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November 10, 2011

**BY ELECTRONIC MAIL**

Mr. Charles E. Hauptman  
Director, Office of Fair Housing and Equal Opportunity  
San Francisco Regional Office  
U.S. Department of Housing and Urban Development  
600 Harrison Street, Third Floor  
San Francisco, CA 94107

Re: Marin County Analysis of Impediments to Fair Housing Choice

Dear Mr. Hauptman:

Thank you for the opportunity to comment on the Analysis of Impediments to Fair Housing Choice (AI) and Implementation Plan submitted for your Department's review by the County of Marin on behalf of its Urban County pursuant to 24 C.F.R. § 91.225 and the December 2010 Voluntary Compliance Agreement (VCA).

In the AI, the Marin community has exercised its judgment by identifying a range of significant County and municipal policies and practices that exclude and segregate members of protected classes. In the Implementation Plan, the community came together around a specific set of actions that it deems necessary to address those impediments.

We write to address one specific defect in the Plan: actions are required to remove identified impediments in the policies and practices of the County of Marin and of each Marin municipality; yet only the County has committed to take action in the Implementation Plan. Absent a commitment that each of the cities and towns will "affirmatively further fair housing within its own jurisdiction" (as HUD instructions pursuant to 24 C.F.R. §570.307 require), or at a minimum, a realistic plan to ensure that commitment, the Plan should not be found in compliance.

**BACKGROUND**

Following your office's July 2009 on-site compliance review, the County and its municipalities jointly undertook a lengthy process to identify impediments and the actions necessary to overcome their effects. During the first phase, the County prepared a draft analysis of the conditions and

policies in Marin that have an adverse impact on fair housing choice. That analysis, which was issued for public comment in March of this year, identified numerous significant impediments, including the land-use policies and practices of the County of Marin and each of its municipalities that exclude members of protected classes from many communities throughout Marin.

The identified impediments include restrictive zoning and permitting requirements set by the County and cities that limit the availability of affordable housing and concentrate minorities in just a few communities.<sup>1</sup> In particular, the identified impediments include (1) the lack of land zoned for multifamily housing “by right;” (2) zoning restrictions based on density, height, and parking; (3) the over-reliance on small sites, second units, and weak inclusionary zoning policies; and (4) the failure to comply with the requirements of California’s Housing Element Law.<sup>2</sup> The AI expressly notes that these are issues “countywide” that affect “the County and other local jurisdictions.”<sup>3</sup> The AI also identifies barriers to fair housing created in a number of municipalities by neighborhood opposition to affordable housing, including inflammatory or discriminatory public responses to affordable housing proposals and litigation to halt development.<sup>4</sup>

The AI concludes that all of these factors place onerous restrictions on the development of affordable housing and reduce open housing options for protected groups, particularly lower-income Hispanics and African Americans, and families with children.<sup>5</sup>

Upon issuing the draft AI, the County and its municipalities appointed a subcommittee of their CDBG Priority Setting Committee charged with assessing the impediments and devising an Implementation Plan consisting of the highest priority actions necessary to begin to overcome the identified impediments. The Subcommittee ultimately held seven public meetings, including four in Marin City and East San Rafael, receiving thoughtful comments from members of the Action Coalition for Equity and the general public. Out of this public process – which extended over a period of nearly six months (facilitated by two extensions of the deadline to which your office agreed) – came an Implementation Plan that represented a county-wide determination of the steps that must be taken to begin to meaningfully dismantle the identified impediments over a five-year period.

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<sup>1</sup> Analysis of Impediments to Fair Housing Choice (AI) (October 5, 2011), Ch. 4, pp. 4-5.

<sup>2</sup> See AI, Executive Summary, pp. ii, iv-vi, Ch. 4, pp.4-10, 53 (citing ZONING FOR AFFORDABLE AND SUSTAINABLE COMMUNITIES: A CASE STUDY IN THE IMPLEMENTATION OF HOUSING ELEMENTS IN MARIN COUNTY (Public Advocates Inc., Aug. 2009) (available at <http://www.publicadvocates.org/sites/default/files/library/marinhousingelementreportfinal081009.pdf>).

