



June 12, 2024

Leah Brown, Management Analyst
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Merced, CA 95340

Sent via Email: brownl@cityofmerced.org

RE: City of Merced's Public Review Draft 2024–2032 Housing Element

Dear Ms. Brown:

Leadership Counsel for Justice and Accountability (“LCJA”) in collaboration with Western Center on Law and Poverty (“Western Center”) and South Merced Residents for Justice write and submit this comment letter regarding the City of Merced’s Draft 2024-2032 Housing Element (“Draft Element”). LCJA, a Community Based Organization (“CBO”), works alongside the most impacted communities to advocate for sound policy and eradicate injustice to secure equal access to opportunity regardless of wealth, race, income, and place. Western Center’s mission is to end poverty and secure housing, health care, a strong safety net, and racial and economic justice for all low-income Californians.

The City of Merced’s 6th Cycle Draft Element offers a critical planning opportunity to identify and address important housing needs and fair housing disparities impacting the City of Merced’s residents, disadvantaged unincorporated communities, and racially and ethnically concentrated areas of poverty (“R/ECAPs”), more specifically South Merced. It is the duty of the City of Merced to not miss the opportunity to analyze, develop, and adopt a Housing Element that complies with the state Housing Element and Civil Rights laws.

For the Draft Element to comply with Housing Element law, the Draft Element must include concrete analysis, objectives, timelines, programs, and meaningful actions to hold the City of Merced accountable. As the Draft Element stands, the analysis, objectives, timelines, and programs do not reflect the policies, issues, and needs identified by Merced residents, and therefore the Draft Element does not meaningfully result in beneficial impact to the community members with critical housing needs.

The recommendations made in this comment letter emphasize changes the City of Merced must make to the Draft Element in order to meet the requirements of the state Housing

Element law, Affirmatively Furthering Fair Housing (AFFH) law, and state and federal civil rights laws.

I. The City Failed to Diligently and Meaningfully Conduct Public Engagement in the Development of Its Housing Element to Fulfill Its Duty to AFFH.

Public participation is a critical component in the development of the housing element with new requirements¹ under California’s Affirmatively Furthering Fair Housing (AFFH) law for the 6th Cycle. Meaningful public engagement allows key stakeholders, such as lower income households, community members in protected classes, CBOs, and other entities that may represent persons with special needs, to share their perspective on housing issues, disparities in access to opportunities, and other factors that may impede the community’s access to fair housing according to the California Department of Housing and Community Development’s AFFH Guidance (hereinafter “HCD AFFH Guidance”) document.² The City of Merced has the duty to AFFH by conducting meaningful engagement through public participation efforts in a variety of ways to engage all sectors of the community, with a focus on special needs populations and protected classes. Those efforts include but are not limited to providing translated materials and making translation available at workshops, working with a variety of stakeholders –as previously described– to develop meaningful engagement plans and efforts, as well as making materials and information accessible to community members that are not familiar with technical language, and allowing organizations and other entities to assist with the public participation of protected classes and lower income households.³ Merced failed to comply with these public engagement requirements in the following ways.

Meaningful engagement warrants a “diligent effort by the local government to achieve public participation of all economic segments of the community...and the program shall describe this effort.” (Gov. Code, §§ 65583, subds. (c)(9)). The City of Merced failed to do early, often, ongoing, targeted, varied outreach and engagement inclusive of all economic segments of the community.

A. The Draft Element is Not Informed by Meaningful, Varied, Targeted or Inclusive Engagement.

As mentioned previously, AFFH requires jurisdictions and planning agencies to engage in “[o]utreach activities intended to reach a broad audience, such as utilizing a variety of methods,

¹ According to the California Department of Housing and Community Development (HCD)’s [Affirmatively Furthering Fair Housing Guidelines](#), jurisdictions must “describe and incorporate meaningful engagement that represents all segments of the community into the development of the housing element, including goals and actions” in order to achieve basic compliance with AFFH public engagement requirements (“AB 686 Compliance Checklist,” pg. 62).

² HCD AFFH guidelines,pg.11

³ *ibid*

broad and proactive marketing, including targeted areas and needs, promoting language access and accessibility for persons with disabilities (which can include effective communication, reasonable accommodations, and remote participation opportunities), and consulting with relevant organizations.” See HCD AFFH Guidance at pg. 22. The City’s efforts, however, failed to provide varied engagement opportunities that were accessible to the public. For example, the City’s pop up events were hosted during the Merced County Spring Fair in Los Banos, which is a 45 minute drive away from the City of Merced. Additionally, this engagement strategy relied on distribution of information rather than collection of meaningful, qualitative input from residents regarding their housing needs via varied methods including in-person surveys, conversation and discussion questions, and other activities. The City also hosted two Housing Element workshops at the Civic Center Council Chambers, but failed to conduct effective outreach to promote these workshops to engage all sectors of the community. Third, the City’s survey was only made available online, excluding residents who face technological barriers, lack internet access, are unhoused, or who do not own computers. The survey also pre-prescribed a list of barriers to accessing affordable housing as a multiple choice question, rather than meaningfully soliciting feedback. Some residents did input their own customized answers, but their input was not meaningfully incorporated to inform and guide the goals, policies, programs, and actions included in the Draft Element.

Lastly, the City’s fair housing needs assessment did not rely on collection of qualitative data (interviews, public engagement, direct communication with impacted community members, conversations with CBOs, etc.). Rather, the Housing Needs Assessment section relies entirely on quantitative data sources to which the City of Merced already had access, meaning that no new information was gleaned and incorporated between the 5th and 6th cycle. As a result, the Housing Needs Assessment regurgitates existing data, which is incomplete, outdated (i.e. much of it is from 2017-2021), and fails to note many of the housing needs that special needs populations bring up frequently in Merced as a part of our community meetings and via public comments at City Council (e.g. unreported housing discrimination for which a formal complaint is never filed, landlord harassment of undocumented tenants, unreported code enforcement violations in rental housing, unreported Tenant Protection Act violations, number of families living in farmworker households, etc.).

B. The Limited Public Input that the City did Receive was Not Incorporated Into the Draft Element.

That said, the feedback the City did receive from residents was not incorporated into the Housing Plan or AFFH analysis. The summary of feedback received on pages G2-1 through G2-5 outlines a number of fair housing needs and program and policy solutions that were not incorporated into the Draft Element. The housing needs and solutions raised by community residents and other stakeholders and summarized in the Draft Element include:

- Cost-burdens for Seniors and others who live on a fixed income
- The need for sustainable development and an end to unsustainable sprawl growth in Northern annexation areas, which contribute to inequality and segregation.
- Increased walkability in existing communities
- Services to address the needs of unhoused people
- The need for targeted outreach on the fair housing needs assessment
- Right to Counsel
- Rent control
- Affordable housing in high-resourced areas
- Inclusionary Zoning
- More tenant protections
- A permanent rental assistance program, and programs with fewer barriers for tenants to access assistance generally
- First-time homebuyer programs
- Water and sewer service to unincorporated South Merced
- Addressing inequitable land use planning and the concentration of polluting land uses in low-income communities of color in South Merced

As noted below in this letter, none of these housing needs, programs, and policies suggested by the public during the City's public engagement process were meaningfully incorporated into the plan.

II. The City Failed to Adequately Perform Necessary Analyses to Ensure Consistency with State Housing Element Law and AFFH Requirements.

The duty to AFFH required of public agencies is a critical tool which was developed to disrupt segregation.⁴ One expert in the field wrote that:

Racial and economic segregation remain one of America's most intransigent problems. In some ways, the problem is worse today than it ever has been. Not because racial and economic segregation are deeper (although the extent of segregation remains shocking), but because it plays an outsized role in shaping life chances. Segregation of our metropolitan regions by race and class is more than simply about where people live or work; it structures opportunity, defining and determining the resources, public and private, that shape our lives.⁵

⁴ See Stephen Menendian, *Affirmatively Furthering Fair Housing: A Reckoning with Government-Sponsored Segregation in the 21st Century*, 106 NAT'L CIVIC REV. 20 (Oct. 24, 2017).

⁵ *Id.*

As discussed throughout this correspondence, the City must revise its Draft Element to comply with the State's requirements to AFFH. *See* Gov't Code § 65583(c)(9).

A. The City Failed to Adequately Analyze Its Fair Housing Enforcement

The Draft Element inadequately analyzes the City's fair housing enforcement and outreach capacity as required by Government Code Section 65583(c)(10). Fair housing enforcement and outreach capacity relates to a jurisdiction's ability to disseminate, provide outreach, and educate residents on fair housing generally and fair housing laws and rights; it also "includes the ability to address compliance with fair housing laws, such as investigating complaints, obtaining remedies, and engaging in fair housing testing." HCD AFFH Guidance at pg. 28; *see also* Federal AFFH Rule, 80 Fed. Reg. at 42271, 42353–62; 24 C.F.R. § 5.154.

The Draft Housing Element touches very briefly on fair housing enforcement and when it does, its assessment demonstrates the inadequacy of its programs to further fair housing, especially given its enhanced mandate to AFFH. For instance, the City lists its contract with Project Sentinel as proof of its "enforcement and outreach capacity."⁶ The Draft Element, however, does not analyze whether Project Sentinel's current funding is enough to meet the need for services in the City of Merced. The Draft Element does note that between January 2019 and June 2020, Project Sentinel was only able to assist fifty-four Merced residents,⁷ illustrating the organization's limited capacity to provide landlord-tenant mediation services and address barriers to fair and adequate housing. LCJA frequently receives phone calls from tenants at risk of eviction or displacement who cannot access legal services from other legal aid providers due to their immigration status, and whom Project Sentinel cannot help due to their limited capacity and inability to formally represent tenants in court proceedings. Additionally, at the City of Merced's June 3, 2024 City Council meeting, Mayor Serrato recommended denying a funding request from Project Sentinel's landlord-tenant mediation project as part of their HOME and CDBG budget hearing.⁸ This context and detail is missing from the City's limited discussion on fair housing enforcement and outreach capacity, and speaks to the insufficiency of the City's Fair Housing Resources.

1. The City's Analysis of Contributing Factors Related to Fair Housing Enforcement is Inadequate

⁶ Draft Element at G5-5.

⁷ *Id.*

⁸ *Agenda Item J.3: Budget Hearing*, Merced City Council (June 3, 2024), https://cityofmerced.granicus.com/MediaPlayer.php?view_id=1&clip_id=790&meta_id=112117 (Public Hearing to Allow the Interested Public an Opportunity to Provide Input on the Content of the City Council, Public Financing and Economic Development Authority, Parking Authority, and Successor Agency to the Redevelopment Agency of the City of Merced Fiscal Year 2024-25 Proposed Budget and After Hearing all Comments Continue the Public Hearing to June 17, 2024).

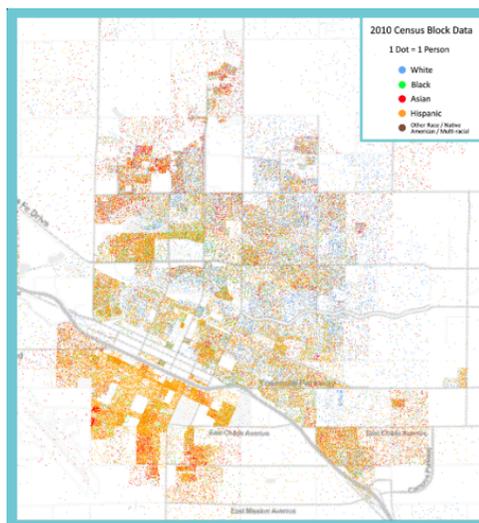
The Draft Element fails to provide a comprehensive analysis of factors that contribute to inadequate fair housing enforcement. (HCD AFFH Guidance at pg. 25). The Draft Element attributes gaps in enforcement to issues surrounding language access and limited distribution of materials. It does not discuss other major barriers to fair housing enforcement, including (but not limited to) lack of resources for fair housing enforcement, lack of available expertise on a wide range of fair housing issues, and capacity to affirmatively prosecute fair housing concerns.

