decertified the City's Housing Element stating that the City could no longer demonstrate that it had adequate sites to accommodate its "fair share" of housing as determined by ABAG.

ABAG's fair share calculations were based in part on population projections which included new residents on Sky Valley and the City pointed out that the suspension of planning for Sky Valley should result in a reduction in its fair share of affordable housing. HCD indicated that only ABAG could revise the fair share calculations, and only for the next required housing Element update in 1995. Due to state budget cuts, ABAG has not yet revised the fair share calculations, and the due date for the next Housing Element update has been extended to July 1, 1997. In May 1995, Legal Services of Northern California filed suit against the City alleging that the City had failed to adopt an adequate Housing Element, thereby preventing low income persons from finding affordable housing in Benicia. Benicia Housing Element Amendment, pg. 1.

1. When did S. Lynn Martinez (lead attorney in the suit and AHA (Affordable Housing Affiliation) Vice President) inform HCD that Benicia lost Sky Valley and was allegedly out of compliance with State Housing Element Law?

If by letter or fax please send a copy. If by telephone, please give details of conversation.

2. Which Agency or Agencies calculate the regional housing needs that are allocated to the Council of Governments like ABAG?

(A) What is the process and criteria used to calculate?

3. We understand Benicia must have a General Plan that includes a Housing Element that addresses the housing needs of all economic segments of the community, however: Are cities mandated by the State Housing Element Law (SHEL) to meet regional housing needs? Or, is meeting regional housing needs by cities, voluntary?

4. Given our City voluntarily joined ABAG (Association of Bay Area Governments), if Benicia resigned from that Association, can the City then legally remove from our General Plan and Municipal Code, all commitments to meeting regional housing

needs (as determined by ABAG or HCD (Housing & Community Development) and be in compliance with the SHEL? If not, please give specifics.

- 5. What specific Statute established the California Regions, like the "Bay Area Region," as legal subdivisions of the State?**
- 6. What specific Statute established the "Council of Governments," like the "Association of Bay Area Governments" as governing bodies?"**
- 7. What specific Statute allows HCD's allocation of "regional housing needs" to local jurisdictions like Benicia?**

Sincerely,

Donnie Mason

Donnie Mason

**DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
LEGAL AFFAIRS DIVISION**

1800 THIRD STREET, Suite 440
P.O. BOX 952052
SACRAMENTO, CA 94252-2052
(916) 323-7288
FAX (916) 323-2815



November 20, 1996

Donnie Mason
35 El Bonito Way
Benicia, CA. 94510

Dear Mr. Mason:

Pursuant to our telephone conversation, the Department of Housing and Community Development (HCD) has received your request for copies of records described in your letter sent via facsimile on November 4, 1996. We will make available all documents, correspondence and letters in the file.

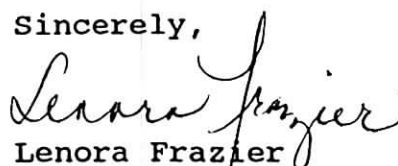
This is to advise you that the Department intends to respond to your request as promptly as possible, and as fully as possible to the extent that you have not requested public documents exempt from disclosure under Government Code, section 6254, the Information Practices Act of 1977, California Civil Code, section 1798 et seq., or other provisions of California law.

Any documents provided to you will, where applicable, be edited to remove "personal information" from them pursuant to the requirements of the Information Practices Act and to protect the identity of complainants pursuant to Evidence code, section(s) 1040 and 1041.

It has been determined that the number of pages to be copied in response to your request is 746. The cost of these copies (based on \$.10 per page) is \$74.60. Upon receipt of the cost of these copies from you, we will make the documents available to you. In addition, documents related to item number 4 in your letter are currently in the state archives. We expect to receive these documents within ten working days. At that time we will notify you of any additional costs.

I am pleased to be of assistance to you. If you have any questions about the procedure for receiving these documents, please do not hesitate to contact me at (916) 323-7288.

Sincerely,


Lenora Frazier
Legal Assistant

Benicia COMMUNITY RIGHTS ASSOCIATION

To: Rich Mallory, Director
Housing and Community Development (HCD)
Fax: 916-324-5107

May 6, 1997

Re: Recertification of Benicia's Housing Element

Dear Mr. Mallory,

We respectfully request that you correct the inaccurate decertification of Benicia's Housing Element by your predecessor/s. HCD's decertification of Benicia's Housing Element was inaccurate because:

1. The specific numbers to which HCD has held Benicia, are only a projection, an estimate, a forecast. The specific numbers are not a mandate, unless we are to believe the State mandates estimates. Please note: Land Use Background Report, dated February 22, 1996 (p. 18), "*Table 2 - Benicia's Share of Solano County Households and Population. . . . Source: ABAG, Projections 96. . . . The Association of Bay Area Governments (ABAG) develops projections of future growth to "identify potential regional needs and problems, as well as to provide a vehicle to debate the type of future desired by the Bay Area residents."* (Projections 96, p. 14).

"Subregional (city) projections should not be interpreted as either a floor or a ceiling on growth. They are estimates and forecasts of an area's development potential based upon current zoning, general plans, and other local development policies, in conjunction with economic and demographic demand coming from both the regional and subregional areas during the period 1995 to 2015." (Projections 96, p. 16)."

And, "State law (Government Code Section 65584) requires each regional council of governments to estimate the future housing needs for its region and to allocate a 'fair share' of the regional need to each locality." (Housing and Demographics Background Report (HDBR), dated February 22, 1996, p. 20).

*Underlining added for emphasis.

Where did HCD get the idea that the specific numbers of these ABAG estimates were mandated by the State Housing Element law? That misinterpretation may have its roots in the years of constant and aggressive correspondence to HCD from Legal Services Corporation grantees, i.e. Solano County Legal Assistance; Legal Services of Northern California; Western Center on Law and Poverty, etc. Since the early 90s, a constant flow of letters from Legal Services to HCD reported how Benicia, for one reason or another, was not meeting the specific numbers of those ABAG estimates. When the City lost Sky Valley, Legal Services reported it to HCD, along with the opinion that Benicia could no longer meet the estimates. HCD subsequently decertified Benicia's Housing Element, the reason being, we could not accommodate the specific numbers of the ABAG estimate.

It seems the first order of business for HCD should be to recognize that the specific numbers of Benicia's so-called "fair share" of the regional need are just a projection, an estimate, a forecast; and, that there is no mandate to accommodate the specific numbers of the estimate, as previously interpreted by HCD. Which, it seems, would allow immediate recertification of Benicia's Housing Element.

2. Benicia doesn't have enough land to accommodate regional housing need estimates, without substantially altering its character, its identity and jeopardizing the safe and suitable living environment that has long been established.

a) Please note the proposed Infill Housing Sites map. Even if every so-designated site could be rezoned to high density it still would not be enough to accommodate Benicia's quota, for a variety of reasons, including:

1) According to a HCD letter, HCD does not support inclusionary zoning; inclusionary zoning policies allow for developers to pay a fee, in-lieu of making room for or building the additional units. Therefore, rezoning to high density does not guarantee that even one unit of so-called "affordable housing" will be built. Rezoning to high density does guarantee that all subsequent construction will be high density. If the developer decides to allow or build the units instead of paying the in-lieu fee, then he is only required to include 10% so-called "affordable housing" (5% very low - 5% low (which may vary according to the City's Housing Element)). For developers that decide to build the units, the density can be substantially increased: A 25% density bonus from the State, the City can add additional density bonuses or boost the density of units by changing the definition of high density, as recommended by HCD. Nonetheless, this still will not give us the total ABAG estimated.

2) This area is already impacted with high density. (City Staff Report, City Council Meeting, August 14, 1996).

3) This area also includes well-established lower density neighborhoods, historical buildings and residences. Note California Historical Society report that high density infill destroys historical value, which is one of Benicia's major assets. Forced, high-density infill of established lower density neighborhoods and historical areas will undermine Benicia's established character, identity and historical value.

4) Most of the property to be arbitrarily rezoned to high density is private property. There would be incentive to sell. The owner will have lost the right to build for his/her private use of the property, the rezoning to high density will increase the value of the property. However, unless the City is willing to use eminent domain and then turn it over to developers, all of the sites will not be available. Even if ALL sites were available and all the proposed high density rezoning came to pass, it wouldn't be enough to meet the ABAG estimates. We are told no construction need occur, only the rezoning. That may be true today, or in this planning period. However, it must be noted that Benicia's alleged quota is for households, not housing. Large amounts of high density infill will occur to meet the ABAG estimate or a large portion of that quota for 893 households, will go unanswered.

5) As for residential development, Benicia is nearly built out. "The existing General Plan designates 1,733 acres for residential use, 21 percent of the total city land area. Over 90 percent (1,577 acres) of this residential land was developed as of 1995. The 156 acres of vacant residential land represent only 9 percent of the total land remaining for development in Benicia." (Land Use Background Report, p. 22). Additional residential construction since 1995 will have raised Benicia's "over 90 percent" build-out figure. Benicia has also lost a large area (Sky Valley) that was scheduled for growth. Without annexation of new land, Benicia is extremely limited in the amount of new construction of any kind it can accommodate.

3. The community will not voluntarily accept the large amounts of high density infill required to meet the alleged regional housing need estimates.

a) The Community Survey, also known as the U.C. Davis Survey clearly defines what the community wants and does not want for Benicia. Benicians do not want intrusive, out-of-character additions to existing neighborhoods; Benicians do not want their City to become LARGE. They want to maintain the existing small-town character of Benicia, and will accept only minimal growth; Benicians do not want high-density infill; Benicians do not want multi-family infill in existing neighborhoods; Benicians do not want a higher level of rentals; they support home ownership; Benicians like Benicia the way it is; that's why they are here.

4. Requiring Benicia to accommodate unrealistic and thus unachievable numbers (estimates) of households will get us sued, as evidenced by the Winterhawk and other housing lawsuits now pending against Benicia.

a) The Legal Services' (LS) Winterhawk lawsuit was settled out of court with the now infamous Stipulated Settlement Agreement (SSA). Even though the quotas were unachievable, it seems the City could have argued (with HCD and Legal Services) that the City could not be decertified or sued for not doing something it still had years to accomplish. HCD decertified the Housing Element before the end of the planning period. The Suit was filed in May of 1995. These actions may have been appropriate if the planning period was up in 1995, but the planning period was extended to 1997 and we understand now to 1999. According to a HCD letter to the City when it was extended to 1997, the extension gave the City additional time to develop and implement policies and programs to address the matter. **HCD's decertification and the LS Suit was like saying we lost the race, before the race was over, based on an unmet estimate.**

5. Benicia has met the State housing goal by maintaining and providing an ample supply of affordable, decent housing and a suitable living environment for all economic segments of the community. The State Housing Goal:

"The Legislature finds and declares... the availability of housing is of vital statewide importance, and the early attainment of decent housing and a suitable living environment for every California family is a priority of the highest order." California Government Code Section 65580 (a).