<sup>3</sup> See, e.g., AI, Executive Summary, pp. iv, v, vi.

<sup>4</sup> AI, Ch. 3, p. 9, Ch. 4, pp. 14-15.

<sup>5</sup> See AI, Executive Summary, p. i.

That Implementation Plan identifies a number of priority actions that the Marin community has determined are needed to overcome the onerous restrictions on affordable housing that the AI identified. These actions include:

- Adopting a compliant Housing Element by 2013 (Action 1)
- Adopting design guidelines for multi-family developments as a means to permitting affordable housing projects either ministerially or through a streamlined process of discretionary design review (Action 9)
- Expanding overlay zones, with increased density standards and minimum density requirements for affordable housing (Action 10)
- Rezoning a sufficient number of suitable sites to accommodate the lower-income share of the Regional Housing Need Allocation (RHNA) for higher density affordable multi-family housing by December 31, 2013 (Action 11)
- Implementing and strengthening inclusionary zoning requirements (Action 13)
- Diversifying development of affordable housing with multiple strategies and types of housing (Action 15)
- Rewording guiding principles in zoning ordinances and development regulations that may be a pretext for discrimination (Action 19)

A vote of the full CDBG Priority Setting Committee on September 12, on the motion of Mill Valley Mayor Ken Wachtel, approved sending the AI and Implementation Plan that resulted from this process to the Board of Supervisors; the Board then approved it (with a very small number of modifications) on October 11.

The Implementation Plan that was adopted, however, assigns its actions only to the County, with no indication that any of the cities or towns will also undertake any of the identified actions. We are unaware of any plan for ensuring that the cities and towns will do their part to address the impediments that have been identified within their respective jurisdictions.

## DISCUSSION

The legal framework for assessing the adequacy of the Implementation Plan is set by HUD's regulations and the Voluntary Compliance Agreement itself. The VCA requires the preparation of a new AI that identifies and analyzes "*the impediments to fair housing within the County, including impediments based on race and ethnicity and municipal resistance to the development of affordable housing; and those impediments identified by HUD during the course of its compliance review*" and further requires identification of "*the actions the County will take to address those impediments.*"<sup>6</sup> (The reference to the "County" in the VCA includes the entire Urban County consortium.<sup>7</sup>)

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<sup>6</sup> VCA § III (E) (2) (emphasis added).

<sup>7</sup> See VCA, p. 2 ("the Community Development Block Grant (CDBG) program administered by the County of Marin (hereinafter referred to as the County or Recipient").

In addition, HUD regulation provides that the jurisdiction must “take *appropriate actions* to overcome the effects of *any impediments* identified through [its] analysis.”<sup>8</sup>

Where an impediment is created by a particular unit of local government, and the power to remove that impediment lies solely with that local government, an “appropriate action” to address that impediment can only be one undertaken by that local government itself. That is especially clear here, where both the obligation and the power to zone and plan for affordable housing within incorporated Marin lies solely with the incorporated cities and towns. As noted above, the AI explicitly identifies municipal land-use, zoning and planning impediments in the incorporated cities and towns, and the Marin community has determined what actions are “appropriate” to address impediments relating to affordable housing planning and zoning. The Plan, however, includes only “ACTIONS FOR IMPLEMENTATION BY COUNTY GOVERNMENT.”<sup>9</sup> The municipal impediments, in short, are not simply impediments without “appropriate” action, they are impediments with no associated action at all.

HUD, in fact, in the exercise of its authority under 42 U.S.C. §3535(d) and 24 C.F.R. §570.307, explicitly instructs Urban Counties that each and every “cooperating unit of general local government” has an obligation to “affirmatively further fair housing within its own jurisdiction.”<sup>10</sup> Each sub-recipient municipality must commit in the Cooperation Agreement “to take all actions necessary to assure compliance with the urban county’s certification,” and “noncompliance by a unit of general local government included in an urban county may constitute noncompliance by the grantee (i.e., the county) that can, in turn, provide cause for funding sanctions or other remedial actions by the Department.”<sup>11</sup> These instructions make it clear that a county’s bare certification is not enough; its certification must include a meaningful basis for ensuring that the cities in the Urban County are doing their part to address impediments within their respective jurisdictions.