B. The City Did Not Adequately Analyze Integration and Segregation Patterns and Trends

The Draft Element fails to provide a comprehensive analysis of integration and segregation patterns and trends as required by state law 65583(c)(10)(A). The analysis is inconsistent, lacks critical data, and lacks an analysis of trends over time and the relationship between integration and segregation in Merced and the region as a whole.

As an initial matter, the Draft Element used the AFFH Data Viewer to analyze patterns of segregation and integration. LCJA, along with other CBOs, have raised concerns over the AFFH Data Viewer, its methodology lacks accuracy and does not reflect real-world conditions. The City of Merced should have used additional data, like the CalEnviroScreen and Census data to reflect a more granular representation of racial and ethnic makeup throughout the City of Merced. The figure below is a map that our coalition partners created to show the deep segregation in the City of Merced, with large Hispanic and Asian populations living in the southern part of the City.

The Draft Housing Element does indicate areas of severe segregation. Figure G5-2 illustrates that over 81 percent of the population of South Merced in both District 1 and 2 is non-white, whereas only 21 to 40 percent of the population is non-white in some North Merced and eastern Merced neighborhoods in District 4 and District 6; and Figure G5-4 (Racial Segregation and Integration) illustrates that South Merced has neighborhoods with “High POC Segregation,” and North Merced has neighborhoods with “High White Segregation.”



However, G5-2 and G5-4 have apparently inconsistent conclusions and rely on contradictory data. For instance, some areas that demonstrate over 81 percent non white populations in figure G5-2 are not considered an area of high segregation in figure G5-4, whereas one area that is considered to have high POC

segregation in figure G5-4 has a relatively lower non-white population than G5-2. The same is true for one of the areas that are disproportionately white. Most alarmingly, several neighborhoods in District 1 and District 2 that are considered to have very high non-white populations in figure G5-2 are not included in the analysis of relative segregation in figure G5-4 due, apparently, to “no applicable data to 2021 census tract boundary.” This leaves a substantial gap and inconsistency with respect to the analysis of segregation and integration.

The analysis of the segregation and integration trends also fails to discuss segregation and integration trends over time. Such an analysis is critical to understanding factors that contribute to segregation and designing programs and policies to address discrimination. Similarly, the analysis of segregation and integration trends failed to assess segregation and integration in the City of Merced in the context of regional trends and patterns. Such an assessment is similarly critical to identifying measures to address segregation. Finally, the analysis did not include a discussion of how different protected characteristics interact in the context of segregation. This too is critically important to understanding what factors are contributing to segregation and what tools will be necessary to combat its invidious threats.

1. The City’s Analysis of Contributing Factors to Integration and Segregation Patterns is Inadequate

The Draft Element lacks an adequate *analysis* of factors contributing to clear patterns of segregation. (HCD AFFH Guidance at pg. 25) The Draft Element attributes segregation to displacement which, while it may be a contributing factor, falls far short of identifying the full scope of factors that contribute to segregation in the City. Other potential factors may include zoning, land use, public opposition to housing for lower income populations, lack of available housing for lower income people throughout the City, failure to enforce fair housing rules, and several others.

C. Racially and Ethnically Concentrated Areas of Poverty, and Racially Concentrated Areas of Affluence Were Not Adequately Analyzed

The Draft Element failed to adequately analyze Racially and Ethnically Concentrated Areas of Poverty (R/ECAP) and Racially Concentrated Areas of Affluence (RCAA)⁹ as required by housing element law and its duty to AFFH. *See* Gov’t Code §§ 8899.50, 65583(c)(9), (10); *see also* Federal AFFH Rule, 80 Fed. Reg. 42271, 273, 275, 305, 336, 338–342, 353–360; 24 C.F.R. §§ 5.152, 5.154(c)(d), 5.156(d). The analysis of R/ECAPs and RCAAs is incomplete and includes data and conclusions that appear inconsistent with other data in the Draft Housing Element.

⁹ *See generally* Edward G. Goetz, Anthony Damiano, & Rashad A. Williams, *Racially Concentrated Areas of Affluence: A Preliminary Investigation*, 21 CITYSCAPE: J. POL’Y DEV’T RSCH. 99 (2019), <https://www.huduser.gov/portal/periodicals/cityscpe/vol21num1/ch4.pdf>.

Figure G5-11 (Areas of High Segregation and Poverty) identifies areas within south Merced as R/ECAPs however half of the area identified as a R/ECAP in Figure G5-11 in District 1 are identified as areas of racial integration in figure G5-4 (Racial Segregation and Integration). This indicates lack of critical data and potential inconsistencies which undermine an effective analysis of R/ECAPs. Notably, several RCAAs are in the north and eastern parts of the City bordering the County and likely growth areas for the City.

Additionally, the section failed to complete several critical components of an effective R/ECAP and RCAA analysis including (1) an evaluation of patterns and changes over time; (2) consideration other relevant factors, such as public participation, past policies, practices, and investments and demographic trends (3) a regional analysis and comparison of R/ECAPs and RCAAs; (4) an analysis of specific racial demographics broken down by individual race across districts; (5) consideration of specific income demographics broken down by income level (extremely low-income, very low-income, low-income, etc.) across districts; and (6) public input for both R/ECAPs and RCAAs. HCD AFFH Guidance at pg. 32, 33. *See also* Government Code Section 8899.50 and 65583(c)(9).

1. The City's Analysis of Contributing Factors to Racially and Ethnically Concentrated Areas of Poverty, and Racially Concentrated Areas of Affluence is Inadequate

The Draft Element does indicate that zoning and land use patterns contribute to segregation, as does concentration of lower income housing opportunities, but the Draft Element fails to identify factors that isolate people in lower resource areas including (but not limited to) infrastructure deficiencies, concentration of polluting land uses, lack of access to transit, and access to educational opportunities, child care, cultural centers, and other community assets. Similarly, it does not discuss barriers beyond zoning and land use that contribute to the exclusion of lower income people and people of color from high resource areas.

D. The Draft Element Needs to Fully Analyze Disparities in Access to Opportunity With Protected Characteristics.

The Draft Element fails to discuss or describe differential access to opportunity with respect to protected classes and fails entirely to consider several critical indicators of opportunity. *See* HCD AFFH Guidance 34–38 (“This more complete understanding of what types of disparities in access to opportunity exist for what populations and in what geographies is necessary to identify and prioritize contributing factors to fair housing issues and formulation of goals and actions.”); Gov’t Code, §§ 8899.50, 65583(c)(10); *see also* Federal AFFH Rule 80 Fed. Reg. 42271, 305, 338, 336, 353–360.

The Draft Element notes that there is limited transit access in the north and south of the city and access to employment opportunities is generally limited, but leaves out any discussion of how transit access (or lack thereof) impacts people with protected characteristics. Similarly, it fails entirely to discuss transportation needs for members of protected groups or the combined housing and transportation cost impacts on protected groups. Similarly, the Draft Element fails to effectively analyze educational opportunities. It notes some basic statistics about educational outcomes by race and generally notes that educational outcomes are better in the northern and eastern parts of the city and worse in the south-western neighborhoods of the city, but fails to describe the differences among schools in the jurisdiction, as well as the relationship between school quality and protected classes, the relationship between high and low-performing schools and R/ECAPs and RCAAs, or efforts underway to address disparities in access to quality education. The deficiencies are similar in the Draft Element's discussion of access to economic opportunity and opportunity overall. While there are general descriptions and geographical representations demonstrating disparities, there is no discussion of the relationship between differential access to opportunity and protected classes despite stark disparities among and between neighborhoods and areas of the City of Merced. The Healthy and Safe Housing section does note that the areas with the worst environmental outcomes are predominantly Latino but fails to provide a detailed analysis and fails to discuss any policies or practices that impact access to healthy neighborhoods.

The Draft Element also fails to include an overall analysis of access to opportunity by classifying protected characteristics and spatial/location areas as high, moderate, or low in access to opportunity (HCD AFFH Guidance at pg. 34) and fails to identify an "overall score value of access to opportunity" (HCD AFFH Guidance at pg. 48.)

Furthermore, the Draft Element fails to analyze the relationship between people with protected characteristics and other critical indicators of opportunity including: (1) condition, quality, and accessibility to roads, bike lanes, sidewalks, street lighting, other mobility infrastructure, and road and pedestrian safety; (2) land use designations,¹⁰ particularly locations of industrial land use siting and concentrations of polluting land uses; (3) recreation, parks, and access to green spaces; (4) safety from environmental hazards, public health outcomes, and quality of life; (5) social services; (6) geographic distribution of market rate versus affordable housing; (7) cultural institutions; (8) cost of housing and condition of housing stock; (9) rates of violent crime; and (10) "other important opportunities" as outlined by HCD. *See* HCD AFFH Guidance at pg. 35, 36, 48. A pertinent example of another "important opportunity," that the City failed to analyze, for instance, is food access and food deserts. This is critical because South Merced still does not have a single, full-scale supermarket grocery store. *See* CITY OF MERCED,

¹⁰ The Economic Outcomes section does note that most industrial land use is in Districts 1,2, and 3 in the southern part of the City but does not discuss the environmental, social, or health impacts of those land uses or the impacts on protected groups

MERCED VISION 2030 GENERAL PLAN, at 3-28 (2012) [hereinafter Merced General Plan] (“Many South Merced residents need to travel to Central and North Merced for even their basic shopping needs because of the lack of neighborhood commercial services in South Merced.”). Residents in South Merced neighborhoods rely on small convenience stores (which can often be overpriced and do not contain the full gamut of healthy foods available in larger grocery stores) and discount grocery stores (e.g., Choice Food Market and Shop and Save). Every full-scale grocery supermarket in Merced is located North of the railroad tracks and Highway 99, which segment South Merced off from the rest of the City.

Finally, the City’s analysis regarding access to opportunity fails to consider a wide array of data sources including existing plans and local expertise. For example, the City’s recently completed SB 244 analysis may provide critical information regarding the impact of infrastructure deficiencies just beyond city boundaries on nearby residents. Similarly, land use planning and proposed land use changes are important data sources to identify access to opportunity. The City should reference findings in its General Plan and previous comment letters submitted by LCJA related to community needs. For example, the City stated in its General Plan—and must plan for in its housing element—that in South Merced, “[e]xcept for some scattered convenience commercial uses, this area lacks even the most basic services. Because of the low average incomes of this area, it is difficult to entice major commercial users to locate in South Merced The City will need to make considerable effort to turn this situation around.” Merced General Plan at 3-42. LCJA, along with community leaders from South Merced, has raised several critical needs and opportunities for improved access to beneficial opportunities in South Merced and increased investment in existing neighborhoods in South Merced as opposed to northward and eastward expansion.¹¹

The Draft Element must look at land use planning, current studies relating to future land use planning, current land uses, and land use designation to analyze existing and future environmental hazards as part of its analysis of disparities in access to opportunity. *See* HCD AFFH Guidance at 5 (“Land use policies and planning often translate into the ability of families to access neighborhoods of opportunity, with high-performing schools, greater availability of jobs that afford entry to the middle class, and convenient access to transit and services.”). South Merced neighborhoods are disproportionately cited adjacent to or near industrial zones,¹² and this

¹¹ *See generally* LCJA November 2021 Letter; Comment Letter from Leadership Couns. for Just. & Accountability to Ken Elwin, PE, City of Merced Public Works Director (Oct. 29, 2020) (on file with author) (regarding The City of Merced Wastewater Collection System Master Plan Update Draft Environmental Impact Report (EIR)); Comment Letter from Leadership Couns. for Just. & Accountability to Merced City Council & Jacy D. Gaige, Program Compliance Grant Chief, Region IX, The Office of Fair Housing and Equal Opportunity U.S. Department of Housing & Urban Development (Oct. 16, 2020) (on file with author) (regarding Comments on the City of Merced’s Revised Draft 2020-2024 Consolidated Plan and First Year 2020 Annual Action Plan, and the Revised Draft 2020 Update to Analysis of Impediments to Fair Housing Choice).