Benicia is a shining example of how to fulfill that goal. Benicia's character, accented heavily by it's methodical restoration of existing housing and structured growth created a very high demand for Benicia housing. In 1995, Benicia's vacancy rate "...was only 3.7 percent, less than the 4.5 percent rate normally needed to provide adequate choice in the housing market. In 1995, Benicia would have needed 85 additional units to achieve ABAG's targeted 4.5 percent vacancy rate." (Housing and Demographics Background Report (HDBR), dated Feb. 22, 1996, p. 9). The optimum words here are "normally" and "targeted." As decided by ABAG, normally the optimum vacancy rate of 4.5 percent is the "target." It is not a "one size fits all" vacancy rate. It's a "rule of thumb," and generally considered the "target" under ideal circumstances. In 1995, Benicia missed the "target" by eight-tenths of one percent. A near - "normal" reading, even by ABAG estimates.

The most effective means of providing lasting housing affordability is home-ownership. "Benicia's existing households are primarily owner-occupied. The 1990 Census showed 70 percent of Benicia units were owner-occupied, which is higher than the national home ownership rate of 64 percent, and California's rate of 56 percent." (HDBR, p.11)

"Housing in the San Francisco Bay Area is generally expensive. Fortunately, Benicia is more affordable than most other Bay Area cities." (HDBR, p. 12)

"On average, the cost of housing in Benicia is lower than in the Bay Area as a whole. . . Rents in the Bay area were also higher than rents in Benicia. . . ." (HDBR, p. 13).

"Of the 309 single-family residences sold between April 1994 and November 1995, only 1 percent were affordable to very low-income households of four persons; 18 percent were affordable to low-income households. . . . Condominiums were more affordable than single-family residences. Of the 61 condos sold between September 1994 and November 1995, 26 percent were affordable to very low-income households of four persons, 84 percent were affordable to low-income households. . . ." (HDBR, p. 14)

"The 1995 rental survey showed that 26 percent of Benicia's 91 available rental units were affordable to very low-income households of four persons, and 80 percent were affordable to low-income households." (HDBR, p. 15).

Also, please note that 80% of the Winterhawk plaintiffs have housing in Benicia and that the other two plaintiffs (20%) have housing in Solano County but stated, they would "like" to live in Benicia in particular. If asked, so would perhaps millions of other Californians. Yes, every American citizen has a right to live in Benicia and if any one of them is denied available housing because of race, color, creed, sex, disability, etc., that person would have "standing" to sue. That right to live in Benicia doesn't constitutionally extend to lawfully obligating the community, and the taxpayers in general, to accommodate or subsidize the construction of additional housing, especially for people that already live here, or just because a person would "like" to live in Benicia. "Overall, in 1995, 1,840 of Benicia's 4,106 low- and very low-income households (45 percent) paid more than 30 percent of their incomes for housing." (HDBR, p. 17). Every household in Benicia paying more than 30% of their income for housing wouldn't by itself translate into a need for more housing to be built. They already live here. Such a statistic would more likely translate into a need for more income.

For the reasons stated herein, **Benicia has met the State housing goal by maintaining and providing a consistent and ample supply of affordable, decent housing and a suitable living environment for all economic segments of the community.**

For the reasons stated herein, it seems appropriate HCD recertify Benicia's Housing Element, immediately, and thereby affirm Benicia has fulfilled the Spirit of the State's Housing Element law.

Sincerely, *Donnie Mason*

Donnie Mason, President
Community Rights Association
POB 1235
Benicia, Ca. 94510
707-745-6562

cc: Kim Dillinger, HCD
Paul Deiro, HCD
Stephanie Christiansen, Benicia Chamber of Commerce
Mayor Jerry Hayes, Benicia
Benicia City Council
City Attorney
Dan Sharp, District Representative, Senator Johannessen

**DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT**

1800 THIRD STREET, Room 430
P.O. BOX 952053
SACRAMENTO, CA 94252-2053
(916) 323-3176 FAX (916) 327-2643



July 10, 1997

Mr. John Cosmides
Executive Director
Benicia Community Rights Association
P.O. Box 1235
Benicia, California 94510

Dear Mr. Cosmides:

Thank you for your invitation to visit Benicia on May 7, 1997 to discuss Benicia's housing element and State housing element law. We appreciated the opportunity to meet with you and your organization, and to hear of your concerns. As you know, we had previously met with Benicia's City Manager, Planning Director, and City Attorney. To further my understanding of the issues involved in Benicia, I also expect to meet soon with representatives from Legal Services of Northern California. This letter responds generally to the issues raised in Mr. Donnie Mason's May 6 memorandum. We would also be happy to discuss any of these issues in greater depth at your convenience.

Benicia's new construction need for the current planning period (January 1988 through July 1999), after accounting for newly-built units, requires that Benicia plan **and** appropriately zone for 499 very low-, 374 low- and 152 moderate-income households. Benicia's share of the regional new construction need was calculated and assigned by the Association of Bay Area Governments (ABAG). In assigning the new construction need ABAG was required to consider the following factors: market demand for housing, employment opportunities, the availability of suitable sites and public facilities, commuting patterns, the type and tenure of housing need, and the housing needs of farmworkers (Government Code Section 65584(a)).

ABAG incorporated local data about policies, plans and regulations affecting development for the current planning period. This data, contained in Projections 87, formed part of the basis for the regional new construction need (along with the other statutory factors listed above) that Benicia is required to accommodate. When sites and facilities were not available, ABAG's projections took these constraints into account (as discussed in Housing Needs Determinations, Association of Bay Area Governments, January 1989, page 7).

When Benicia stopped processing the Sky Valley annexation, the City no longer had sufficient sites to accommodate its remaining new construction need, which consisted of all of its lower-income need and a portion of its moderate-income need. We were informed of this action in a letter from the City of Benicia on April 28, 1993. We notified the City that the housing element required amendment to identify new sites to accommodate the remaining regional share need (as specified in Government Code Section 65588(b)).

While it is undoubtedly true that without Sky Valley, Benicia has much less vacant land to accommodate its remaining regional share need, it is our understanding that a portion of the City's small stock of parcels that permitted high density multifamily development or which were the best candidates for rezoning to high density residential have been developed with other uses since the beginning of the current planning period. We also understand from ABAG that only 600 units of the City's allocation was attributed to the Sky Valley development.

However, we appreciate the City's concern that existing housing element law does not allow recognition of such a significant change in circumstance. For this reason, we are committed to working with Senator Johannessen to develop legislation to address serious, significant and unanticipated changes that affect the regional housing need allocation. We believe that such a change would address many of the concerns expressed in Mr. Mason's correspondence.

The May 6 memorandum also expressed the view that Benicia is a built out community with a limited amount of vacant residential land, and that multifamily development at higher densities would destroy the character of the community. It is our experience that with effective planning, local governments can accommodate needed growth (necessary for a vibrant local economy) while maintaining important community values and character. For example, higher density development can facilitate agricultural and open space preservation, the preservation of historically significant sites, and more efficiently use limited land and infrastructure resources.

In addition, for your information, State housing element law does specifically mandate that local governments utilize their zoning powers to accommodate their new construction need for very low-, low-, moderate-, and above moderate-income households. Local governments are to *identify adequate sites which will be made available through appropriate zoning and development standards and with public services and facilities needed to facilitate and encourage the development of a variety of types of housing for all income levels, including all income levels, including multifamily rental housing, factory-built housing, emergency shelters, and transitional housing in order to meet the community's housing goals as identified in subdivision (b). Where the inventory of sites, pursuant to paragraph (3) of subdivision (a), does not identify adequate sites to accommodate the need for groups of all household income levels pursuant to Section 65584, the program shall provide for sufficient sites with zoning that permits owner-occupied and rental multifamily residential use by right, including density and development standards that could accommodate and facilitate the feasibility of housing for very low and low-income households.*

In addition to requirements in State housing element law, State planning law also requires local governments establish residential densities and development standards which contribute significantly to increasing the feasibility that housing development can occur at the lowest possible cost: *In exercising its authority to zone for land uses, a city, county, or city and county*

shall designate and zone sufficient vacant land for residential use with appropriate standards, in relation to zoning for nonresidential use , and in relation to growth projections of the general plan to meet housing needs as identified in the general plan. For the purposes of this section, "appropriate standards" shall mean densities and requirements with respect to minimum floor areas, building setbacks, rear and side yards, parking, the percentage of a lot which may be occupied by a structure, amenities, and other requirements imposed on residential lots pursuant to the zoning authority which contribute significantly to the economic feasibility of producing housing at the lowest possible cost given economic and environmental factors, the public health and safety, and the need to facilitate the development of housing for persons and families of low or moderate income, as defined in Section 50093 of the Health and Safety Code (Government Code Section 65913.1).

While local governments have the responsibility to adequately plan and zone land to accommodate needed growth, the law provides significant and important discretion to local governments regarding where and how to appropriately plan. A local government is required to demonstrate that it can accommodate its share of the regional housing need, however significant flexibility is provided on how the need will be addressed. For example, the need for lower-income households can be met through a combination of zoning sites for high density multifamily housing, second units, mixed commercial and residential uses, and through the redevelopment of substandard uses. In addition, we are working with interested parties to explore legislative changes that would enable local governments to count the rehabilitation of existing substandard housing towards meeting some of their regional housing need. Along with the existing flexibility of the law, we believe this change would further enhance the ability of local governments to address important housing needs.

We hope this clarifies some of the questions members of your organization may have about State housing element law. Thank you for setting up our meeting in Benicia. We sincerely appreciate your interest in State housing element law, and your interest in facilitating a positive outcome in its application in Benicia. I look forward to further discussions with you and other members of the Benicia community.

Sincerely,



Kimberley L. Dellinger
Deputy Director

Community Rights Association

POB 1235
Benicia, Ca. 94510
707-745-6562

To: Kimberly L. Dellinger, Deputy Director
Division of Housing Policy Development
Department of Housing and Community Development
1800 3rd Street, Room 430
Sacramento, CA. 95814

September 25, 1997

Re: Compulsory regional housing needs allocations - a mandate to grow.

Dear Ms Dellinger,

Thank you for your written response to our memorandum and your phone call. Our delay in responding was due to the work required to help finish our Report (A Report on General Plan Revisions and Affordable Housing). We have sent a copy to HCD Director Mallory and encourage you to review it if you have not already.