The absolute lack of implementation commitments at the municipal level will not only run afoul of explicit HUD regulations and instructions, it will as a practical matter stymie Marin’s laudable efforts to overcome some of its most serious impediments to fair housing choice. A look at population, housing need, and developable land in the County makes this evident:

- *75 percent of Marin’s households reside in its cities and towns, with only a quarter living in the unincorporated County; on the other hand, two-thirds of*

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<sup>8</sup> 24 C.F.R. § 91.225 (a) (1) (emphasis added).

<sup>9</sup> Implementation Plan, Section 1. Section 2 includes actions by other County-level agencies, such as the Housing Authority, and non-profits, but none by any municipality.

<sup>10</sup> HUD Notice CPD-11-02 *Instructions for Urban County Qualification for Participation in the Community Development Block Grant (CDBG) Program for Fiscal Years (FYs) 2012-2014*, pp. 11-12, paragraph H (April 28, 2011) (available at [portal.hud.gov/hudportal/documents/huddoc?id=11-02cpdn.doc](http://portal.hud.gov/hudportal/documents/huddoc?id=11-02cpdn.doc)).

<sup>11</sup> *Id.*

Marin's *African American* population lives in the unincorporated County, with *only a third* in the 11 incorporated cities and towns.

- *83 percent of Marin's lower-income housing need*, as determined by the Housing Element Regional Housing Needs Allocation (RHNA) process, falls to its cities and towns. Thus, while the countywide RHNA for very-low and low-income units through 2014 comprises 1,849 units, the unincorporated County share is just 320 units; and
- *87 percent of Marin's developable sites suitable for affordable housing* are located on land the development of which is controlled by its cities and towns.<sup>12</sup>

As a result, even if the County's actions facilitated the development of its entire share of the lower-income housing need, and a minority household moved into each of those 320 new units, there would be nearly no impact on Marin's pattern of segregation – 81.8 percent of the households in Marin County would still be white, virtually unchanged from the current 82.1 percent. To make any measurable progress towards overcoming the impediments identified in the AI and fostering a more integrated Marin, the actions identified in the Implementation Plan must be carried out by the incorporated cities and towns with the obligation and power to plan and zone for affordable housing.

In just a year, Marin has made great strides toward meeting the requirement to affirmatively further fair housing. No doubt, some of the implementing actions could be strengthened by setting milestones, timetables, and measurable results,<sup>13</sup> and some significant impediments that the AI identifies are not addressed at all.<sup>14</sup> Still, the Implementation Plan marks a strong start to creating a more open and inclusive Marin County. Despite these significant strides, however, Marin cannot satisfy its obligation to take appropriate actions to overcome the significant impediments it identified at the municipal level until each of the member cities and towns of the Urban County has committed to implement the actions in the Plan with respect to the impediments within their jurisdiction.

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<sup>12</sup> Earlier this year, the Non-Profit Housing Association of Northern California performed a comprehensive analysis of potential sites for affordable housing development in Marin County, using a carefully constructed G.I.S. database to identify each parcel that would meet minimum standards for securing federal Low-Income Housing Tax Credits – the dominant source of funding for below-market-rate homes in California. Of the 4,650 acres identified, 4055 lie within the borders of Marin's incorporated cities and towns.

<sup>13</sup> See Fair Housing Planning Guide (FHPG), p. 2-6.

<sup>14</sup> For instance, the Implementation Plan does not identify actions to overcome several key impediments, such as local opposition to affordable housing fueled by NIMBY sentiments, local preferences in housing selection processes, inadequate local funding for affordable housing and for fair housing services, and lack of landlord participation in Section 8 programs. See Ch. 4, pp. 13-15, 34-36, 46, 55, Ch. 6, pp.2-3.

Mr. Charles E. Hauptman  
November 10, 2011

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Thank you for your consideration of these comments.

Sincerely,



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Cc: The Hon. John Trasviña, Assistant Secretary for Fair Housing and Equal Opportunity  
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