¹² *See* CITY OF MERCED, CITY OF MERCED - LAND USE (ZONING) MAP (2023), <https://www.cityofmerced.org/home/>

should be considered and analyzed adequately in the Housing Element, especially considering that South Merced neighborhoods were identified by the Draft Element as R/ECAPs, areas with disproportionate housing needs, and areas with POC segregation.

1. The City's Analysis of Contributing Factors to Disparities in Access to Opportunity With Protected Characteristics is Inadequate

While the Draft Element discusses a variety of factors and conditions that hinder access to opportunity for people with protected characteristics, it fails to consider several contributors including lack of transit opportunities, unequal access to education and employment opportunities, and lack of access to affordable housing opportunities in high resource areas. Additionally, the Draft Element fails to discuss or describe the factors that it acknowledges contribute to unequal access to opportunity, including land use and zoning patterns and high pollution burdens, but does not discuss or describe the relationship between those factors and people with protected characteristics.

E. The Draft Element Fails to Analyze Disproportionate Housing Needs and Displacement Risks Impacting People with Protected Characteristics

The Draft's "Disproportionate Housing Needs" section lacks the data and analysis needed to identify meaningful actions that will address disproportionate housing needs and comply with the AFFH obligation. First, this section relies on HUD Comprehensive Housing Affordability Strategy (CHAS) data and fails to incorporate sufficient local knowledge. *See* § 65583(c)(10)(A)(ii); HCD AFFH Guidance at pg. 39¹³. Second, the Draft Element fails to identify whether members of certain protected classes are impacted by disparities in housing needs and displacement risk. HCD's AFFH Guidance defines disproportionate housing needs by saying they "generally [refer] to a condition in which there are significant disparities in the proportion of members of a *protected class* experiencing a category of housing need when compared to the proportion of members of any other relevant groups, or the total population experiencing that category of housing need." *See* HCD AFFH Guidance at pg. 39.

For each of the housing needs (i.e., cost burden, overcrowding, substandard housing, homelessness, and displacement risk), the Draft Element identifies geographic areas of the City where these needs are felt disproportionately but fails to analyze the protected classes which experience the highest incidence of these needs (e.g., whether race, ethnicity, immigration status,

showpublisheddocument/19839/638362421217030000; MERCED CNTY., GENERAL PLAN - MERCED SUDP MAP (2010), <http://web2.co.merced.ca.us/pdfs/planning/sudpmaps/Merced.pdf>; CITY OF MERCED, CITY OF MERCED - GENERAL PLAN DESIGNATIONS MAP (2023), <https://www.cityofmerced.org/home/showpublisheddocument/19838/638362420978270000>.

¹³ "Particularly important to this analysis is local data and knowledge, since some areas could be impacted by market conditions that put households at risk of displacement, or pending or upcoming planning decisions may exacerbate displacement risk."

disability, or other protected characteristics play a role in these disparities). *See* HCD AFFH Guidance at pg. 40. For example, the Draft Element identifies a neighborhood in South Merced as having the highest rates of overcrowding in the City at G5-38, yet fails to look at whether people of color, farmworkers, undocumented immigrants, or any groups with special needs face this housing need disproportionately.

Third, the Disproportionate Housing Needs section’s limited discussion on displacement failed to include an assessment and analysis of the displacement risks from natural disasters, such as floods and wildfires. *See* HCD AFFH Guidance at pg. 40–43. Given the recent flooding of Bear Creek in 2023,¹⁴ which impacted residential property and displaced residents from their homes, the City must identify and analyze flooding¹⁵ and other disasters as a displacement risk and conduct the required analysis to determine if special needs groups¹⁶ were disproportionately impacted (and if so, why). *See* HCD AFFH Guidance at pg. 42¹⁷.

1. The City’s Analysis of Contributing Factors to Disproportionate Housing Needs and Displacement Risks Impacting People with Protected Characteristics

The City’s analysis of contributing factors that create or exacerbate disproportionate housing needs fails to discuss how contributing factors relate to and differentially impact people with protected classes. This is a critical component to the analysis.

F. The Draft Element Fails to Adequately Discuss other Factors that Impact its Duty to Affirmatively Further Fair Housing

The Draft Housing Element notes several other relevant factors that impact fair housing issues, two of which we’d like to address: Community Opposition and Annexation. First, the Draft mentions “Community Opposition” to higher density housing in high resource areas, but fails to mention that many residents do broadly support higher density and affordable housing development in R/CAAs. Additionally, the Draft Element fails to describe consistent opposition to industrial development in and near South Merced. Both of these factors are relevant to opportunities facing Merced to affirmatively further fair housing.

¹⁴ Victor Patton, *Here’s How Merced Was Hit by an ‘Insane Amount’ of Flood Water and What Happens Now*, MERCED SUN STAR (Jan. 18, 2023, 12:31 PM), <https://www.mercedsunstar.com/news/weather-news/article271315592.html#storylink=cpy>.

¹⁵ *FEMA Needs to Improve Management of its Flood Mapping Programs*, HOMELAND SECURITY INSPECTOR GENERAL (2017), <https://www.documentcloud.org/documents/4066233-OIG-17-110-Sep17.html>.

¹⁶ Jee Lee & Shannon Zandt, *Housing Tenure and Social Vulnerability to Disasters: A Review of the Evidence*, 34 J. PLAN. LITERATURE 156 (2018), <https://journals.sagepub.com/doi/10.1177/0885412218812080>.

¹⁷ “California’s recent history has shown that environmental disasters such as wildfires, earthquakes and floods can be significant causes of displacement, and that climate change is accelerating [this] risk Addressing disaster risk is not a justification for furthering segregation, and policies . . . should include strategies that mitigate the risk of displacement and exclusion.”

The Draft Element notes that areas that have been annexed to the City from Merced County have infrastructure deficiencies. This discussion on annexation leaves out two critical issues and opportunities. Merced is well positioned to invest in infrastructure upgrades in communities that neighbor the City of Merced and have been part of the City's fabric for decades or longer. Lack of basic infrastructure in disadvantaged unincorporated communities near Merced, especially those within the City's sphere of influence, raises serious and urgent fair housing concerns. It demonstrates a systemic and ongoing failure to invest in certain neighborhoods despite their close relationship to the City of Merced, it has secondary impacts on neighbors within Merced who are impacted by severe infrastructure deficiencies in their neighborhoods, and it makes annexation of those neighborhoods much more difficult. A separate but related matter –and one that is just as concerning is the concerted effort to annex areas to the east of the City of Merced. On the one hand, annexation threatens to put further strain on city resources further hindering the City's ability to address fair housing disparities in existing neighborhoods and also threatens to reinforce and exacerbate patterns of segregation and unequal access to opportunity. As discussed throughout this letter, the City of Merced must include meaningful and enforceable fair housing programs and policies, including but not limited to inclusionary zoning and equitable allocation of resources, to ensure that historic and ongoing patterns of annexation do not violate fair housing laws.

III. The Draft Element Failed to Adequately Identify, Analyze and Remove Constraints to Housing Maintenance, Improvement, and Development.

In Chapter G-4, the City includes its analysis of governmental and non-governmental constraints that hinder the development of residential housing. This analysis is required under Government Code Section 65583(a)(5). Jurisdictions must also provide specific and concrete steps necessary to remove these constraints. Particular attention must be paid to the constraints that may or do make it more difficult to develop housing for vulnerable populations such as low-income individuals and families, individuals with disabilities, and those who are housing unstable or formerly unhoused. This analysis is not limited to constraints in the development process, but should also include constraints that make it difficult for vulnerable populations to access and maintain safe, affordable, and quality housing.

The City identified a number of governmental and non-governmental constraints, but has failed to identify a number of constraints, including environmental constraints and infrastructural deficiencies, among others. And for those constraints that were identified, the City's proposed solutions to address the constraints are inadequate.

A. The Draft Must Revise Its Analysis of Governmental Constraints.

A compliant housing element must include an analysis of governmental constraints that restrain or hinder the “maintenance, improvement, or development of housing for all income levels.” Gov’t Code Section 65583(a)(5).¹⁸ While the City has identified a number of constraints, the proposed steps to addressing these constraints are either missing or inadequate.

First, the City identifies a number of constraints, goes on to provide some basic analysis of these constraints, and then concludes that the identified constraints are not actually constraints. For example, in the introduction, the City identifies short-term rentals as a constraint on the availability of long-term housing stock, making housing more difficult to obtain and driving rental prices up. However, the City eventually reaches the conclusion that short-term rentals are not in fact a constraint and thus, the City will not take any action to attempt to regulate short-term rentals.

On top of this, the City fails to identify the need for student housing as a constraint on the housing supply in the City, despite acknowledging that more than half of the student body (more than 5,000 students) does not have housing on the campus of the University of Merced. The City has not identified specific solutions to address the housing needs of this particular population, and how that might affect the ability of permanent City residents to find adequate and affordable housing.

Second, the City has failed to identify constraints that address the maintenance and/or improvement of the current housing stock (as opposed to the development of new housing). Although the City acknowledges elsewhere in the Draft Element that there are presently significant displacement risks and imminent loss of subsidized housing, the City does not analyze the market force and/or government policy constraints that facilitate this loss of housing and the displacement risks for vulnerable populations. For example, elsewhere in the Draft Element, the City states that “15.5 percent of the affordable units in Merced are at moderate or high risk of conversion [to market rate rents].” However, the City fails to identify what constraints would prevent it from saving these units from conversion, especially given its acknowledgment that it would be significantly cheaper to preserve existing units than it would be to develop new affordable housing. See Draft Element, G3-35. It has also failed to identify any infrastructure constraints that might render the housing stock inhabitable or prevent the

¹⁸ Subdivision (a)(5) states that a compliant housing element must include, “An analysis of potential and actual governmental constraints upon the maintenance, improvement, or development of housing for all income levels, including the types of housing identified in paragraph (1) of subdivision (c), and for persons with disabilities as identified in the analysis pursuant to paragraph (7), including land use controls, building codes and their enforcement, site improvements, fees and other exactions required of developers, local processing and permit procedures, and any locally adopted ordinances that directly impact the cost and supply of residential development. The analysis shall also demonstrate local efforts to remove governmental constraints that hinder the locality from meeting its share of the regional housing need in accordance with Section 65584 and from meeting the need for housing for persons with disabilities, supportive housing, transitional housing, and emergency shelters identified pursuant to paragraph (7).”

development of new housing, despite community feedback identifying the lack of basic infrastructure in areas like South Merced.

Finally, the bulk of the City's recommended actions to address the identified governmental constraints are to simply implement what is already required under state law. While the City did a sufficient job of analyzing its Zoning Code and identifying where the City is falling short of compliance with state law, there are very few recommended actions that go beyond mere compliance. There is little analysis of how the Zoning Code can be amended to actively remove barriers to the development of affordable housing, or other housing needs that are specific to the community of Merced, such as farmworker housing and student housing. Given the City's failure to meet its lower-income RHNA numbers in the previous cycle, as well as the deep need expressed by the community for more housing specific to low-income workers, the City must analyze the constraints specific to Merced more closely and more proactively remove barriers to low-income housing.