Your letter was very informative but does not clearly respond to some of the issues addressed in our memorandum. The Governor's Department of Housing and Community Development (HCD) has interpreted Government Code, Chapter 3, Article 10.6, the State Housing Element Law (SHEL) in a manner that requires local jurisdictions to meet the specific numbers of the regional housing need projections, as determined and allocated by the regional council of governments, ABAG (Association of Bay Area Governments). As you note in your letter, "*Benicia's new construction need for the current planning period (January 1988 through July 1999), after accounting for newly-built units, requires that Benicia plan and appropriately zone for 499 very low-, 374 low- and 152 moderate-income households.*" HCD's interpretation, in effect, mandates growth by requiring local jurisdictions to accommodate new construction in order to absorb specific numbers of households.

However, "*Local housing elements, and local programs adopted by local governments, are not required to "meet" the identified housing need.*" And, "*How much can be achieved in a particular community will also depend on the willingness of neighborhood and other community groups to recognize the housing needs of the region. . .*" ABAG, "Housing Needs Determinations," p. 25 (1989). When we meet with you, Director Mallory and others from HCD on May 7, 1997 we were given excerpts from this ABAG document, but they did not include page 25. We contend the current SHEL is in accord with these 1989 ABAG statements. The current SHEL notes ". . . each local government also has the responsibility to consider. . . to cooperate with other local governments and the state in addressing regional housing needs." Section 65580 (e). We believe that having the responsibility to consider to cooperate is far from a mandate to cooperate and is, in fact, language that compliments the ABAG statements above. Local governments are not required and it depends on the willingness of the community. There is no mandate to meet the identified regional housing need in the SHEL, notwithstanding HCD's interpretation. We contend that the power to issue such a mandate would require substantial alterations to the United States Constitution as well as the California Constitution.

Further, one of the criteria ABAG uses for determining the regional housing needs allocation is the "availability of suitable sites." As you note in your letter (July 10, 1997) "*... it is undoubtedly true that without Sky Valley, Benicia has much less land to accommodate its remaining regional share need. ... 600 units of the City's allocation was attributed to the Sky Valley development.*" Yet, according to HCD, that unforeseen loss of suitable sites cannot lower Benicia's "fair share" of the ABAG projection that HCD and ABAG openly admit is exaggerated and which, according to ABAG, "*... local governments are not required to 'meet' ...*" According to HCD, unforeseen changes in circumstances have no weight because, allegedly, there are no provisions in the SHEL that allow ABAG to do midcourse recalculations or that allow HCD to reduce the so-called "fair share" of a local government. Such a lack of provisions may be the case, such provisions are not needed because there is no mandate and the SHEL is not the only applicable law. Unlike ABAG and HCD, a local government has legislative power. The Benicia government has not yet used its legislative power to amend its General Plan/Housing Element to HCD's satisfaction. Accommodating those 600 units and the rest of the projection within the limited space remaining would require rezoning for large amounts of high density infill, something the community has, for good reason, been unwilling to accept.

ABAG has clearly noted that local housing elements are not required to meet the identified housing need and that doing so also depends on the willingness of the community. However, HCD has presumed Benicia's Housing Element is out of compliance with the SHEL and has refused to certify it because it has not meet the specific numbers of ABAG's admittedly erroneous "identified housing need" projection.

This HCD presumption has weight that leaves local jurisdictions with a loss of points in the competitive application process for Federal and State grant money through HCD. And with far greater consequence, this HCD presumption leaves local jurisdictions vulnerable to lawsuits, as is Benicia's plight. Benicia is far from being an isolated case. HCD applies its interpretation State-wide. **Local jurisdictions across the State are being "mandated" and sued to "keep building" regardless of the political, economic or social cost and regardless of the physical realities.** No matter what, keep building. This stance could be appropriately called the "Winchester Mystery House Syndrome."

We believe the General Plan and all its required Elements, including the Housing Element, are legislative tools to be used by local governments to plan and manage growth, including residential growth, as lawfully determined by the citizens living within the jurisdiction. We do not believe local governments can be lawfully required to use those legislative tools for planning and managing mandated residential growth as dictated by the Governor's Office (HCD) or voluntary associations like ABAG. We do not believe that the "regional new construction need" as calculated by ABAG and pushed by HCD can be or is, in fact, mandated by the State.

We believe that, within its power to legislate, a local government has the lawful authority and duty to amend its General Plan and/or any of it's required Elements **at any time** to accurately reflect the lawful will of its citizenry, the loss or gain of suitable sites, known discrepancies in projections or any other unforeseen reality. Thereby, a community can effectively, efficiently, accurately and lawfully plan and manage its own residential growth. In the context of rights guaranteed to citizens under the protection of the United States Constitution and the California Constitution, we believe HCD's interpretation of the SHEL and lawsuits based thereon are without merit. HCD's interpretation of the SHEL in relation to this issue is continuing to cause substantial political, economic and social harm to Benicia and we believe local jurisdictions throughout the State.

Therefore, we are forwarding this letter and previous correspondence to all our elected representatives (City, County, State, United States) in an attempt to have this matter clarified and corrected. We hereby respectfully request that our elected representatives use all necessary resources, including the United States Attorney General and the California Attorney General, in order to succinctly answer the following questions, and to investigate and act to protect the liberty and property of the citizens in Benicia as well as local jurisdictions throughout the State of California:

1. Is mandatory regional governance over constitutionally established governments (City, County, State and/or United States) now lawful?
2. Can local jurisdictions be lawfully mandated to meet regional housing needs as determined and allocated by ABAG or HCD?
3. Can a local government unilaterally amend its General Plan and/or Housing Element to remove or adjust commitments to meeting regional housing needs, as determined and allocated by ABAG or HCD?
4. Does a local government have a duty to amend its General Plan and/or Housing Element to reflect the lawful will of the community, the loss or gain of suitable sites, corrections of known exaggerations in growth projections or changes in the actual housing needs as determined by the community?
5. If it is the will of the citizenry within, can a local government unilaterally amend its General Plan and/or Housing Element to speed up, slow down or stop its growth?

Please see the two attached documents. We will gladly provide additional information upon request.

cc:

Benicia City Council
General Plan Oversight Committee (GPOC)
GPOC Housing Element Task Force
Solano County Supervisors
State Representative
State Senator
United States Representative
United States Senator

***Attachments:**

1. HCD letter, July 10, 1997
2. CRA Memorandum, May 6, 1997

Sincerely, *Donnie Mason*
Donnie Mason, President
Community Rights Association

To: Kimberly L. Dellinger, Deputy Director
Division of Housing Policy Development
Department of Housing and Community Development
1800 3rd Street, Room 430
Sacramento, CA. 95814

October 2, 1997

From: Donnie Mason, President
Community Rights Association
POB 1235
Benicia, CA. 94510
707-745-6562

Re: Clarification - regional housing needs - mandatory compliance?

Dear Ms Dellinger,

Could you please give us the HCD position on the following information. I will try to contact you by phone tomorrow (10/03/97) at 1:00 pm.

"Local housing elements, and local programs adopted by local governments, are not required to "meet" the identified housing need." And, "How much can be achieved in a particular community will also depend on the willingness of neighborhood and other community groups to recognize the housing needs of the region. . . ." ABAG, "Housing Needs Determinations," p. 25 (1989). We contend the existing State Housing Element Law (SHEL) is in accord with these 1989 ABAG statements. The existing SHEL notes ***" . . . each local government also has the responsibility to consider. . . to cooperate with other local governments and the state in addressing regional housing needs."*** Section 65580 (e). We believe that having the responsibility to consider to cooperate is far from a mandate to cooperate and is, in fact, language that compliments the ABAG statements above. We contend a mandate to cooperate is not and could not have been the legislative intent.

We understand ***" . . . State law does require a sustained and serious attempt to address housing needs."*** Benicia would have no problem proving that, even in a court of law. However, HCD has refused to certify Benicia's Housing Element because it allegedly will not meet the specific numbers of a known erroneous projection, that is, the regional "identified housing need" from ABAG. We believe HCD's position on this matter is contrary to the ABAG statements above, existing housing element law and would require substantial alterations to the United States Constitution as well as the California Constitution.

It is of the utmost importance that we clear up this matter as soon as possible. Our City is currently working on a new Housing Element. Benicia is 95% built out. The community is justly unwilling to change the character of their city by implementing an unprecedented amount of rezoning to high density to "meet" the unrealistic quota of housing that HCD has said is required. Benicia will never be able to comply. And, it is our contention that there is no law requiring our City to do so. Because of the urgency of our situation, we are also seeking clarification of this matter from other sources.

Your assistance in this matter is greatly appreciated.

cc: Benicia City Council and Counsel
General Plan Oversight Committee (GPOC)
GPOC Housing Element Task Force
Solano County Supervisors
State Representative
State Senator
United States Representative
United States Senator

Sincerely, *Donnie Mason*
Donnie Mason, President
Community Rights Association

Community Rights Association

POB 1235
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Ms. Kimberley L. Dellinger
Deputy Director
Housing and Community Development (HCD)
1800 Third Street, Room 430
POB 952053
Sacramento, CA. 94253-2053
(916) 323-3176 Fax: (916) 327-2643

April 22, 1998

Re: CRA response to the Governor's Office (HCD) review of the City of Benicia's Draft Housing Element, letter dated February 13, 1998; requested clarification.

Dear Ms. Dellinger,

You note, on page one of your letter, that "*. . . the element still fails to include the City's approved share of the regional housing need by income level and fails to identify sufficient sites to accommodate that need.*" You further note on page four of your letter, "*The City has a need to accommodate 893 units for households of lower-income. . . . the element is unable to demonstrate sites to accommodate its need.*" As you know, the aforementioned "need" is regularly referred to as Benicia's "fair share" of a projected regional housing need.

These so-called "fair share" numbers are, in fact, merely a portion of a prediction and we find nothing in the State Housing Element law¹ (SHEL) that mandates local governments to accommodate a portion of a prediction, that is, a "fair share" of a projected regional housing need. Instead, we find that the SHEL notes that local governments have a responsibility to consider economic, environmental and fiscal factors and community goals set forth in the general plan, a responsibility that is equal to its responsibility to cooperate with other local governments and the State in addressing regional housing needs. The SHEL notes that "*. . . total housing needs . . . may exceed available resources and the community's ability to satisfy this need.*"² The SHEL clearly notes numerous reasons why local governments may not be able to "*accommodate that need*" and instructs them to therefore develop a plan that reflects what they can do. Consonant with this, the Association of Bay Area Governments (ABAG), in its Housing Needs Determinations, states, "*Local housing elements, and local programs adopted by local governments, are not required to "meet" the identified housing need.*"³ Yet, HCD has refused to certify Benicia's housing element because it was not a plan that would accommodate the entire amount of a projected need, a "need" that the SHEL and ABAG acknowledge may be beyond local governments resources and abilities and that, therefore, does not have to be met. We believe HCD's intransigent position regarding certification is contrary to law and has unduly cost Benicia a significant amount of money and duress.

¹Government Code, Article 10.6, starting at Section 65580

² Government Code, Article 10.6, Section 65583 (b) (2)

³ABAG, Housing Needs Determinations (1989), p.25)

Again, we do not believe the SHEL or any other existing law imposes a mandatory obligation on local governments to accommodate a portion of a projected regional housing need. We believe ABAG and the SHEL, as well as the California Constitution and the United States Constitution, favor our interpretation. That is, under current law, local governments can voluntarily agree to fully accommodate a portion of a projected regional housing need but local governments have not been mandated by the State to do so. It is a matter of jurisdiction. Accommodating an assigned portion of a projected regional housing need, as determined by an entity lacking jurisdictional authority, requires the city or county government to waive its rightful jurisdiction over zoning, housing and land use. Therefore it only makes sense that, under current law, fully accommodating that declared "need" must be voluntary. Otherwise, representative government and other rights currently guaranteed to the people would be denied, including due process of law, equal protection under the law and private property rights. These lawfully recognized and guaranteed rights are of the essence of the overall right to self-governance, freedom and liberty that permeates our governmental system.

However, it appears to us that HCD and Legal Services (LS)¹ are claiming that local governments are mandated by the SHEL to fully accommodate their assigned portion of a regional housing need projection, and at least some Benicia City Council members were apparently convinced of that assertion. As one Council member repeatedly stated, "It's the law, we have to do it." Also, we are painfully aware that LS used HCD's refusal to certify Benicia's housing element as supporting evidence that the City was out of compliance with State law, with the SHEL, even though HCD's stance is an administrative opinion that is a "rebuttable presumption" and is not a judicial ruling. Yet, as we have said, both the SHEL and ABAG note major exceptions and allowances regarding full compliance, allowances apparently not recognized by HCD, which support our interpretation of voluntary compliance with specific "need" numbers. And neither HCD nor LS has a judicial ruling to back an assertion of mandatory compliance, for no court has specifically addressed the mandatory vs. voluntary question regarding a local government accommodating its so-called "fair share." We believe such a case would confirm our interpretation of voluntary compliance.

We understand, however, that HCD and LS may not be basing their position strictly on interpretation of the SHEL. HCD and LS may be saying that Benicia must "*accommodate that need*" because of pre-existing contractual agreements voluntarily entered into by the Benicia government. These agreements include: (1) Voluntarily signing a Joint Powers Agreement with the regional council of governments, ABAG; and (2) Voluntarily committing to "*accommodate that need*" (as calculated and allocated by ABAG) in its housing element. These agreements were made long before any of the current Benicia Council members came to office and have been the standard for a dozen years. However, we believe there is no law to be found that says Benicia must, without reservation, accommodate ABAG "need" numbers. It may be that HCD and LS are maintaining that really it is the above voluntary actions, acting as

¹"Legal Services" is a generic term used to define the various corporations that are grantees of Legal Services Corporation (Federal) including, but not limited to: Solano County Legal Services, which merged with Legal Services of Northern California; Western Center on Law and Poverty; Housing Element Enforcement Project of the Legal Aid Society of Alameda County.

contracts, that legally bind Benicia to the specific numbers. Therefore, we ask you: **Is HCD basing its position that Benicia must “accommodate that need” on an alleged mandate from the State or on pre-existing contractual agreements made by the City government?** We request this response in writing so it can be communicated accurately during our Housing Element deliberations.

In addition, please review and respond to the following considerations concerning voluntary compliance:

The Governor’s Office and the regional COGs jointly created the “fair share” numbers using their own growth projections and complex formulas that hinged on those projections.¹ **“Fair share” is thus a hypothetical quota of governmentally projected household growth. It is merely a prediction,** a prediction that has proven to be out of sync with the realities of Benicia today. What was predicted did not happen. Yet, we are expected by both HCD and LS to believe that Benicia is mandated by the State to accommodate the specific numbers of that prediction:

HCD: “. . . Benicia’s draft element, while including commendable revisions, still fails to identify sufficient sites to accommodate its entire regional share need for 893 lower-income households . . .”²

LS: “The City of Benicia has met none of its fair share of the regional need for 374 low- and 517 very low-income housing units during the current planning period (1990-1997).”³

Notwithstanding this apparent HCD-LS assertion, we do not believe local governments have been mandated by the State to accommodate the specific numbers. We believe such an assertion defies logic, common sense and existing laws. We believe that in using its vested powers “to make adequate provision for the housing needs of all economic segments of the community,”⁴ Benicia has an obligation to fulfill both “the responsibility to consider economic, environmental and fiscal factors and community goals set forth in the general plan” and the responsibility “to cooperate with other local governments and the state in addressing regional housing needs.”⁵ If, in attempting to fulfill the latter responsibility of cooperation, Benicia ignored the formerly stated responsibility, we believe the City would be out of compliance with State law the same as if it ignored its responsibility to cooperate. The responsibility to cooperate is far from a simple mandate to fully meet specific, predetermined, predicted numbers. Such a mandate would make “cooperation” a *fait accompli* and a sham of governance via elected representatives of the city and county governments. Even if a local

¹Regional Council of Governments (COG): Association of Bay Area Governments (ABAG), Housing Needs Determinations (HND), 1989.

²HCD (Dellinger) letter to Benicia City Manager Giuliani, p. 1, para. 4 (April 12, 1996).

³ Winterhawk vs. City of Benicia (L004789), p. 6, ln. 15

⁴ Government Code, Article 10.6, Section 65580 (d)

⁵ Government Code, Article 10.6, Section 65580 (e)

government volunteered to fully cooperate, we do not believe that such “cooperation” allows local governments to ignore existing economic, environmental or fiscal realities or community goals (the lawful will of the community) as may be set forth in their general plan:

“It is recognized that the total housing needs identified pursuant to subdivision (a) may exceed available resources and the community’s ability to satisfy this need within the content of the general plan requirements outlined in Article 5 (commencing with Section 65300). Under these circumstances, the quantified objectives need not be identical to the total housing needs. The quantified objectives shall establish the maximum number of housing units by income category that can be constructed, rehabilitated, and conserved over a five-year time period.”¹

“... ABAG staff recognizes that many communities may find it difficult to “meet” the projected housing need identified in this report. Local housing elements, and local programs adopted by local governments, are not required to “meet” the identified housing need. But State law does require a sustained and serious attempt to address housing needs. Meeting a community’s identified housing needs may exceed the communities abilities to design or finance local housing programs, especially those to assist lower-income households.”²

“The housing element shall identify adequate sites for housing, including rental housing, factory-built housing, and mobile homes, and shall make adequate provisions for the existing and projected needs of all economic segments of the community.” However, the element shall also contain “(a) An assessment of housing needs and an inventory of resources and constraints relevant to the meeting of those needs.”³

Yes, the housing element shall “[i]dentify adequate sites . . .” but “[w]here the inventory of sites . . . does not identify adequate sites . . . the program shall provide . . .”⁴ (We do not believe the State has commanded local governments to perpetually identify adequate sites for new construction of a variety of types of housing. Of course, a local government could volunteer to “just keep building.”)

Yes, “[t]hese existing and projected needs shall include the locality’s share of the regional housing needs in accordance with Section 65584,”⁵ but Section 65584 notes, “The distribution of regional housing needs shall, based on available data take into consideration . . . the availability of suitable sites . . .”

¹ Government Code, Article 10.6, Section 65583 (b) (2)

² ABAG, Housing Needs Determinations (1989), p.25)

³ Government Code, Article 10.6, Section 65583.

⁴ Government Code, Article 10.6, Section 65583 © (1).

⁵ Government Code, Article 10.6, Section 65583 (a) (1)

And, *“How much can be achieved in a particular community will also depend on the willingness of neighborhood and other community groups to recognize the housing needs of the region . . . ”*¹

We do not believe local housing elements and local programs are required to “meet” the identified housing needs, as is noted above by ABAG and in the SHEL. ABAG and the SHEL both acknowledge that the “need” for growth (particularly lower-income housing growth) may exceed available resources, which would reasonably involve a lack of adequate and suitable sites, so they offer an alternative, which is the outlining in quantified objectives of what can be accomplished within the five-year planning period. These noted exceptions and allowances for “existing” conditions by the SHEL and ABAG are in line with our “voluntary” interpretation, which in turn is in line with recognition that the “fair share” numbers are only predictions. But a “mandatory” interpretation regarding meeting specific numbers is not logically compatible with either allowances for existing conditions, existing law or recognition that the “fair share” numbers are mere predictions.

Benicia has continually told the Governor’s Office (HCD) that the City cannot *“identify sufficient sites to accommodate its entire regional share need for 893 lower-income households,”* that is, meet the prediction, because that number exceeds available resources, in particular sufficient and suitable infill sites needed for the amount of high-density development demanded. Even though Benicia has continuously made *“a sustained and serious attempt to address housing needs”* of all economic segments of the community within the confines of its true resources, HCD continues to reject as adequate, Benicia’s legislative decision in the matter. We believe the apparent HCD-LS “mandatory” interpretation of Benicia’s fair share obligation conspicuously conflicts with the SHEL and ABAG findings, as well as interfering with rights recognized and guaranteed within our State and Federal Constitution.

Therefore, we believe the Governor’s Office (HCD) erred when it refused to certify Benicia’s Housing Element after it was correctly amended to reflect the loss of sites in Sky Valley that were once thought developable. It was a loss that included sites for hundreds of higher density, lower-income housing units. HCD’s intransigent insistence that Benicia must still accommodate its entire governmentally projected “need” for growth, even though that “need” is based on a decade-old prediction which included the sites Benicia lost in Sky Valley, has cost Benicia a great deal of money and duress to its citizens. We see nothing in law (including the SHEL) that prevents local governments from amending their housing elements based on present day realities like the unforeseen loss of developable sites because of an uncovered environmental hazard. We believe a local government would be legally negligent if it did not alter its growth plans accordingly. HCD agrees such amendment is necessary and allowed, but that Benicia’s new plan must somehow still accommodate its assigned “need” for growth, in its entirety. Again, we do not believe this HCD claim has an existing law or court ruling upon which to stand and may therefore be based on pre-existing contractual agreements entered into by the Benicia government. Therefore, as requested above, we are seeking written clarification from HCD regarding its reasons for refusing to certify Benicia’s housing element.