B. The Draft Element Must Revise Its Analysis of Non-governmental Constraints.

The City also includes a very short section of non-governmental constraints found in the City, identifying just four constraints found in the market. Government Code Section 65583(a)(6) requires jurisdictions to identify the “nongovernmental constraints upon the maintenance, improvement, or development of housing for all income levels...”¹⁹ This is an opportunity for local jurisdictions to identify market and private forces that have created and perpetuated segregation and poverty, and identify actions that the City can take to disrupt these harmful and racist actions. However, the City's very limited analysis is woefully incomplete.

First, these constraints only speak to the development of new housing, and does not address the “maintenance [or] improvement” of housing as required. Merced's housing stock was largely built more than 40 years ago. As such, regular maintenance is necessary, and there is no discussion here as to how private landlords and private owners are maintaining their property or how tenants may be reluctant to identify and ask for necessary repairs because of fear of losing their housing. There's also no mention here of the incentives that private property owners might have to allow affordable housing subsidies to expire and endanger what little affordable housing is available in Merced. While the City desperately needs the development of more affordable

¹⁹ In its entirety, subdivision (a)(6) states that a compliant housing element must include, “An analysis of potential and actual nongovernmental constraints upon the maintenance, improvement, or development of housing for all income levels, including the availability of financing, the price of land, the cost of construction, the requests to develop housing at densities below those anticipated in the analysis required by subdivision (c) of Section 65583.2, and the length of time between receiving approval for a housing development and submittal of an application for building permits for that housing development that hinder the construction of a locality's share of the regional housing need in accordance with Section 65584. The analysis shall also demonstrate local efforts to remove nongovernmental constraints that create a gap between the locality's planning for the development of housing for all income levels and the construction of that housing.”

housing, the City will continue to lose affordable units due to lack of robust code enforcement and a plan for extending affordable housing covenants.

Second, the constraints that the City does identify do not then result in “local efforts to remove nongovernmental constraints that create a gap between the locality’s planning for the development of housing for all income levels and construction of that housing.” See Gov’t Code § 65583(a)(6). Instead, the City identifies a handful of constraints present in the market and then largely said there was nothing for the City to do to address the constraints. For example, the City identifies land costs as a constraint to developing new housing but fails to identify any possible solutions to addressing this particular problem in the development process, stating that the City cannot control the market. However, the City completely ignores how land owned by the City or other governmental entities (like the local school district) can be used to facilitate the development of housing, especially for affordable housing or for vulnerable populations. The City also fails to identify whether any housing it has identified in its site inventory is publicly owned, and how the City can facilitate the sale or lease of such land to affordable housing as required under state law. With land costs as high as they are, the City should be utilizing public land for public good, as well as encouraging other local governmental entities to identify surplus land in their portfolio to offer for desperately needed housing.

Third, the Draft Element mentions that “environmental factors” constrain “the development of adequate and affordable housing” on page G4-1, but subsequently concludes that there are, in fact, no environmental constraints present in the City. Environmental constraints include proximity to industrial zones (including zones slated for future industrial development), proximity to existing polluting land uses (e.g. industrial land uses including distribution centers, warehouses, factories, airports, freeways, industrial agriculture with heavy pesticide application or other emissions, etc.), insufficient groundwater supply or nearby groundwater overpumping, areas of concentrated air pollution, and other environmental hazards that impact the viability of the site for housing development. According to the City and County’s land use designation maps, the majority of industrial zones in and around the City are concentrated in South Merced, and some are near or adjacent to vacant lots, presenting an environmental constraint to developing housing that disproportionately impacts R/ECAPs. The Draft Element must also identify and analyze proximity to Highway 99, which cuts through South Merced, as a constraint. Residents living in fringe communities within the City’s sphere of influence also currently rely on domestic wells which often run dry due to nearby agricultural overpumping. Groundwater supply and over-extraction, as a result, must also be identified and analyzed as a constraint to fringe and growth areas.

Fourth, the Draft Element also identified at G4-1 that “infrastructure... factors” can constrain housing development, but again, failed to identify constraints relating to non-existent or deficient infrastructure, including (but not limited to) water, wastewater, and stormwater

drainage infrastructure. The Draft Element claims on page G4-17 that “the City has adequate capacity to provide water and sewer service to future housing development, and only needs to extend service lines to development areas.” However, the City of Merced’s most recent Sewer Master Plan, updated in 2022, concluded that “the existing wastewater collection system does not have the capacity to convey the projected flows from interim development projects without exceeding the City’s LOS criteria in several reaches of the trunk system. Without improvements, the existing system does not have the capacity to service the build-out of the pre-annexation areas and the City’s remaining SUDP” (Sewer Master Plan²⁰, pg. IX). The Draft Element thus contradicts the City’s other documents regarding infrastructural capacity and fails to identify this as a constraint. Additionally, there are a number of existing communities in unincorporated pockets adjacent to City limits and within the Merced’s sphere of influence that lack any water and sewer infrastructure. The Draft Element fails to analyze how the non-existence of basic infrastructure in these communities (and all unincorporated growth areas) hinders further housing development. Aside from these infrastructural deficiencies, the City should also look at other components of necessary infrastructure, including stormwater drainage, sidewalks, street lighting, pedestrian and bicyclist safety infrastructure, public transit, among others, to identify constraints.

Finally, the City includes a paragraph about “Requests for Lower Development Densities” in the nongovernmental constraint section, but does not provide a conclusion or recommended action specific to this constraint. The City’s Zoning Code also does not currently include minimum densities in any of its zones - it simply provides for maximum densities depending on the zone. This constraint analysis must be redone to identify that the development of an adequate number of new housing units is often constrained not only because developers prefer to develop single family housing or higher end townhomes, which is facilitated by the lack of minimum densities, but also because there is strong opposition to denser housing in R/CAAs, especially for lower-income individuals and families. See Draft Element, pgs. G1-2, G5-44, G5-45 (“Merced has experienced some negative public comments and opinions regarding zoning changes to allow higher density housing and public negative opinions coming from those living close to recent permanent supportive housing complexes.”).

Thus, the real constraint that results in the City’s consistent failure to achieve its lower-income RHNA numbers is that the City does not currently have minimum densities built into its Code, allowing developers to readily build at lower densities and taking valuable land for lower density projects. While the City has committed to a rezone plan that includes “spot-zoning” that will provide a minimum density on some proposed site inventory sites, the City is not committed to doing this rezone until the end of January 2025. At minimum, the City should deny permits for any development proposed at the lower density to the extent allowed under law, as well as have an expedited rezoning process in the event that these proposed rezone

²⁰ Accessed at: <https://www.cityofmerced.org/home/showpublisheddocument/20090/638417101675770000>

sites are developed at a lower density prior to the enactment of this minimum density zone change. It should also consider establishing minimum densities in the Zoning Code in order to provide a greater number of sites available for denser and more affordable housing. This section regarding non-governmental constraints must be redone, with a focus on the issues that arise with the maintenance and improvement of the current housing stock, as well as identifying specific and concrete actions that the City can take to address the present constraints.

IV. The City Failed to Assess the Appropriateness of 5th Cycle Housing Element Programs and Actions

The Housing Element requires a review of the past programs and policies set forth in the 5th cycle Housing Element to evaluate the progress in implementation, the effectiveness of the programs in meeting the goals, and the appropriateness of program continuation and modifications necessary for the 6th Cycle Housing Element. *See* HCD AFFH Guidelines, pg. 22. The City of Merced's actions in the 5th cycle Housing Element failed to comply with the Housing Element's requirements to evaluate the effectiveness of goals, objectives, and policies that contributed to achieving the state and community's housing goals. Rather than reviewing whether the 5th cycle programs and policies were effective in addressing the state and community's housing goals and refining the actions to ensure there are measurable outcomes (§ 65588(a)), the City proposed recycling the same actions in the 6th cycle's Housing Plan. Of the 43 programs in the 5th cycle Housing Plan, 37 of the programs were found to be incomplete or ongoing and were implemented in the 6th cycle.

In fact, of the 44 5th cycle programs reviewed, the City proposes recycling 37, without evaluating their effectiveness. The City has a duty to substantially evaluate the effectiveness of the programs and actions to meet community needs (§ 65588(a)(4)), especially before deciding to recycle past programs, but failed to do so. *See* § 65588, *Id.*, *subds. (a)(1), (a)(2), (b), (c), and (d).*, and *HCD AFFH Guidelines, pg.9*²¹. HCD also suggests that goals and policies, which determine the direction of programs and actions, must commit to “well beyond a continuation of past actions” (HCD AFFH Guidelines, pg. 52).

The Draft's “Review of Past Accomplishments” section also acknowledges that the City failed to take any action on several programs (e.g: 5th Cycle Programs H1.1.g, H1.2.d, H1.3.b, and H1.7.d). As a result, we remind the City of (§ 65588(a)(4)) requirements to substantially and frequently evaluate the effectiveness of the goals, policies, and actions to meet the community's needs during each Housing Element cycle. Additionally, each of these incomplete programs focused on housing needs impacting special needs populations (e.g. extremely low and very low-income students, disadvantaged communities, single parent households, and farmworkers).

²¹ “These new statutory obligations charge all public agencies with broadly examining their existing ... policies, plans, programs, rules, practices, and related activities and make proactive changes to promote more inclusive communities.”

The City should also focus on addressing the housing needs of undocumented individuals and families. Therefore, the City has even more work to do in the 6th cycle to meaningfully address past and ongoing housing-related disparities in special needs populations and should therefore make commitments beyond those made in the 5th cycle to address the needs of special needs populations.

In other cases, several past programs referred residents to other organizations, and the Draft Element failed to report on their progress since there was no action for which the City could be held accountable (§ 655889(a)(3)). One example of this is 5th Cycle Program H4.1.b, which the Draft Element lists as “ongoing” and recycles into 6th Cycle Programs 5, 10, 12, and 14. Another example is Program H2.1.f, which aimed to “Encourage Energy Conservation and Weatherization” by providing information to low and moderate income residents and helping them participate in the Community Action Agency’s Weatherization program. The progress indicates that the City “continues to refer homeowners to the Community Action Agency,” however there is no metric to determine if the program adequately serves the community to address their needs. Without an evaluation of the program’s effectiveness, it is unclear how or if the program will have a “beneficial impact”²² as required when recycled in the 6th cycle Draft Housing Element.

V. The City Failed to Adopt Community-Identified Goals, Policies, Programs, and Actions That Will Result in A Beneficial Impact and AFFH for the 6th Cycle.

A. Goals and Policies

For the reasons outlined below in our comments on each of the following goals and policies, the Draft Element’s goals and policies fail to “have a specific connection to outreach, the assessment of fair housing, the analysis of the site inventory and most importantly, the prioritization of contributing factors to fair housing issues” as required by AFFH. *See HCD AFFH Guidelines at page 52.* They also fail to “aggressively ...overcome” contributing factors to disparities and housing needs and do not meet the ““meaningful impact” requirement in statute.’ *Id.* The policies also fail to propose “a significant impact, well beyond a continuation of past actions, and to provide direction and guidance for meaningful action.” *Id.*

Goal 1: Goal 1 focuses on regional collaboration-- particularly, how the City of Merced will collaborate with other agencies and organizations in the County to meet special housing needs. Policy 1.1 outlines that the City of Merced will collaborate with other agencies “to create effective policies and programs” and address housing needs. However, the development of “effective policies and programs” is a requirement for the Housing Element. The policies and

²² Gov. Code, § 65583, subd. (c)., and HCD AFFH Guidance at pg. 35-36.

programs should already be included in the Housing Plan, not developed over the course of the planning period.²³

In order to strengthen Policies 1.1 and 1.2, the City must establish timelines and metrics for “pursuit of state and federal housing funds to address regional housing issues,” identify those regional housing issues, and identify funding sources. Additionally, Policy 1.1 must identify the areas of collaboration of the City of Merced and other agencies, and clarify what specific actions Merced will take and by when as a part of this collaboration in order to address regional housing needs. Lastly, the City should clarify how these policies deviate from or exceed the City’s status quo operations. In looking at these policies’ associated programs and actions, many of them reflect work the City already does in the Continuum of Care and in collaboration with MCAG.