¹ABAG, Housing Needs Determinations (1989), p.25)

Also, neither ABAG nor HCD is a legislative body. ABAG is a quasi-governmental corporation and HCD is an administrative body established in the Governor's Office. This is evident from a brief review of the history of Benicia's "fair share" numbers. The process that gave local governments in ABAG territory their most recent "fair share" quotas of growth (projected regional housing need) started about ten years ago. *"Based on data provided by the Department of Finance, in consultation with each council of government, the Department of Housing and Community Development shall determine the regional share of the statewide housing need Based upon data provided by the department relative to the statewide need for housing, each council of government shall determine the existing and projected housing need for its region."*¹ The regional council of governments (COG) in turn assigned a portion of that projected growth "need" to their respective members, the local governments within their provinces that had signed a Joint Powers Agreement with the COG. We understand the SHEL allows HCD to predict "fair share" portions for local governments that choose not to sign a JPA with a regional COG. However, the source (HCD or COG) of the prediction has no bearing on whether accommodating that projected "need" is mandatory or voluntary.

*"The realized demand for housing is a function of the growth in households projected for the region."*² A local government's so-called fair share of the "regional housing need" is the "realized demand" for housing, but only in a hypothetical sense since that quota is based on growth in households projected for the region. The "fair share" quotas do not just include a predicted growth "need" number of lower-income households. "Fair share" quotas include four governmentally established income groups (very low, low, moderate and above-moderate) in governmentally established percentages. Redistribution and brokerage of lower income households are incorporated policies.³ When the entire projected growth quotas are not met, HCD refuses to certify the housing element. If the local government's projected growth quota is lacking in its assigned portion of lower-income households, then Legal Services (LS) sues, as happened to Benicia. Along with other local governments throughout the State, Benicia did not accommodate its entire projected growth quota of lower-income households in its general plan. In April, 1996, during public hearing, Benicia's city council was told by the city attorney that HCD's decertification of Benicia's housing element was, legally, presumptive evidence of non-compliance with State law. Even if accurate, we do not believe an administrative "presumption" can outweigh a legislative body's legal decisions if that presumption conspicuously infringes upon jurisdictional authority, as is the case for Benicia.

Further, we believe the complexity and thrust of the evolution of the growth quotas referred to as "regional housing need" and "fair share," in harmony with HCD denying funds to local governments that lack HCD certification, has resulted in Benicia being pressured to forsake the best interest and lawful will of the community it represents. We do not believe HCD has the right to thus require Benicia to, in essence, violate law in order to obtain

¹ Government Code (SHEL), Section 65584 (a).

² COG-ABAG, HND, p. 5.

³ SHEL, Section 65584; "Regionalism: The New Geography of Opportunity," Henry G. Cisneros, Secretary of Housing and Urban Development (March 1995).

certification. We believe the California Constitution and the United States Constitution still prevail in California, Solano County and Benicia, thus making, in the end, the mandating of accommodation of governmental growth predictions a legal impossibility. We believe HCD's apparent interpretation of the SHEL in regards to "fair share" violates the people's lawful right to govern themselves by attempting to usurp the jurisdiction of city and county governments. We believe that Benicia has the legislative authority and duty to adopt a residential growth plan that reflects both reality and the lawful will of the citizens within the jurisdiction, even if such reality and will are contrary to the State's specific, predicted "need" for growth. But the Governor's Office (HCD), as of this date, has failed to recognize that the SHEL does not mandate local governments to accommodate their growth predictions. We believe administrators and employees of the Governor's Office (HCD), if asked, have an obligation to clearly acknowledge that, under current law, fully accommodating a portion of a projected regional housing need can only be taken on by local governments, voluntarily.

In an attempt to create a lawful housing element that HCD will certify and that the community will willingly accept, the Benicia City Council has established a citizens advisory group, the "Housing Element Advisory Committee" of which we have been asked to participate. First on our agenda is a policy position regarding the "fair share" numbers. Your timely response, in writing, is therefore extremely important.

Finally, the clarification we seek does not imply that we believe a local government is not required to have a Housing Element in its General Plan that plans its growth with consideration given to the housing needs of all economic segments of the community. Nor do we believe Benicia or any other community cannot and will not grow. The clarification does not mean LS will not sue local governments that fail to accomplish contractual obligations in their own general plans. It does mean, however, that HCD cannot deny housing element certification based on an unmet prediction that the so-called "fair share" numbers represent. And, it does mean our community can more properly grow according to law and to reality and the lawful will of its citizens.

Sincerely, *Donnie Mason*

Donnie Mason, President
Community Rights Association

cc: John Bunch, Benicia Planning Director
Heather McLaughlin, City Attorney
Maurice Johannessen, State Senator
Helen Thomson, Assemblymember
John E. Kramer, Institute for Justice

Community Rights Association

POB 1235
Benicia, California 94510
(707) 745-6562

Ms. Kimberley L. Dellinger
Deputy Director
Housing and Community Development (HCD)
1800 Third Street, Room 430
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(916) 323-3176 Fax: (916) 327-2643

June 17, 1998

Re: Request for written response to previous correspondence (April 22, 1998); request for written response to this letter (Re: HCD position contrary to reason and established law, including the State housing Element law.

Dear Ms. Dellinger,

We understand our seven page letter dated April 22, 1998 raises some complicated questions and would require some time for a written response, but it has been nearly two months since our initial request. We do not believe that the withholding of the answers we have requested is appropriate. We noted in our initial correspondence that a timely response was vital because Benicia's Housing Element Advisory Committee (CRA representation included) would be starting its work by investigating and making a determination concerning Benicia's "fair share" numbers. HCD's written response to our previous letter and this letter is still needed.

HCD has been steadfast in it's position: *"It is now apparent that, barring a policy change by the City Council, Sky Valley will not be available for development during the current planning period, and therefore the City does not currently have adequate sites to accommodate the remaining new construction need of 517 very low-, 376 low, and 152 moderate-income units (total remaining regional share need of 1,045-units). Therefore, Benicia's housing element no longer complies with State housing element law, and will require additional program (s) to provide sites for lower-income housing sufficient to meet Benicia's regional share need."*¹

The quantified "regional share need" as specifically identified by HCD above is Benicia's

¹HCD letter from Deputy Director, Thomas B. Cook to Benicia City Manager, Michael Warren (10/25/93).

so-called "fair share," a determination (calculation) made by ABAG in 1989. The bottom line of the ABAG calculation is referred to as a locality's "total projected need" for housing, the result of household growth/housing need projections prepared by the Governor's Office (Department of Finance; HCD) and regional councils of governments (COGs) like ABAG. As noted in the State housing element law (SHEL), the COG's calculated projection must be included in two analysis² (examinations). This set of required examinations that must include ABAG's calculated projection are two of seven examinations and four sub-examinations that make up the required "*assessment (estimate) of housing needs. . .*"³

HCD has raised ABAG's calculation of Benicia's projected "*. . . share of the regional housing need. . .*" beyond being part of examinations that make up an estimate. ABAG's calculated projection is very sophisticated data, but it is still just a projection. A projection that must be included in examinations that make up an estimate. And the very next Section of the SHEL notes that the completed estimate (assessment) of total housing needs "*. . . may exceed available resources and the community's ability to satisfy this need Under these circumstances, the quantified objectives need not be identical to the total housing needs.*"⁴ Still, HCD's interpretation of the SHEL requires Benicia to adopt a housing element (a legally binding contract) that accommodates the specific numbers of an outdated projection - examination - estimate of housing needs.

The SHEL requires housing element "*review and revision*" as frequently as appropriate to evaluate the "*appropriateness of the housing goals, objectives, and policies in contributing to the attainment of the state housing goal*" and the "*effectiveness of the housing element in attainment of the community's housing goals.*" And, "*as appropriate, but not less than every five years, to reflect the results of this periodic review*" along with "*subsequent revisions*" that "*shall be completed not less often than at five-year intervals following the second revision.*"⁵ An unforeseen environmental hazard caused Benicia to drastically alter its development plans. Over 3,000 housing units had been planned, hundreds of which would have been for lower income households. Continuing the planned development in light of the environmental hazard would have been contrary to that portion of the State housing goal that seeks early attainment of "*decent housing, and a suitable living environment for every California family. . .*"

As appropriate and required by the SHEL, Benicia revised its growth plans (housing element) to reflect the loss of sites once thought "suitable" for development. However, HCD has continually refused to accept Benicia's revised housing element, on the grounds that the SHEL requires Benicia to accommodate the specific numbers of a projection-examination - estimate made in the past and that is now conspicuously invalid. We believe HCD's position defies reason and established law, including the State housing element law.

²Government Code, Article 10.6, Section 65583 (a) (1) and (4).

³Government Code, Article 10.6, Section 65583 (a).

⁴Section 65583 (b) (2).

⁵Government Code, Article 10.6, Section 65588.

We believe that Benicia has the legislative authority and duty to adopt a residential growth plan that reflects both reality and the lawful will of the citizens within the jurisdiction, even if such reality is contrary to the State's predicted "need" for growth. But the Governor's Office (HCD) has failed to recognize that the SHEL does not mandate local governments to accommodate these growth predictions. Even though contrary to HCD's steadfast position in the past, we believe current administrators and employees of the Governor's Office (HCD), if asked, have an obligation to clearly acknowledge that the calculated projections of housing needs by regional COGs like ABAG, referred to as the "fair share" numbers, do not have to be accommodated in order to be in compliance with the SHEL. And, we are hereby asking for that acknowledgment.

Your assistance and written response in this matter would be greatly appreciated.

Sincerely, *Donnie Mason*

Donnie Mason, President
Community Rights Association

Community Rights Association

POB 1235
Benicia, California 94510
(707) 745-6562

Ms. Kimberley L. Dellinger
Deputy Director
Housing and Community Development (HCD)
1800 Third Street, Room 430
POB 952053
Sacramento, CA. 94253-2053
(916) 323-3176 Fax: (916) 327-2643

July 13, 1998

Re: Request for written response to previous correspondence (April 22, 1998);
restatement that HCD position is contrary to reason and established law, including the State
Housing Element law; second request for response.

Dear Ms. Dellinger,

We understand our letter dated April 22, 1998 raises certain questions that might require some time for a written response, but it has been over two months since our initial request. We do not believe that the withholding of the answers we have requested is appropriate. We noted in our initial correspondence that a timely response was vital because Benicia's Housing Element Advisory Committee (CRA representation included) would be starting its work by investigating and making a determination concerning Benicia's "fair share" numbers. HCD's written response to our previous letter and this letter is still needed.

HCD has been steadfast in its position: *"It is now apparent that, barring a policy change by the City Council, Sky Valley will not be available for development during the current planning period, and therefore the City does not currently have adequate sites to accommodate the remaining new construction need of 517 very low-, 376 low, and 152 moderate-income units (total remaining regional share need of 1,045-units). Therefore, Benicia's housing element no longer complies with State housing element law, and will require additional program (s) to provide sites for lower-income housing sufficient to meet Benicia's regional share need."*¹

¹HCD letter from Deputy Director, Thomas B. Cook to Benicia City Manager, Michael Warren (10/25/93).

The quantified “regional share need” as specifically identified by HCD above is Benicia’s so-called “fair share,” a determination (calculation) made by ABAG in 1989. The bottom line of the outdated ABAG calculation is referred to as a locality’s “total projected need” for housing, the result of household growth/housing need projections prepared by the Governor’s Office (Department of Finance; HCD) and regional councils of governments (COGs) like ABAG. As noted in the State housing element law (SHEL), a locality must include the COG’s calculated projection in two analyses² (examinations). This set of examinations are two of seven examinations and four sub-examinations that make up the required “*assessment (estimate) of housing needs...*”³ However, HCD has raised ABAG’s outdated calculation from being a sub-part of examinations that make up an estimate to being a mandated quota.

ABAG’s calculated projection has the appearance of sophisticated data, but it is still just a projection, a projection that must be included in examinations that make up an estimate (as per Section 65583 (a) of the SHEL). And the very next sub-section of the SHEL notes that the completed estimate (assessment) “. . . *may exceed available resources and the community’s ability to satisfy this need Under these circumstances, the quantified objectives need not be identical to the total housing needs.*”⁴ Still, HCD’s interpretation of the SHEL requires Benicia to adopt a housing element (a legally binding contract) that identifies adequate sites to fully accommodate the specific numbers of ABAG’s calculated projection as if it were a mandated quota: “. . . *517 very low-, 376 low, and 152 moderate-income units (total remaining regional share need of 1,045-units).*” We believe HCD’s position defies reason and established law, including the State Housing Element law.

We believe that Benicia has the legislative authority and duty to adopt a residential growth plan that reflects both reality and the lawful will of the citizens within the jurisdiction, even if such reality and will varies partially from the State’s predicted “need” for growth. The SHEL requires that “*Each local government shall review its housing element as frequently as appropriate to evaluate . . . : The appropriateness of the housing goals, objectives, and policies in contributing to the attainment of the state housing goal*” and the “*effectiveness of the housing element in attainment of the community’s housing goals.*” And, “*as appropriate, but not less than every five years, to reflect the results of this periodic review . . .*”⁵

An unforeseen environmental hazard caused Benicia to drastically alter its residential development plans in 1993. Over 3,000 housing units had been planned, hundreds of which would have been for lower income households. Continuing the planned development in light of the environmental hazard would have been contrary to the State housing goal: “*early attainment of decent housing, and a suitable living environment for every California family . . .*” As appropriate and required by the SHEL, Benicia revised its growth plans (housing element) to reflect this dramatic loss of sites once thought “suitable” for development. However, HCD has continually refused to accept Benicia’s revised growth plans

²Government Code, Article 10.6, Section 65583 (a) (1) and (4).

³Government Code, Article 10.6, Section 65583 (a).

⁴Section 65583 (b) (2).

⁵Government Code, Article 10.6, Section 65588.

(housing element) on the grounds that the SHEL requires Benicia to fully accommodate the specific numbers of ABAG's calculated projection, as noted above. We believe the Governor's Office (HCD) has failed to recognize that the SHEL does not mandate local governments to fully accommodate these administrative predictions of growth, no matter how elaborate the predictive process.

Even though contrary to HCD's steadfast position in the past, we believe current administrators and employees of the Governor's Office (HCD), if asked, have an obligation to clearly acknowledge that the so-called "fair share" numbers, that is the projections calculated by regional COGs like ABAG, are not a mandated quota that must be fully accommodated in order to be in compliance with the SHEL. And, we are hereby asking again for that acknowledgment. We understand "silence equals agreement," but we would prefer written confirmation from HCD that compliance with the SHEL does not require Benicia to fully accommodate the governmental predictions referred to as the "fair share" numbers.

Your timely assistance and written response in this matter would be greatly appreciated.

Sincerely, *Donnie Mason*

Donnie Mason, President
Community Rights Association

cc:

Elected Officials
Benicia City Attorney
Benicia City Planner
Benicia Housing Element Advisory Committee
Institute For Justice

**DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT**

1800 Third Street, Suite 430
P.O. Box 952053
Sacramento, CA 94252-2053
(916) 323-3176 FAX (916) 327-2643



July 17, 1998

Mr. Donnie Mason, President
Community Rights Association
P.O. Box 1235
Benicia, California 94510

Dear Mr. Mason:

Thank you for your recent correspondence regarding the City of Benicia and the requirements of State housing element law. I understand Cathy Creswell of my staff had a very productive conversation with you after your last correspondence. We were not aware that a written follow-up was desired. I apologize for any misunderstanding and am happy to respond at this time.

Your letter describes the position of the Community Rights Association that State housing element law does not require local governments to accommodate their full regional housing needs allocation. You note that the regional housing needs allocation is a "projection" of expected growth and the law does not mandate local governments to fully accommodate these predictions of growth.

We can appreciate your frustration with this component of state law. The law establishes the requirement that local governments plan to accommodate their share of the regional housing need through the housing element of their general plan. The law requires local governments to include their share of the regional housing need within their housing element and that the jurisdiction identify sites with appropriate zoning and development standards to accommodate the projected growth. Normally, housing elements (and regional share allocations) are updated every five years. The five year update schedule ensures that conditions and needs will be reevaluated and updated on a regular schedule. Unfortunately, the requirement to update the allocations and housing elements have been suspended since 1992 and local governments have been required to continue implementing their existing housing elements. For Benicia, this has meant that revised/updated regional housing needs, more reflective of the current situation, have not been prepared. The City has been obligated as a result, to continue implementing their existing housing element and regional housing need.

We understand your concern that existing housing element law does not provide a mechanism to address significant changes in local conditions. When Benicia's regional housing needs allocation was established, the City was planning on the annexation of Sky Valley. The City's regional share allocation reflected the growth expected to be

Mr. Donnie Mason, President

Page 2

accommodated by Sky Valley development. Unfortunately, the annexation was unable to proceed and Benicia was left to try and accommodate their entire need within the City. We agree that current housing element law could be more flexible to reflect unforeseen, significant changes in local circumstances. As a result, we have agreed to work with Senator Johannessen on legislation to address this issue.

Your letter also takes issue with the requirement of housing element law that local governments must identify sites to accommodate their entire regional housing needs allocation. You correctly note that a local governments' quantified objective can be less than the regional housing need because the need may exceed available resources. However, the adequate sites requirement of the law, requires local governments to identify sufficient sites to accommodate the need for groups of all household income levels pursuant to Section 65584 (regional share requirements). The difference between the two requirements is that local governments are required to utilize their zoning and land use powers to "plan" to accommodate their entire regional housing need allocation. They are not responsible, however, to ensure that sufficient units are built commensurate with the need. The law recognizes that local governments do not build housing, but through their zoning and land use powers they influence both the supply and affordability of housing. Therefore, housing element law requires local governments to plan for sufficient housing to accommodate their regional share allocation by providing sufficient zoning to allow sufficient development to occur. However, if the market does not actually build the housing commensurate with the need, local governments are not held accountable.

I hope this clarifies existing requirements of the law. While we appreciate your frustration with perceived inflexibility of the law, we believe that Benicia can adopt a housing element in compliance with State law that reflects its community values and concerns. We would be happy to meet with you to discuss these and other issues of interest to the Community Rights Association.

If you have additional questions, please feel free to contact us at (916) 323-3177.

Sincerely,



Kimberley L. Dellinger
Deputy Director

Enclosure

Community Rights Association

POB 1235
Benicia, California 94510
(707) 745-6562

Ms. Kimberley L. Dellinger
Deputy Director
Housing and Community Development (HCD)
1800 Third Street, Room 430
Sacramento, CA 94253-2053
Via: Fax and US Mail

October 26, 1998

Dear Ms. Dellinger:

Thank you for your July 17, 1998 letter. We realize that you are very busy, and that Benicia's situation is far from being your only concern. However, your continued assistance in this matter would be greatly appreciated.

The information we need is not only for CRA. The Benicia City Council has had, for over a year now, two committees in session to work on and advise the Council on Benicia's new Housing Element. They are the former Housing Element Task Force and the current Housing Element Advisory Committee (HEAC). CRA has been active in both groups from the beginning. Our contributions are based on our understanding of State housing element law (SHEL).

Unfortunately, your July 17 letter does not give us specific, substantive responses to important questions we raised in our previous letters.¹ Your letter contains statements that need clarification and substantiation, as well as erroneous statements about CRA's positions on the SHEL that we must rebut. What follows is a rebuttal to some of the statements contained in your letter, and requests for additional clarification and substantiation. In response to this letter, we need HCD to supply us with definitive, written responses to items #2 and #3.

1. Your letter misstates our findings concerning the SHEL.

You state, "We can appreciate your frustration with this component of state law . . . We understand your concern that existing housing element law does not address significant changes in local conditions . . . We agree that current housing element law could be more flexible to reflect unforeseen, significant changes in local circumstances."

These statements are completely erroneous. CRA has consistently held the exact opposite position. We have no frustration with any "component" of the SHEL. We believe the content and the intent of the SHEL substantially and clearly support our position, namely that existing housing element law not only addresses, but clearly recognizes the ample flexibility and superior authority possessed by local governments to address unforeseen, significant changes in local conditions. CRA has tried, for over a year now, to persuade HCD to recognize that flexibility and authority, as is clearly spelled out in the SHEL and supported by our State and Federal Constitutions.

¹Letter dated 10/2/97 (Ms. Creswell promised (10/3/97) a written response - no response received); letter dated 4/22/98 (no response); letter dated 7/13/98 (response received-7/17/98).

2. HCD's directives, as relayed in your letter, hold Benicia to a requirement that cannot exist under current law, except perhaps, by voluntary contractual agreements.

You relay in your letter that “. . . *the adequate sites requirement of the law, requires local governments to identify sufficient sites to accommodate the need for groups of all household income levels pursuant to Section 65584 (regional share requirements)* . . . The law establishes the requirement that local governments plan to accommodate their share of the regional housing need through the housing element of their general plan . . . local governments are required to utilize their zoning and land use powers to ‘plan’ to accommodate their entire regional housing need allocation.”

These statements clearly spell out HCD's policy, but you have not given us anything whatsoever that substantiates that policy. We do not find the necessary empowering language in Section 65583, Section 65584 or any other Section that supports this policy. Instead, we have found substantial language and spirit in the SHEL and in our California and United States Constitutions that conspicuously guard against such a policy.

Therefore, we must ask you to consult with HCD's legal staff and confirm, in writing, that your statements, as quoted above, are in fact HCD's official position. Please include the specific laws and empowering language that support this policy.