Goal 3: Under goal 3, Policy 3.2 commits the City of Merced to promoting Housing Choice Vouchers (HCVs) to make the public more aware of vouchers. The Merced County Housing Authority currently administers 2,705 HCVs across the county. The Housing Authority website states that families must apply for the HCV program when the Housing Authority is taking applications, and that as the applicant’s name comes to the top of the waitlist, only then is the applicant screened for eligibility.²⁴ According to the Housing Authority, during a call made on June 5th 2024, the voucher waitlist is currently 2 years long. This information was not made available on the Housing Authority website, instead, to find more information, one must register and apply for the waiting list before finding out the wait time, and determining whether or not they are eligible. Given the two year waitlist, however, the issue likely is not that an insufficient number of people are aware of Housing Choice Vouchers. Rather, the current issue is that so many people have registered for vouchers that there is a two year wait. This policy should be amended and expanded to other strategies for increasing affordable housing options and mitigating for the long waitlist for vouchers, including applying for funding, adopting ordinances that place rent caps on certain housing units, or adopting policies such as Inclusionary Zoning, which require developers to build a certain percentage of deed-restricted, affordable housing alongside market-rate development.

Goal 4: Goal 4 seeks to maintain and improve the City’s Housing stock, but fails to propose meaningful policies to do so. Policy 4.1 commits the City to “promoting balanced design and architecture,” but does not define “promoting” or “balanced design and architecture.” See Draft Element at pg. G7-2. Policy 4.2 commits to “support code enforcement efforts” to help address needed repairs and rehabilitation to homes. The policy is not clear on what “support” means, and describes ongoing, status quo, baseline city operations (i.e. the existence and operation of a code enforcement division) rather than an ambitious or aggressive proposal to address substandard housing. According to HCD, “goals and policies must be created with the intention to have a

²³ Gov. Code, § 65583

²⁴ “Housing Choice Voucher.” *Merced Housing Authority*, www.merced-pha.com/housing-choice-voucher/.

significant impact, well beyond a continuation of past actions, and to provide direction and guidance for meaningful action.” See HCD AFFH Guidelines at pg. 52. The City must replace this policy with a stronger policy to maintain or improve the quality of Merced’s housing stock, such as a commitment to develop a rental registry, rental escrow account program, or rental inspection ordinance. The City of Merced should make proactive efforts, beyond existing city operations, to address the substandard housing units they identified that lack kitchens and plumbing facilities, as well as units that have kitchens and plumbing but have other common habitability issues (e.g. improper insulation or lack of adequate cooling and heating during extreme weather, mold, inadequate or broken appliances, etc.). Policy 4.3 aims to utilize the City’s Capital Improvement Program to repair and improve public facilities.

In order to ensure that the need for public facilities is equitably met, the policy must be amended to read: “Utilize Capital Improvement Programs in addition to other local, state, and federal funding sources for repairs and improvements of public infrastructure and facilities in existing neighborhoods, ensuring that community input is incorporated when deciding where to invest funds, and ensuring that each neighborhood in Merced receives equitable investment proportional to the community need and history of investment or disinvestment.” This is a prime opportunity for the City of Merced to address its history of disinvestment in South Merced by prioritizing disadvantaged communities’ needs relating to aged (or non-existent) infrastructure and public facilities.

Goal 5: Goal 5 is aimed at addressing the needs of persons with special needs, yet falls short of Affirmatively Furthering Fair Housing. Policies 5.1 and 5.4 highlight the City of Merced’s efforts to collaborate locally and regionally to address housing needs for special populations, including the unhoused and farmworkers. Policy 5.2 commits to “provide reasonable accommodation for individuals with disabilities,” which is not an “aggressive” commitment, but rather basic compliance with FHA and ADA legal requirements. However, as noted above, since the AFFH analysis failed to identify all of the special housing needs and their contributing factors, these policies fall short of meaningfully addressing the need.

Policy 5.3 outlines that the City of Merced will “support the development” of farmworker housing by “encouraging the use” of grant funding. As noted above, HCD AFFH guidelines suggest that policies should “aggressively [be] set to overcome... contributing factors to meet the “meaningful impact” requirement in statute.”²⁵ The AFFH analysis – had it analyzed the needs of farmworkers – would have identified the needs and contributing factors, thus helping the City identify policies to meaningfully address them. The City should develop a myriad of programs such as rental assistance programs, rental escrow account program to improve that habitability of Merced’s rental housing, and ordinances for City Council consideration such as rent stabilization,

²⁵ See HCD AFFH Guidelines at pg. 52.

right to counsel, and inclusionary zoning to facilitate the construction of affordable housing units to serve individuals and families regardless of immigration status.

Goal 6: This goal seeks to promote energy conservation and sustainability, yet fails to propose meaningful policies. Policy 6.1 commits to “support and, as appropriate, incentivize... green building techniques,” but fails to outline what support will look like or define “green building techniques.” Policy 6.2 tasks the City of Merced with promoting energy conservation and efficiency in residential developments, without defining what “promoting” means, and connecting the policy to the housing need to explain why the policy will address the need. Instead, this policy should make energy conservation and efficiency financially accessible. Education will not result in a beneficial impact as much as resources to provide direct assistance will go beyond mitigating disparities. Both policies also fail to address the City’s existing housing stock.

Goal 7: Goal 7 commits the City to “compliance with local, state, and federal fair housing laws,” and policies 7.2, 7.3, and 7.5 also describe basic compliance with fair housing laws (G7-3). Again, goals must be “aggressively set” to have a “meaningful impact” and address the housing needs and issues identified through outreach and in the AFFH (HCD AFFH guidance at pg. 52). Goal 7 and its associated policies largely describe baseline compliance with the law, rather than an aggressively set goal aimed at addressing fair housing needs. The remaining policies under this goal lack sufficient clarity regarding how they meaningfully respond to the issues identified in the City’s AFFH analysis, Housing Needs Assessment Policy, and summary of feedback received during public engagement. For instance, Policy 7.6 includes a vague commitment to “promote integration of special needs housing and affordable housing in existing and planned neighborhoods.” Given the years-long history of Merced residents asking the City of Merced to advance an Inclusionary Zoning ordinance in order to ensure that affordable units are developed across the City, including in high-resourced areas, we recommend strengthening Policy 7.6 by including a commitment to pursue an ordinance requiring developers to build affordable housing concurrently with market rate housing, also known as Inclusionary Zoning (IZ). This policy would be supported by Program 15, which already includes an action regarding Inclusionary Zoning²⁶, which we would recommend strengthening to include a commitment for the City to develop an IZ ordinance for City Council’s consideration by the end of 2025.

All of the aforementioned policies as written in the Draft Element do not reflect meaningful actions that go beyond mitigating disparities, as required through AFFH (HCD AFFH Guidance, pg. 14-15) since many of these policies describe the City’s operations and do not specifically aim to combat legacies of discrimination. For example, Policy 2.1 focuses on the City of Merced meeting their RHNA during the 8 year planning period. This is not a Housing Element policy, but rather a baseline requirement. Policy 3.3 focuses on complying with SB 35 and policy 3.6’s

²⁶ See Draft Element pg. G7-18.

focus is to monitor affordable housing development. However, complying with the law and monitoring development are actions the City of Merced should already take to maintain City operations. Policy 5.2 also emphasizes that special needs housing will be addressed by complying with ADA law and providing reasonable accommodations for people with disabilities. Goal 7, which focuses on AFFH, outlines that the City of Merced will comply with fair housing laws as a goal. Specifically, policies 7.2 and 7.5 state that the City will comply with fair housing anti-discrimination laws and protect tenants from discriminatory housing practices.

The policies identified above do not reflect a diligent effort to incorporate the feedback the City received during the public participation process into the housing plan's goals, policies, programs, and actions. The Draft Element summarized the public input received, but the City failed to incorporate the engagement in a meaningful way to identify and implement goals and actions that will eradicate barriers in access to fair housing. According to HCD's AFFH guidance at pg. 52, "goals and policies must have a specific connection to outreach, the assessment of fair housing, the analysis of the site inventory and most importantly, the prioritization of contributing factors to fair housing issues." In the examples outlined above, the City failed to connect the Draft Element's goals and policies to the feedback received during outreach, as well as to the AFFH analysis and contributing factors impacting fair housing it identified (or should have identified).

B. Programs and Actions:

Section G7.2 *Implementing Programs* lists a total 15 programs, many of which are recycled from the 5th cycle, or include components of recycled programs. These programs fail to comply with AFFH requirements by failing to include "meaningful actions"²⁷ with a targeted, "beneficial impact." They must be amended to commit the City to actions "well beyond a continuation of past actions."²⁸

Program 5: Program 5 includes a series of actions aimed at facilitating the development of 16 Accessory Dwelling Units (ADUs) in the 6th cycle planning period, which it lists as an AFFH outcome. It is unclear from the Draft Element, however, whether these ADUs will play any role in Affirmatively Furthering Fair Housing. Page G4-21 of the Draft Element says that "the City's ADU Ordinance encourages... the development of ADUs as a form of affordable housing," yet

²⁷ "Affirmatively furthering fair housing" means taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws. The duty to affirmatively further fair housing extends to all of a public agency's activities and programs relating to housing and community development. - (Gov. Code, § 8899.50, subd. (a)(1).)

²⁸ See HCD AFFH Guidelines pg. 52.

page G6-6 says that “all anticipated ADUs were conservatively assigned to the above moderate-income category.” As currently written, the language of this program and its actions (which primarily focus on creating pre-approved plans for ADUs, updating the ADU ordinance, and providing information about ADUs) is not strong enough to guarantee that the ADUs will serve as truly affordable housing options or to serve special groups, such as persons with disabilities. As a result, this program can be improved by including a commitment for ADUs that are not occupied by family of the owner to be listed publicly as rental housing and deed-restricted for no more than 80% of the Area Median Income.

Program 7: This program (Facilitating Affordable Housing Development) includes a list of actions that the City either already does or should be doing as part of basic City operations (i.e. pursuing funding annually, developing a list of local housing developers, reviewing permit fees annually, ensuring infrastructure exists to accommodate housing development, and prioritizing permit processing for affordable units)²⁹. Many of the actions are also vague and lack concrete timelines and metrics (e.g. “[allow] improvements to be negotiated” and “ensure infrastructure is in place”). It is also unclear how another action, to “encourage the use of the City’s Lot Split Process,” will advance the development of affordable housing, since higher density housing without affordability requirements has not guaranteed affordability to low-income residents to date. This program must be strengthened in the following ways: (1) tie specific timelines to each action, (2) include an action that directly results in the construction of deed-restricted, affordable units (such as a commitment to develop an Inclusionary Zoning ordinance), and (3) add an action concretely outlining an affordable housing developer outreach plan, and (4) add funding sources the City has not previously sought for affordable housing, such as AHSC, to the action relating to pursuit of funding, as well as a commitment to leverage local funds from the City’s affordable housing fund.

Program 10: Program 10 (see Draft Element pages G7-12 and G7-13) aims to address the housing needs of lower income and special needs populations, yet fails to comply not only with AFFH but also with existing anti-discrimination law. First, Program 10 recycled the action to work with UC Merced to develop a Student Housing Plan, which the City did not initiate in the 5th cycle. The lack of action during the 5th cycle planning period should have resulted in a refined action as a part of this program. The City failed to incorporate goals, policies, programs, and actions to meaningfully address student housing needs in the 5th cycle Draft Element, and instead deferred this requirement to the 6th cycle planning period. Second, The program’s second action -- “work with the Housing Authority to continue providing assistance in the community”-- does not have a specific milestone or timeline, and does not concretely describe what the City’s action is. The City also proposes promotion of Housing Choice Vouchers as a means of ensuring more residents can benefit from the program. That said, according to the Merced County Housing Authority, there is currently a two year waitlist for housing choice vouchers, making it

²⁹ Draft Element at pg. G7-10.

clear that the primary barrier to residents' ability to access vouchers is not lack of knowledge about vouchers, but rather than not enough vouchers are available to meet the level of need. It is unclear as to why the City set a goal of 3,110 HCVs with no milestones or additional actions that will lead to the reduction of the 2 year waitlist time. The City proposes conducting outreach events "for landlords on the HCV program," however according to 2 CCR § 12141, it is unlawful for *any* landlord to discriminate on the basis of source of income (i.e. refuse to be "on the HCV program"). Therefore, it is no longer appropriate to say that there are "landlords on the HCV program." Rather, any landlord is obligated to accept vouchers from any prospective tenant who qualifies for a property. This program must be amended in the following ways:

- Since the need for vouchers far outweighs voucher availability, mitigate for voucher shortage by developing a rent stabilization ordinance, inclusionary zoning ordinance, rental assistance program, and commit to apply for additional resources to facilitate the construction of more affordable units via affordable housing developers.
- Given 2 CCR § 12141 requirements, conduct outreach events targeted towards *all* landlords in Merced that educate landlords on their duty not to discriminate, including on the basis of source of income.

Program 11: Program 11 (Farmworker Housing) is another recycled 5th cycle program that fails to AFFH. The associated actions with this program include (a) applying for or supporting on funding applications, (b) "periodically review[ing] available funding programs," (c) conducting a farmworker housing needs assessment by talking exclusively to employers, (d) and providing "fast-track permit processing."³⁰ First, regarding the second action (periodic review of available funding programs), this action does not commit to time-bound, concrete, meaningful actions, as required by AFFH. See HCD's AFFH Guidelines at pg. 51.³¹ Periodic, or ongoing, review of available funding sources, is not time-bound, lacks measurable outcomes, and without a commitment to proactively apply for funding, does not demonstrate that it will have a "beneficial impact" on farmworkers. The recycled action to "fast-track permit processing" also lacks these necessary components of a meaningful action under AFFH. It has no timeline, no connection to milestones or metrics, and no evidence to support the claim that it will result in a beneficial impact to farmworkers as expressed in the HCD AFFH Guidelines at pg. 51. To that end, the City's own evaluation of this action's efficacy in the 5th cycle indicates that it did not result in "any applications for farmworker housing to apply any of these [fast-track] processes" (Draft Element at pg. G1-10, See 5th Cycle Housing Element Program H.1.7.e). Given the inability of fast-track permitting to result in construction of farmworker units in the 5th cycle, it is unclear why the Draft Element proposes recycling it. Lastly, Program 11 proposes outreach to employers in order to determine how much farmworker housing is needed within the City of Merced. This action describes baseline compliance with Housing Element Law rather than an effort to Affirmatively Further Fair Housing. As noted above, this action is recycled from the 5th cycle

³⁰ Draft Element at pg. G7-14.

³¹ "Actions must be specific with timelines, discrete steps and measurable outcomes to have a "beneficial impact" during the planning period" (HCD AFFH Guidelines, pg. 51).

because the City never began implementation of it in the 5th cycle, and it was thus incomplete. Gov. Code, § 65583, subd. (a) (7); requires jurisdictions to conduct a Fair Housing Needs Assessment that identifies the special housing needs of several demographic groups, including farmworkers. This action should therefore have been completed as part of the City's Housing Needs Assessment, not as part of a program. Under AFFH, the actions associated with programs must then "*address* the existing and projected housing needs" meaningfully, according to HCD. See HCD AFFH Guidance at pg. 12. See also Gov. Code, § 65583, subds. (b), (c). This action does not address the housing needs of farmworkers as it proposes outreach solely to employers. Before the development of this action to address farmworker housing, the City of Merced should have focused on speaking with farmworkers directly to determine what sort of housing challenges they face, and gain a more holistic understanding of their housing needs. This direct engagement with farmworkers is critical for a few reasons. First, many farmworkers who reside in the City of Merced do not engage in farm work solely in Merced County, if at all, and many farmworkers are employed by a number of Farm Labor Contractors (FLCs) up and down the San Joaquin Valley in several counties. Should the City focus its outreach solely on local employers, they may miss a significant segment of the Merced farmworker population that travels on a daily basis to Stanislaus, Madera, Fresno, or other Counties for work. Secondly, an employer-focused outreach strategy will miss key components of needed information, including information on household overcrowding, rent cost burden, habitability in rental housing occupied by farmworkers, and other necessary components of the AFFH analysis on housing needs. Ultimately, this "action" should be conducted immediately and incorporated into the AFFH, and the City must engage directly with residents who are farmworkers and Community-Based Organizations that work with farmworkers in the City of Merced in order to obtain the information needed for such as an assessment of farmworker housing needs.

In addition to incorporating a more robust farmworker housing needs assessment into the AFFH analysis, Program 11 must be amended to read as follows:

- (a) The City of Merced will develop a City-wide rent stabilization ordinance for Council discussion and consideration, by June 2025.
- (b) The City of Merced will develop and identify funding and an administering organization for a rental assistance program that can provide aid to low-income tenants regardless of immigration status, and for which funding can be distributed more than once, by January 2026.
- (c) The City will conduct direct outreach to affordable housing developers and identify at least one developer with interest and capacity in developing deed-restricted affordable housing for farmworkers and other low-wage workers in Merced, by 2027.

- (d) The City will work closely with said developers and the community in order for construction of affordable units for farmworkers and other low-wage workers to break ground by the end of the sixth cycle³².

Program 12: Program 12 focuses on water and sewer service. The actions associated with this program include periodic outreach regarding water conservation, pursuing rehabilitation and weatherization assistance, updating the water and sewer master plans, and adopting a policy to prioritize water and sewer services for affordable housing development applications when capacity is limited and warrants allocation. What is missing is a commitment from the City of Merced to extend critical services such as water and wastewater to existing, disadvantaged communities within their sphere of influence prior to continuing to extend services to luxury sprawl housing in annexation areas in North Merced. This is a critical, place-based strategy aimed at addressing disparities in access to basic services and infrastructure, which was also well-documented as a key finding in the Public Engagement section. According to the summary of input received at the workshops, “the City must address the service needs of South Merced residents [including water and sewer, stormwater drainage, fire protection services, as well as sidewalks and street lighting] within the City’s sphere of influence.” (Draft Element, G2-3).

Therefore, Program 12 must be amended to include actions committing the City to extend water and sewer services to existing, disadvantaged neighborhoods within their Sphere of Influence prior to continuing to expand city capacity to new, sprawl development in undeveloped, growth and annexation areas.

Program 13: Program 13 (Community and Economic Development) includes a commitment to “connect street and pedestrian/bicycle networks...between new and older neighborhoods...”(Draft Element G7-15). This is only possible if the infrastructure in existing communities that are disadvantaged, such as South Merced, are prioritized in public infrastructure investment. The City must strengthen this program to reflect a commitment of public infrastructure improvements in R/ECAPs.

The program also includes a commitment for the City to apply for a CMAQ grant to fund sidewalks and infrastructure improvements. This action must be amended to include other funding sources beyond CMAQ which the City can pursue, including local sales tax measures, and to prioritize disadvantaged communities and R/ECAPs with outstanding needs for these sidewalk, street lighting, public transit, and other mobility investments. In order for the City to address the housing needs of all economic segments, the City must “remove all governmental

³² At G3-16 and G3-17, the Draft Element identifies that, although temporary housing is provided to migrant farmworkers typically from April - November, the City of Merced does not have any permanent farmworker housing, specifically for farm workers who are year-round Merced residents. As a result (and given the AFFH requirements highlighted above), concrete timelines and milestones for the development of year-round farmworker units is a critically important addition.

and non-governmental constraints to the maintenance, improvement, and development of housing”³³ which includes sidewalks and other infrastructure. Another action under this program is to coordinate with Public Works to review the City’s Capital Improvement Program (CIP) to ensure infrastructure and public facilities are supportive of the needs of underserved communities. This assessment will be helpful in determining where the City must prioritize future investment, but the action is missing a timeline.

This action must be amended to read: “Coordinate with the City Public Works Department to conduct an assessment of public facilities and infrastructure-related needs in underserved communities by March 2025.”

An additional action must follow this action to read: “Submit at least four applications for grant funding to address the needs identified in the assessment above on annual basis during the planning period starting in 2025, and commit local funding to at least four mobility infrastructure projects (including sidewalks, public lighting, pedestrian safety infrastructure, and existing roadway road maintenance) in R/ECAPs and/or Disadvantaged Communities on an annual basis during the 6th cycle planning period to make improvements.”

Lastly, in order to ensure that investments to address infrastructure and mobility needs in underserved communities are driven by community residents, we recommend that the City add an action to establish a Housing Element Implementation Committee made up of diverse stakeholders but prioritizing participation from residents living in DACs or R/ECAP, so that they can guide implementation and investment priorities. In order to do this meaningful engagement, residents would like to see the City of Merced commit to inclusive and targeted outreach by providing information on Spanish Broadcasting channels such as Channel 21, Channel 24, Channel 30, Spanish-based Radio Shows, Spanish Written Media, Hmong Broadcasting Channels, Hmong-based Radio Shows, and CBOs.

Program 14: Program 14 focuses on Fair Housing Outreach and Enforcement. One action under this program proposes that the City provide information on their website “regarding available programs, current plans, and other information.” Given that many groups with special needs in Merced struggle with access to internet and technological barriers (e.g. unhoused populations, farmworkers, immigration populations facing language barriers, extremely low-income residents, seniors, etc.), this action falls short of ensuring that all residents (especially those facing the most extreme fair housing needs) know their rights and understand how to submit fair housing complaints upon facing discrimination. Information should be shared via in-person workshops in partnership with fair housing organizations, available in physical copies at accessible locations to the community, and should be printed in multiple languages, including but not limited to meet the needs of the top two non-English speaking communities in the City of Merced – Spanish and

³³ HCD AFFH Guidelines at pg. 52

Hmong. The action to coordinate with community groups to disseminate fair housing resources and information should also be inclusive of non-English community groups to engage a wider audience as the current language³⁴ does not imply targeted and inclusive outreach.

This program also commits the City to sponsor workshops to educate tenants and landlords on their rights and responsibilities, which must be strengthened through the addition of a clear timeline. This action must also be amended to include an outreach plan to landlords residing outside of the City of Merced. The City of Merced must commit to collaboration with a myriad of CBOs and fair housing organizations to provide information to families regardless of immigration status. The City included the action of contracting with Project Sentinel, however, Project Sentinel is one organization with limited capacity. Project Sentinel provides Landlord-Tenant mediation services, and although this program aims to continue partnering with Project Sentinel, Mayor Serratto suggested on at the City's June 3, 2024 City Council meeting that since the City "funds [Project Sentinel] in another area," the City "should go down to zero on the landlord-tenant services..."³⁵ This mediation program is currently the only mediation service in Merced, and one of the only services that is available to undocumented residents. This action must be strengthened by committing the City to increase funding for Project Sentinel and/or other landlord-tenant mediation programs, in order to make commitments "well beyond a continuation of past actions" as suggested by HCD. See HCD AFFH Guidelines at pg. 52.