3. CRA holds to the following positions and is basing its contributions to Benicia's Housing Element process accordingly.


In creating a lawful Housing Element:

- (a) Benicia is not required by the SHEL to utilize her zoning and land use powers to plan to accommodate the entire regional housing need allocation.
- (b) Benicia is not required by the SHEL to identify adequate sites to accommodate the entire regional housing need allocation, commonly referred to as the “fair share” numbers.

We ask that HCD's legal staff give us written confirmation that these two statements are true and correct, or supply us with specific laws and empowering language that support any contrary position. If there are existing contractual agreements that prevent confirmation of these statements, we request written identification of those agreements.

Conclusion:

CRA is working diligently with other local groups to assist our Council in creating an achievable housing element -- one that has the support of our community, will increase Benicia's supply of affordable housing, and is defensible in court. So that we may satisfactorily conclude our work, we request that HCD respond promptly with definitive written responses to items # 2 and #3 of this letter. Again, your continued assistance would be greatly appreciated.

Sincerely, 
Donnie Mason, President
Community Rights Association

cc: Benicia HEAC
HCD Director Mallory

Community Rights Association

POB 1235
Benicia, California 94510
(707) 745-6562

Ms. Kimberley L. Dellinger
Deputy Director
Housing and Community Development (HCD)
1800 Third Street, Room 430
Sacramento, CA 94253-2053
Via: Fax and US Mail

October 28, 1998

Dear Ms. Dellinger:

Please consider this letter in conjunction with our request letter (10/26/98). Again, your continued assistance in this matter is greatly appreciated.

According to HCD (letter-7/17/98), "*... the adequate sites requirement of the law, requires local governments to identify sufficient sites to accommodate the need for groups of all household income levels pursuant to Section 65584 (regional share requirements).*"

According to CRA, no such requirement exist in the State housing element law (SHEL), in fact, the SHEL conspicuously contracts such a "requirement."

Note SHEL, Section 65583, "*The element shall contain all of the following . . .*"

We take this to mean that the "checklist" that does follow this statement is a complete and inclusive list of all the required components of a housing element.

65583:

- (a) "*An assessment of housing needs and an inventory of resources and constraints relevant to the meeting of these needs. The assessment and inventory shall include the following . . .*"
- (3) "*An inventory of land suitable for residential development, including vacant sites and sites having potential for redevelopment, and an analysis of the relationship of zoning and public facilities and services to these sites.*"

Please answer the following questions:

- 1) Would you agree, HCD's "*adequate sites requirement*" is not mentioned in 65583 (a)(3)?
- 2) Would you agree, it would be inappropriate to impose a requirement to "*identify sufficient sites to accommodate the need . . .*" **before** (a)(3), that is, before compiling an "*... inventory of land suitable for residential development?*"
- 3) Would you agree, a requirement to "*identify sufficient sites to accommodate the need . . .*" placed **after** (a)(3) would be unrealistic, being that such a "requirement" could exceed available resources, for example, (a)(3) - land suitable for residential development?

Agreement with these three statements is supported by the SHEL "checklist."

65583 (c)(1), notes the requirement to *"Identify adequate sites . . . in order to meet the community's housing goals as identified in subdivision (b)."*

65583(b):

(1) requires *"A statement of the community's goals, quantified objectives, and policies relative to the maintenance, preservation, improvement, and development of housing;"*

(2) recognizes *" . . . that the total housing needs identified pursuant to subdivision (a) may exceed available resources and the community's ability to satisfy this need . . . Under these circumstances, the quantified objectives need not be identical to the total housing needs."*

65583 (a) is that part of the "checklist" where you find the required assessment (examination) of housing needs at (1) and (2), **before** taking an *" . . . inventory of land suitable for residential development . . ."* at (3). Do you still agree, it would be inappropriate to impose a requirement to identify sufficient sites to accommodate a particular need **before** (a)(3)? Clearly, (1) and (2) on the checklist require and outline an extensive examination of housing needs, period; assess housing needs, local and regional, that is the command, with no inference or reference indicating a requirement to identify sufficient sites to accommodate that projected need, as is claimed by HCD. And, (a)(3) rules out such a requirement, as well as does other portions of the SHEL.

65583 (c)(1) goes on to note:

"Where the inventory of sites, pursuant to paragraph (3) of subdivision (a), does not identify adequate sites to accommodate the need for groups of all household income levels pursuant to Section 65584, the program shall provide for sufficient sites with zoning that permits owner-occupied and rental multi-family residential use by right . . ."

The *"program"* that *"shall provide for sufficient sites"* is described in subdivision © as:
"A program which sets forth a five-year schedule of actions the local government is undertaking or intends to undertake to implement the policies and achieve the goals and objectives of the housing element . . ."

Conclusion:

Words and phrases from the SHEL are used in forming HCD's "requirement," quoted at the beginning of this letter. However, we believe we have given enough additional, actual language from the SHEL to reveal that HCD has apparently, at best, used key words and phrases from various components of the "checklist" to form an illogical component (requirement) that is, not only not on the list, but is conspicuously contradicted by numerous components on the list.

We believe the SHEL requires local governments to identify adequate sites to accommodate their goals, policies and quantified objectives, as outlined in their housing elements. However, we do not believe local governments are required, as alleged by HCD, to identify adequate/sufficient sites to accommodate the projected housing needs resulting from their assessment, as is clearly noted throughout the SHEL.

Again, we request that HCD give us written confirmation that our findings are correct, or furnish substantive evidence to the contrary.

Sincerely,



Donnie Mason, President
Community Rights Association

cc: Benicia HEAC
HCD Director Mallory

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT

Office of the Director

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(916) 445-4775



November 23, 1998

Mr. Donnie Mason, President
Community Rights Association
P.O. Box 1235
Benicia, California 94510

Dear Mr. Mason:

Thank you for your recent letter to Kimberley Dellinger and your continuing interest in assisting the City of Benicia develop a compliant housing element. I am happy to respond to your request for additional information and to inform you of our ongoing efforts to work with Benicia.

Your letter requests that we confirm, in writing, the Department's policy and State law regarding the adequate sites requirements of housing element law (questions 2 and 3 of your letter). As you point out in your letter, in carrying out our statutorily mandated review responsibilities, HCD has reviewed local housing elements to, among other things, ensure that each element identifies adequate sites to accommodate the locality's share of the regional housing need. Where the land inventory, pursuant to Government Code 65583(a)(3), does not identify sufficient sites, we look to see that the element includes a program to provide adequate sites pursuant to Government Code Section 65583(c)(1). This Section of State housing element law specifically requires the program to: *"Identify adequate sites which will be made available through appropriate zoning and development standards and with public services and facilities needed to facilitate and encourage the development of a variety of types of housing for all income levels, including multifamily rental housing... Where the inventory of sites, pursuant to paragraph (3) of subdivision (a), does not identify adequate sties to accommodate the need for groups of all income levels pursuant to Section 65584 (the regional share requirements of the law) the program shall provide for sufficient sites with zoning that permits owner-occupied and rental multifamily residential use by right, including density and development standards that could accommodate and facilitate the feasibility of housing for very low and low-income households."* The statute is clear that a local government is required to identify sites for their entire regional share allocation and that they are to use their zoning and land use powers to provide the necessary sites.

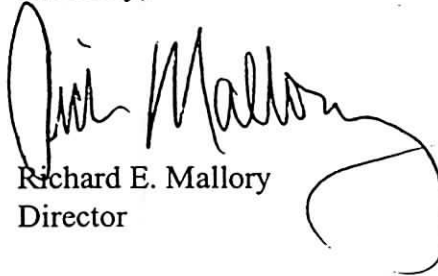
Housing element law consistently references the responsibility of local governments to address regional housing needs. For example, Section 65580 of the law specifies that local governments have a responsibility to use the powers vested in them to facilitate the improvement and development of housing to make adequate provision for the housing needs of all economic

segments of the community. Section 65581 recognizes "that each locality is best capable of determining what efforts are required by it to contribute to the attainment of the state housing goal provided such a determination is compatible with the state housing goal and regional housing need." The statute does specifically mandate local governments to plan and zone land to accommodate needed growth as represented by the regional housing need allocation, but, it also provides significant discretion to local governments regarding where and how to appropriately plan. To adequately plan for housing to accommodate lower-income households a local government could, for example, use a combination of various techniques including zoning sites for higher density multifamily use, second units, mixed commercial and residential uses, rezoning excess commercial land, and the redevelopment of underutilized residential or nonresidential uses. In addition, housing element law was recently amended to allow local governments to meet up to 25 percent of their regional housing need through rehabilitation, preservation of subsidized housing at-risk of conversion, and/or the conversion of market-rate multifamily projects to affordable uses (see the enclosed description of the law).

You may also be aware the Department has been in contact recently with City officials to discuss Benicia's housing element. We have offered to work closely with and provide any necessary assistance to the appropriate staff and/or committees. The Department is committed to working cooperatively with the City to address State requirements in a manner most consistent with local circumstances and concerns. We welcome your participation in this effort.

I hope you find this letter responsive to your questions and concerns. If you have any additional questions or concerns, please feel free to contact me at (916) 445-4775 or Cathy Creswell, Acting Deputy Director, Division of Housing Policy Development, at (916) 323-3176.

Sincerely,



Richard E. Mallory
Director

cc: City of Benicia Planning Department
Senator Maurice Johannessen

Community Rights Association

P. O. Box 1235
Benicia, Ca. 94510

February 12, 1999

Richard E. Mallory, Director
Department of Housing and Community Development (HCD)
1800 Third Street, Suite 450
Sacramento, CA. 94252-2051

Via Fax and Certified Mail

Re: HCD position not supported by State Housing Element law;¹ request for review and reconsideration.

Dear Director Mallory,

Thank you for your detailed letter (11/ 23/98) in response to our many inquiries to your Department. In that letter you quote various portions of the State housing element law (SHEL) as the lawful source for justification of HCD's position that:

"The statute is clear that a local government is required to identify sites for their entire regional share allocation and that they are to use their zoning and land use powers to provide the necessary sites."

"The statute does specifically mandate local governments to plan and zone land to accommodate needed growth as represented by the regional housing need allocation . . ."

"HCD has reviewed local housing elements to, among other things, ensure that each element identifies adequate sites to accommodate the locality's share of the regional housing need."

You then proceed to defend this position, in part, as follows:

"Where the land inventory, pursuant to Government Code 65583 (a) (3), does not identify sufficient sites, we look to see that the element includes a program to provide adequate sites pursuant to Government Code 65583(c)(1). This Section of State housing element law specifically requires the program to: 'Identify adequate sites which will be made available through appropriate zoning and development standards and with public services and facilities needed to facilitate and encourage the development of a variety of types of housing for all income levels, including multifamily rental housing . . .'"