Another action in this program commits the City to "support homeownership" for "racial and ethnic groups underrepresented in the homebuying market."³⁶ To strengthen the action, the City can and should do more to provide opportunities for underserved communities and those underrepresented in the home buying market such as committing additional funding to the City's First-Time Homebuyer program, including a targeted outreach plan aimed at benefiting underrepresented communities, and setting metrics for the number of residents they will help become homeowners by a given date. Additionally, the City must ensure that their First-Time Homebuyer program is accessible to undocumented residents, with a particular focus on low-wage workers such as farmworkers.

Program 15: Program 15's AFFH Actions Summary includes one small paragraph and a few bullet points listing a summary of actions that fail to meet with HCD's standard of a "meaningful action"³⁷, and do not actively or aggressively combat legacies of discrimination and segregation, as required by Government Code Section 8899.50. The AFFH Action Matrix provided on page G7-18 has 11 commitments, including "seek input from the community...on options for an Inclusionary Zoning (IZ) Ordinance Requirement." This commitment can be strengthened by amending the action to read: "The City will develop and adopt an Inclusionary Zoning ordinance

³⁴ *ibid*

³⁵ See https://cityofmerced.granicus.com/MediaPlayer.php?view_id=1&clip_id=790 at timestamp 2:14:57

³⁶ See Draft Element pg. G7-16

³⁷ See HCD AFFH Guidelines at pg. 53 and Government Code section 8899.50.

by the end of 2025 to ensure an equitable distribution of affordable housing throughout the City of Merced alongside new development, including in high-resourced communities.”

Program 15 also includes actions that lack necessary timelines and milestones. As an example, one action is to “encourage the inclusion of childcare centers within multi-family developments,” though it is unclear what actions the city will take to encourage this, and by when these actions will be complete.

Program 15 also fails to incorporate place-based strategies that invest in R/ECAPs and must be amended to incorporate the following actions:

- Apply for funding to develop green space in R/ECAPs, and conduct the necessary property acquisition, rezoning, planning and construction work with input from the community, with the goal of creating two new green spaces in R/ECAPs by the end of the sixth cycle planning period.
- Complete an Updated South Merced Community Specific Plan, driven by community input, by January 2026.
- Collaborate with the Public Health Dept. to conduct a comprehensive Health Assessment by January 2026, focused on South Merced community health as compared to Merced’s R/CAAs. The study will focus on South Merced Community Health as it relates to nearby polluting land uses along the corridors of W Childs Ave, Highway 99, Highway 59, Highway 140, V St, and other significant truck routes and thoroughfares.
- Develop a policy to prohibit further concentration of Industrial zones and polluting land uses in and adjacent to R/ECAPs by March 2025.
- Amend the Zoning ordinance by January 2025 to include setbacks or buffer zones between noxious land uses (e.g. industrial zoning, industrial-scale agriculture, etc) and sensitive land uses (i.e. residential zones, places of worship, parks, schools, etc.).

Other overarching issues with the Draft Element’s programs and actions: Many of these programs and their associated actions describe basic compliance with legal requirements, fail to provide specific commitments to which the City can be held accountable during the planning period, or fail to connect the program and its actions to the needs and contributing factors identified via outreach, the AFFH analysis, and the Housing Needs Assessment.³⁸ For example, Program 2, “Adequate Sites for RHNA and Monitoring of No Net Loss” does not constitute an ambitious goal aimed at addressing housing needs, as required by (Gov. Code, § 8899.50, subd. (a)(1)). Program 4, “Replacement Housing” requires the City to comply with AB 1397. This program’s associated action also fails to connect to the needs previously identified by the community and other locally knowledge informed organizations. Program 5 does not meet nor go beyond the basic compliance with legal requirements of Gov. Code, § 65583(c)(7), which requires the City to develop a plan to incentivize and promote the creation of ADUs offered at an

³⁸ See HCD AFFH Guidelines pg. 52.

affordable rent. Program 6 which focuses on Zoning Code Amendments does not meaningfully contribute to dismantling any disparities as it only requires the City to comply with a series of laws, including Sb 35, SB 330, AB 2339, and Health and Safety Code Section 17021.6. Program 12 commits the City to adopt a policy to prioritize the allocation of water and sewer services to affordable housing projects as required by SB 1087.³⁹

Additionally, many of the policies and programs and/or their associated actions described in the plan the City is already taking as a part of routine actions, not an additional and meaningful action that would AFFH or result in different results than what they've gotten in the past. For example, Goal 1: Regional Collaboration solely commits the City to collaborate with other entities and organizations and pursue funding. Both of these policies describe the City's status quo and historical operations. Similarly, Program 1 details the City's status quo operations as actions associated with Goal 1. Program 2 commits the City to annually meet with developers, and maintain a sites inventory of vacant lots suitable for housing which is required by the Housing Element. These actions do not go beyond meeting basic requirements the City is expected to meet as a part of their routine actions. As another example, Program 7 outlines steps the City plans to take to facilitate affordable housing, however, subdividing large parcels, reviewing permit fees annually, pursuing funding are all basic City operations to facilitate any housing—regardless of affordability—in the City. Similarly, program 8 aims to “monitor affordable units” and “maintain the AB 987 database.”⁴⁰ Program 9 also outlines basic City operations such as ongoing code enforcement operations to address substandard housing, posting information on the City website, and continuing to review funding opportunities only to apply when deemed necessary. Program 10 aims to assist the community with access to HCVs, work with the Housing Authority to provide those vouchers although there is a long waitlist, and create an inventory of affordable housing. The aforementioned actions are routine steps the City should already be taking to ensure the community has access to housing without discrimination by income. Program 11 states that the City will “periodically review available funding,” and “fast-track permit processing”, however, the City should review available funding on a consistent basis, and fast tracking the permit processing is something that the City has been doing since the 5th cycle Housing Element. Program 13 aims to have the City coordinate with the public works department, and work with MCAG on the Active Transportation Plan (ATP) and Local Road Safety Plan (LRSP). These actions constitute ongoing and existing City operations. Program 14 aims for the City to “continue to” provide information on the city website, “continue to” contract with Project Sentinel, host “housing workshops [and/or] outreach events,” and “[coordinate] to disseminate information.” All of the aforementioned actions clearly state that these measures must *continue* to be taken; the actions do not go beyond steps that have either not resulted in any progress or do not address disparities. The City must make a commitment to address community needs by doing anything beyond basic operations.

³⁹ See actions on Draft Element G7-15

⁴⁰ See Draft Element at pg. G7-11.

1. Recommended Programs for Inclusion in the Draft Element

The following programs would Affirmatively Further Fair Housing by not only helping to stop the legacy and ongoing reality of discrimination and displacement in Merced, but also by meaningfully beginning to remedy the disparities caused by this legacy:

- Adopt a Rent Control Ordinance
- Develop and implement a Rental Escrow Account Program (REAP) or rental registry program to improve the habitability of the City's existing rental housing stock
- Expand access to landlord/tenant mediation services, available regardless of immigration status
- Develop a permanent rental assistance program for tenants, available regardless of immigration status, and available on a recurring basis, rather than one-time aid.
- Develop a permanent utility assistance program for low-income residents, available regardless of immigration status, and including utility deposit assistance.
- Develop and adopt a Right to Counsel program for tenants regardless of immigration status
- Adopt a policy to reduce urban sprawl and promote higher-density infill housing development
- Develop extreme heat, weatherization, and energy savings programs that are available to low-income households regardless of Immigration Status.
- Extend water and wastewater services to Disadvantaged Communities within the City's Sphere of Influence using available grant funding that will cover residents' connection costs
- Adopt Fair Housing programs and policies to ensure equitable allocation of resources further addressing historic and ongoing patterns of annexation
- Reject further annexations of market-rate sprawl development without first addressing the mobility infrastructure needs of existing R/ECAPs within City limits and the basic service infrastructure needs of existing communities within the City's sphere of influence
- As noted in our comments regarding Program 15, transform R/ECAPs through place-based strategies to provide access to basic services and amenities such as a grocery store, adequate medical services, retail and commercial business, and other additional necessary resources.

VI. The City Failed to Demonstrate Site Capacity to Accommodate Its RHNA and Show Its Sites Inventory is Consistent With the Duty to AFFH.

There are several issues with the proposed site inventory list provided by the City of Merced. At the outset, the City has not provided the site inventory list on the required

spreadsheet issued by HCD.⁴¹ This spreadsheet ensures that HCD and the public understands the basic characteristics of each site as well as how the City anticipates meeting its total RHNA allowance. The City's draft sites inventory list does not include the following crucial information: whether the site has adequate access to public infrastructure, whether the site is publicly owned, whether the proposed site had been identified in previous Housing Element cycles, and whether there is already a proposed project moving forward on the site.

This information is necessary in order to analyze the likelihood that each site is available and ready for development in the current cycle. If, for example, the sites are not adequately connected to public infrastructure, such as sewer systems, the site is much less likely to be developed in the current cycle because of the additional infrastructure that would need to be built before residential development can occur. As South Merced community members clearly identified in community listening sessions, this is a significant issue for existing residential developments and can render sites for future residential development in the same geographic area infeasible for development in this cycle. This is particularly true for affordable housing development given the financial subsidies needed for such development.

A. The Sites Inventory List Does Not Provide the Required Analysis for the Identified Non-Vacant Sites

The majority of sites listed on the site inventory list are vacant. However, there are four listed parcels that are non-vacant. The City states that they anticipate a total of 218 below-income units to be developed on these four non-vacant parcels.⁴² The Draft Element provides information regarding the current use (and under-utilization) of each parcel, identifying each as a parking lot and/or a vacant commercial building attached to a parking lot. See Draft Element, Table G6-5.

For non-vacant sites, the City must include a description of the existing use for each site. Gov't Code § 65583.2(b)(3). The City must also provide additional information that demonstrates the likelihood of each non-vacant site being redeveloped with residential housing in the *current cycle*. Gov't Code § 65583.2(g)(1).⁴³ The City must also indicate whether these

⁴¹ See the required spreadsheet at the link here:

https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.hcd.ca.gov%2Fcommunity-development%2Fhousing-element%2Fdocs%2Fsite_inventory_template09022020.xlsm&wdOrigin=BROWSELINK.

⁴² The City anticipates an additional 96 moderate-income units on these non-vacant sites, but no above-moderate income units.

⁴³ "For sites [that are non-vacant], the city or county shall specify the additional development potential for each site within the planning period and shall provide an explanation of the methodology used to determine the development potential. The methodology shall consider factors including the extent to which existing uses may constitute an impediment to additional residential development, the city's or county's past experience with converting existing uses to higher density residential development, the current market demand for the existing use, an analysis of any existing leases or other contracts that would perpetuate the existing use or prevent redevelopment of the site for additional residential development, development trends, market conditions, and regulatory or other incentives or standards to encourage additional residential development on these sites."

sites are publicly owned (as they must do for every site, see above), and if they are, any plans to dispose of the property pursuant to the Surplus Land Act.

While the City has provided a description of each non-vacant site, identifying each parcel as underutilized, it has failed to engage in adequate analysis regarding the development potential, and does not provide a sufficient “explanation of the methodology used to determine the development potential.” Gov’t Code § 65583.2(g)(1). Instead, the city relies on a single sentence stating, “Nonvacant sites included on the Site Inventory have comparable predevelopment characteristics to developed residential projects in the region.” Draft Element, pg. G6-7. It then lists six recent residential developments in Merced County at large that were developed on nonvacant sites. First, all but one of these residential developments that the City claims are comparable are market-rate developments. Market rate residential developments have different financial resources than affordable housing projects, and thus provides little insight into the development capability for lower-income residential developments. Second, the one affordable housing project developed on a nonvacant site was a hotel conversion project. A site that includes a hotel, with facilities that already include a significant amount of the infrastructure needed for residential living, is significantly different from a site like the ones identified in the site inventory that include purely commercial development.

The City also fails to identify any current leases or contracts that would prevent the redevelopment of these nonvacant sites. For example, the site located at 1407 West 16th Street is “currently a commercial building.” Draft Element, Table G6-5. However, it does not identify whether there are any current tenants operating in the commercial building, or whether the current operators have demonstrated interest in ceasing commercial operations on the site. This renders it impossible for advocates and the community to assess whether existing use of the site would make redevelopment likely in the current cycle.

Given these clear deficiencies in the analysis of the listed nonvacant sites, the City is not in compliance with its obligations under law.

B. Obligations to Provide Analysis of Development Reality of Lower-Income Units on Small and Large Sites

Government Code Section 65583.2(c)(2)(A) and (B) imposes additional requirements when a jurisdiction identifies small (less than a half acre) or large (more than ten acres) sites to satisfy a portion of their lower-income RHNA numbers. When a jurisdiction lists a small or large site, they must demonstrate “that sites of equivalent size were successfully developed during the prior planning period for an equivalent number of lower income housing units” or demonstrate with other evidence that the sites listed can be developed with lower-income housing.

The City has listed one parcel at .50 acres and two parcels at .52 acres that are intended to accommodate lower-income units. See Map ID 92 (11 lower-income units), ID 38 (9 lower-income

units), and ID 80 (9 lower-income units). The City has also listed 6 parcels at exactly 10 acres that are, in total, intended to accommodate 1,257 lower-income units. See Map ID 3, 5, 10, 14, 16, and 17. These small and large sites represent almost a third of the City's RHNA number for lower-income units.

At the listed acreage, the additional analysis under Government Code Section 65583.2 is not technically required. However, at least three of the six 10-acre sites are actually larger than 10 acres – the City has simply stated that only 10 acres of each parcel are “developable” with no further explanation. See Draft Element, pg. G6-27. For example, the chart listing Map ID 16 includes a footnote stating, “This parcel is 10.64 acres; however, the Site Inventory assumes only 10.00 acres are developable.” Id. Another parcel, identified as Map ID 15, includes a footnote stating, “This parcel is **252.50 acres**; however, the Site Inventory assumes only **8.11 acres** are developable.” Id. (Emphasis added.) Without further explanation, it is impossible to ascertain how the City came to this conclusion, and whether or not this is a simple attempt to evade the analysis required under Government Code Section 65583.2(c)(2)(B).

The Legislature recently added this provision to Housing Element law in order to ensure that jurisdictions did not identify unrealistic sites for development of its affordable housing share. On one hand, very small sites can be unrealistic for affordable housing developments if not enough units can be developed to make the project financially feasible. On the other hand, very large sites can also be unrealistic for affordable housing development as they may require larger amounts of capital than affordable housing developers typically have access to for development projects. As a result, the state requires additional analysis when a jurisdiction relies on large or small sites to meet its lower-income share of housing. The City acknowledges this reality in its draft (see G6.4.1), but it then evades the required analysis necessary to demonstrate the *realistic development capacity* for these sites.

C. The Site Inventory List Includes Sites With Little Analysis of Realistic Site Capacity

In a related vein, jurisdictions must also demonstrate that the sites listed can reasonably accommodate the number and type of units listed. Gov't Code § 65583.2(c). This includes listing the typical densities of existing or approved developments that have similar affordability levels and demonstrating that there is sufficient water, sewer, and dry utilities to serve the proposed developments. Further, “[i]f the city ... does not adopt a law or regulation requiring the development of a site at a minimum density, then it shall demonstrate how the number of units determined for that site pursuant to this subdivision will be accommodated.” Gov't Code § 65583.2(c)(1). Finally, the City fails to acknowledge that community opposition, or NIMBYism, has frequently led to the development of proposed sites at a lower density or only of market rate units.

One critical issue raised in the listening sessions conducted by the City is the lack of sufficient utility services, in particular water and sewage services, available in the sphere of influence of South Merced to current residents. However, the City claims that there are “no known barriers outside of financing that would preclude development of these parcels in the planning period.” Draft Element, pg. G6-12. The City does not address the inadequacy of current utility services to areas within its sphere of influence, such as South Merced, or how it intends to ensure that not only current residents receive adequate utility services, but that the sites selected for future development will have adequate services as well. For more discussion of this issue, see the analysis provided above in the constraints section.

While the City states that it will rezone approximately 37 sites to include a minimum density, that leaves approximately two-thirds of sites on the proposed site inventory that do not have a minimum density, thus requiring additional analysis as to the realistic capacity of the proposed number of units. The City attempts to satisfy this analytical requirement by providing a list of projects that have recently been approved or developed in Merced, comparing the density achieved by these projects to the maximum density allowed under the Zoning Code. The City then concludes that every site in the proposed site inventory will achieve 75% of the maximum density allowed under the Zoning Code based on the density of these recent projects. However, the City fails to analyze the *type of units produced* for each of the pipeline projects and compare to the number of units it proposes for each site on the inventory. Of the 24 projects listed in Table G6-2, only 10 of these projects include lower-income units and **none** include moderate-income units. As a result, the City is already set to hit 82% of its production goal for above-moderate units based on already approved projects, but only 15.6% of its lower-income target and 0% of its moderate income target based on these pipeline projects.

This is unsurprising given the City’s reluctance to commit to enforceable production policies, such as a robust inclusionary zoning ordinance. Tellingly, the City recently adopted a resolution creating the RHNA Unit Production Plan—specifically created to avoid creating an inclusionary zoning ordinance—which requires all new development (with several broad, outlined exemptions) to either designate a minimum of 5 percent of the developed units to housing for extremely low, very low, low, and moderate income levels or pay an in-lieu fee into a local affordable housing fund.⁴⁴ However, this is nowhere mentioned in the Draft Element, likely because it has been largely ineffective at producing lower-income units. With a myriad of exceptions and work-arounds for developers (e.g., financial infeasibility, planning staff discretion) it is easy to avoid the requirement. Essentially, this renders the ordinance optional and

⁴⁴ See generally CITY OF MERCED, REGIONAL HOUSING NEEDS ALLOCATION UNIT PRODUCTION PLAN (Nov. 20, 2023), <https://cityofmerced.legistar.com/View.ashx?M=F&ID=12459311&GUID=46F73F0A-48B9-4D85-AA91-FFA78F2FE590>. The City Council did not provide direction on a set or specific target allocation of affordable units under each income category. *Id.* Discretion and the ability to negotiate the number of units under the specific income levels was deferred to Staff. *Id.* There should however be a minimum of Five Percent (5%) of the total number of proposed units within a development project subject to this plan which shall be affordable and shall be spread across the Extremely Low, Very Low-, Low, and Moderate income levels. *Id.*

void of meaningful impact to meet the City’s RHNA zoning obligation or meet the affordable housing need. *See also Martinez*, 90 Cal.App.5th at 271 (showing how plaintiff “pleaded and prove[d] that the City violated the Housing Element Law by its continuing failure to meet its RHNA zoning obligation).

Finally, the City completely overlooks community opposition to dense and/or affordable housing in Merced, and how this will affect the realistic development of the numbers sufficient to meet the City’s RHNA obligation at all income levels. While the City acknowledges that there is often community opposition to affordable and permanent supportive housing (see Draft Element at G5-44) it does not factor this community opposition into its analysis. (The Draft Element also states at G6-10 that sites may not be developed at their full capacity “due to factors such as site-specific condition and development standards such as open space or parking requirements” but with no reference to community opposition.)

Given the City’s lack of commitment to policies such as inclusionary zoning or zoning code minimum densities, the City’s analysis of the realistic capacity of the proposed sites to meet all of its RHNA numbers is inadequate.

D. The Housing Site Inventory Analysis Fails to Conform with the City’s duty to AFFH

The Housing Element site inventory analysis fails to adhere to Government Code Section 65583.2(a) which states: “A city’s or county’s inventory of land suitable for residential development . . . shall be used to identify sites *throughout the community*, consistent with [its Duty to AFFH] that can be developed for housing within the planning period and that are sufficient to provide for the jurisdiction’s share of the [RHNA] for all income levels” (emphasis added). *See* HCD AFFH Guidance at pg. 45–49; *see also* *Martinez v. City of Clovis*, 90 Cal.App.5th 193, 289.

Several deficiencies with the site inventory identified above make its compliance with affirmatively furthering fair housing duties impossible. For example, the City’s failure to demonstrate the realistic development capacity of all the sites included in the inventory, including but not limited to sites identified for lower income units in high opportunity areas, calls into question the likelihood that such sites will in fact be developed. Similarly, the City’s failure to discuss how it will overcome governmental and non-governmental constraints is a fatal flaw, especially considering the City’s acknowledgment of public opposition to high-density development and considering the City’s poor track record of facilitating housing development for lower income people.

While we appreciate that a significant portion of housing for lower income people is designated for high resource areas, we reiterate our concern regarding realistic development capacity of those units absent significant program and policy changes, we also reiterate the importance of investing in housing and other resources throughout the City so that existing neighborhoods that are currently low resource become high resource areas like their neighbors.

We are concerned that the Draft Element allocates very few units to moderate income and above moderate income households in low-resource areas and areas of high segregation, compared to 24 percent of units designed to be affordable to lower income residents and question how this will not lead to further segregation in violation of the City's duty to AFFH.

The site inventory also seems to include inconsistent or incomplete data with respect to demographic information by census tract. Several figures and tables throughout the housing element identify several areas that are less than 40% non-white. However, Table G5-8 (Site Inventory by Census Tract Characteristics) only includes one census tract that is less than 40% white. Are there data inconsistencies within the draft housing element or are there no housing sites identified in the other census tracts that have white populations that are over 60%? Either outcome presents a fair housing issue.

One final point of clarification. The housing element notes that there will be housing available in areas that are at risk of displacement (Draft Housing Element, pg. G5-54) and notes that "these lower income units will provide affordable housing options for existing very low and low-income residents at risk of displacement." It is unclear what mechanism or mechanisms the City of Merced will use to ensure that existing residents at risk of displacement will have access to those units.

VII. The Draft Element Fails to Comply with Other State and Federal Fair Housing Laws

The City's Draft Housing Element fails to conform with the City's duty to affirmatively further fair housing and, in doing so, also threatens violations of other state and federal fair housing and civil rights laws that are designed to ensure fair access to housing, eliminate barriers to critical services and amenities, remediate environmental injustice, and prevent discrimination the the provision of services and benefits. *See* AFFH, Gov't Code § 8899.50; California's nondiscrimination statute, Gov't Code § 11135; Fair Employment and Housing Act (FEHA), Gov't Code § 12940 et seq.; Federal Housing Act (FHA), 42 U.S.C. § 3601 et seq.; Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) et seq. Among viable causes of action for civil rights claims are public agency programs and policies. *See Martinez v. City of Clovis*, 90 Cal.App.5th 193, 263-264 (2023)

The City must update its housing element to ensure compliance with its duty to Affirmatively to Further Fair Housing along with its duties pursuant to state and federal fair housing laws and civil rights laws.

VIII. Conclusion

Thank you for the consideration of our comments. Leadership Counsel for Justice and Accountability welcomes the opportunity to continue collaborating with the State of California and the City of Merced on the 6th Cycle Housing Element to ensure the housing needs of all residents in the City are met for the next 8 years. Housing is a critical component for quality of life, and residents who fall under the protected classes deserve access to fair housing and protections. The City of Merced must do its due diligence to ensure residents of all economic segments throughout the City are living in safe, equitable, and healthy housing.

Respectfully,

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