You maintain that the above excerpt (especially those words you underline) from the first sentence of 65583(c)(1) specifically supports your assertions that "a local government is required to identify sites for their entire regional share allocation and that they are to use their zoning and land use powers to provide the necessary sites." However, you omitted the concluding words of that sentence which conspicuously contradict these claims. The 65583(c)(1) sentence actually states and confirms that the program² shall "Identify adequate sites which will be made available through appropriate zoning . . . in order to meet the community's housing goals as identified in subdivision (b)."

¹ Government Code, Article 10.6, commencing at Section 65580.

² The required "program" is described in 65583(c) as "... a five-year schedule of actions the local government is undertaking or intends to undertake to implement the policies and achieve the goals and objectives of the housing element . . ."

The full content of the remaining 65583(c)(1) sentences clearly confirms that the additional provisions concerning “use by right” are also a means for identifying sufficient sites that will meet the community’s housing goals³ and quantified objectives, not the regional share allocation, as you have claimed. For example:

(1) 65583(c)(1) concludes “Use by right for all rental multifamily residential housing shall be provided in accordance with subdivision (f) of Section 65589.5.”

(2) Subdivision (f) of Section 65589.5 states, “Nothing in this Section shall be construed to prohibit a local agency from requiring the development project to comply with written development standards, conditions, and policies appropriate to, and consistent with, meeting the quantified objectives relative to the development of housing, as required in the housing element pursuant to subdivision (b) of Section 65583.”

(3) Subdivision (b)(2) of Section 65583 notes that “It is recognized that the total housing needs identified pursuant to subdivision (a)⁴ may exceed available resources and the community’s ability to satisfy this need within the content of the general plan requirements Under these circumstances, the quantified objectives need not be identical to the total housing needs. The quantified objectives shall establish the maximum number of housing units by income category that can be constructed, rehabilitated, and conserved over a five-year time period.”

Furthermore, in your Department’s responses (letters dated 7-17-98 and 11-23-98) to our concerns regarding the issue of mandated zonings in order to accommodate the entire regional housing need allocation, it seems that two central points were made.

First, that Government Code Section 65584, in combination with Section 65583, requires a local government to draft an inventory of sites that details its program of commitments to identify adequate sites to accommodate the need for groups of all income levels, and that such an inventory/program is described by the local government’s quantified objectives referred to generally in the heading of Section 65583 and in Subdivision 65583(b) specifically. Second, that Subdivision 65583(c)(1), in cases where these quantified objectives do not identify enough sites to accommodate the entire need for groups of all income levels, requires sufficient further provision of potential to accommodate the entire regional share allocation by means of a program to zone property in a manner that fills the gap between the quantified objectives and the regional share allocation. In combination, Sections 65584, 65583(a) and 65583(c)(1) thus describe specific statutory requirements for a local government’s accommodation of the entire regional housing need allocation.

³ Although there is ebb and flow, California cities and counties for the most part are vigorously growing. In the context of that growth, common sense as well as the SHEL require a “plan” for that growth, a housing element with community goals, quantified objectives, policies and programs that make adequate provision for housing to accommodate all economic segments of the community. However, such requirements are far removed from being a State mandated quota of growth, as is reflected in your assertion that “a local government is required to identify sites for their entire regional share allocation and that they are to use their zoning and land use powers to provide the necessary sites.”

⁴ The “total housing needs identified pursuant to subdivision (a)” of 65583 **includes** the locality’s share of the regional housing need. See 65583(a)(1) and (a)(4).

Regarding those cited requirements, you conclude that "(t)he statute is clear that a local government is required to identify sites for their entire regional share allocation and that they are to use their zoning and land use powers to provide the necessary sites." In support of this conclusion you cite Sections 65580 and 65581, and further conclude that "(t)he statute does specifically mandate local governments to plan and zone land to accommodate needed growth as represented by the regional housing need allocation . . ."

We agree that Sections 65584, 65583(a), 65583(c), 65580 and 65581 do, in combination, describe the "regional share requirements" of the law. However, we cannot agree with the conclusion that these Code sections mandate a local government to zone land in a particular, predetermined manner. Such a requirement is not what is put forward in the Government Code sections you have cited. The local government's "plan" (programs, etc. required by Section 65583) that is required by Article 10.6 is not tantamount to a legal requirement for such zoning to, in fact, exist in order for a housing element to comply with State housing element law.

Section 65584, unlike Section 65583, has no overarching qualifications that preface its subdivisions. Subdivision 65584(a) begins with the qualification, "For purposes of subdivision (a) of Section 65583, the share of a city or county of the regional housing needs includes..." And Subdivision 65584(a), in describing the requirements for distribution of the statewide housing need into regional and local share allocations, states that "(t)he distribution shall seek to reduce the concentration of lower income households..." Section 65583, prior to its subdivisions, refers to "an identification and analysis of existing and projected needs" and to requirements to "identify adequate sites for housing" and to "make adequate provision for the existing and projected needs" in housing elements. Subdivision 65583(a) refers generally to "An assessment . . . and an inventory . . . relevant to the meeting of these needs," and Subdivision 65583(c) refers specifically to a "schedule of actions the local government is undertaking or intends to undertake to implement . . ." Paragraph 65583(c)(1) requires the locality's program to "provide for" sufficient sites with zoning that permits rental multifamily residential use by right, including standards that "could accommodate" and facilitate the feasibility of affordable housing. Mandated enactment of zonings to alleviate the "needs" thus referred to in Section 65583 has not been incorporated by reference from Subdivision 65584(a) into the identifications, provisions, programs, schedule of actions, intentions, adequacies or sufficiencies required in Section 65583, and Section 65583 itself, in the heading to Subdivision 65583(c), requires adequate provision for needs as part of a **statement of intent** but not as a **burden of accomplishment**.

The remaining subdivisions of Section 65584 also contain no references to required zoning actions in their descriptions of requirements concerning areas with no council of governments, revision of shares of the regional housing need, limitations and moratoriums on residential construction, review, revision and implementation of the share of the regional housing need, costs related to revisions and exemptions from CEQA.

In addition, the needs referred to in Section 65583 have not been defined a priori by Article 10.6 as something that will mandatorily be alleviated in fact by actual zonings or actual construction of housing. Specifically, subdivision 65580(d) declares that local governments have a responsibility to "...use the powers vested in them to facilitate..." the development of housing in order to "...make adequate provision for..." housing needs, and Subdivision 65581(b) refers to implementing housing elements that will "move toward attainment," and Subdivision 65581(c) states that a locality's determinations are to be "compatible with" regional housing needs. Localities are thus directed to facilitate and move toward and make determinations compatible with attainment of state goals and regional housing needs, but localities are not required to actually attain the goals or fully meet the needs in order to have a housing element that complies with the SHEL. **Rather, they are required only to make efforts toward such attainment.**

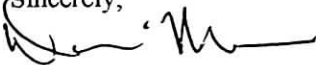
As with Section 65584, mandated enactment of zonings are not incorporated by reference from Sections 65580 or 65581 into the meanings of identifications, provisions, programs, schedule of actions, intentions, adequacies or sufficiencies required in Section 65583. Section 65583 itself describes the specific requirements of how the local government must calculate and assess housing needs, including a plan of zoning that would, if enacted, allow available land to sufficiently accommodate those needs. But nowhere in Sections 65583 or 65584 or any other SHEL Section is it stated that such zonings must already exist in order to have a housing element that complies with State housing element law.

Therefore, based on your Department's Code references, it is not accurate to say that the law requires a local government to "use" their zoning and land use powers to "provide" the necessary sites, nor is it accurate to say that a local government is mandated to "plan and zone" land to accommodate needed growth as represented by the regional housing need allocation.

In conclusion, as we have partially pointed out herein, you have gathered phrases from various SHEL Sections to support the existence of an alleged mandate that is conspicuously contradicted by that law's full structure, content and context. We are therefore making this final plea, asking that you review and reconsider your assertions in light of the compelling information presented herein and in our previous letters to your Department. Now that the State has funded the regional councils of governments to calculate regional share allocations for the next planning period, it is of utmost importance that corrective action be forthcoming, if not administratively then legislatively or judicially.

Please respond in writing. Your continued assistance in this matter is greatly appreciated.

Sincerely,



Donnie Mason
President

cc: Benicia City Council
Benicia Planning Department
Benicia City Attorney
Senator Johannessen
Assembly member Thomson
Pacific Legal Foundation
Institute for Justice

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT**Office of the Director**

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April 14, 1999

Mr. Donnie Mason
Community Rights Association
P.O. Box 1235
Benicia, California 94510

Dear Mr. Mason:

Thank you for your recent correspondence regarding concerns about State housing element law. Your letter describes your continuing belief that housing element law does not specifically require local governments to identify sites for their entire regional housing needs allocation (RHNA) or that they use their zoning and land use power to provide the necessary sites.

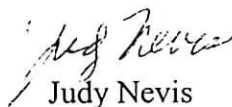
In previous written correspondences and in numerous telephone conversations, we have thoroughly described the statutory requirements of the law and this Department's role in administering it. While we continue to appreciate your concerns, nothing in your most recent correspondence would cause us to alter our administration of State housing element law. It appears that your frustration with the RHNA process and the site requirement stems in large part from Benicia's RHNA for the previous planning period. The allocation included growth expected to occur in the Sky Valley area within Benicia's Sphere of Influence. When the annexation did not occur, Benicia believed their allocation should have been reduced. Currently however, the law does not include any process to allow revisions to the allocation during the planning period. As you know, we worked with Senator Johannessen's office on potential amendments to the law that would allow, under limited circumstances, mid-cycle revisions. While such changes have yet to be implemented, the Department remains willing to continue discussing options for addressing this issue.

More importantly, the Department and the Association of Bay Area Governments (ABAG) have begun working on the RHNA process for the next planning period (beginning June 30, 2001-2006). To ensure greater understanding of and participation in the allocation process, ABAG has established a committee (with two representatives from Benicia) to provide advice on the methodology for developing the RHNA. The issue of assigning need based on the sphere of influence was discussed at the first meeting and it is likely this issue will be addressed differently in the next planning period.

Mr. Donnie Mason
Page 2

I hope this information is helpful to you. We will be working in partnership with ABAG and its member jurisdictions throughout the next few years in preparation for the region's new housing element planning period. The Department remains committed to working with all interested parties to ensure the effective implementation of State housing element law and to work cooperatively in addressing State and local housing needs. Thank you for your continuing interest and participation.

Sincerely,

A handwritten signature in dark ink, appearing to read "Judy Nevis", is written over the printed name.

Judy Nevis
Acting Director

cc: Benicia Planning Director
Susan Blake, Senator Johannessen's Office
Alex Amaroso, ABAG