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**FRESNO LOCAL AGENCY FORMATION COMMISSION (LAFCo)  
DEPUTY EXECUTIVE OFFICER'S REPORT**

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**AGENDA ITEM No. 9**

**DATE:**           **November 5, 2008**

**TO:**               **Fresno Local Agency Formation Commission**

**FROM:**           **Rick Ballantyne, Executive Officer  
Darrel Schmidt, Deputy Executive Officer**

**SUBJECT:**   **Local Housing Element Challenges:** Identified Conflicts Existing Between LAFCo Adopted Policies and LAFCo Law and Mandated State Department of Housing and Community Development Housing Element Requirements for Cities and Counties.

**Recommended Action:**

Authorize the Chairman to sign the attached letter to the California Department of Housing and Community Development expressing Fresno LAFCo's concern regarding conflicts between State LAFCo law and Fresno LAFCo's local adopted policies with the State's implementation of the Regional Housing Needs Allocation Plan.

**Background:**

The California Department of Housing and Community Development (HCD) requires that cities and counties periodically update the Housing Elements of their General Plans. HCD also requires a periodic preparation of a Regional Housing Needs Allocation (RHNA) Plan, which establishes the projected housing needs within each county for all income levels.

Housing needs are based on California Department of Finance population projections and regional population forecasts used in preparing Regional Transportation Plans. The local Council of Governments (COGs) then assign housing allocation numbers to each county and the cities located within the county. It is then up to the local jurisdictions to ensure that an adequate amount of land is available to meet this housing need by designating and zoning properties for future housing use. Fresno County and the cities located therein have a total estimated housing construction need of 52,142 housing units for the period January 1, 2006 through June 30, 2013.

Presently, a number of cities within Fresno County are in the process of updating their respective General Plans, which will include the latest RHNA numbers. Early this year, the City of Clovis submitted its Draft Housing Element to HCD for certification; and on July 9, 2008, submitted a revised Draft Housing Element in response to HCD's request for changes and additional information. Most recently, HCD requested more revisions, which the City of Clovis believes it can not comply with, in part due to specific requirements contained in the Memorandum of Understanding and Master Tax Sharing Agreement (MOU) entered into between the City of Clovis and the County of Fresno—and also due to Fresno LAFCo policies and/or California statutes.

Several other cities (including Kingsburg, Reedley, Sanger, and Selma) have been working through Fresno COG and have discovered that they are all experiencing similar difficulties

complying with HCD requirements related to their Housing Elements, and more specifically identifying sites within their boundaries which are adequate to meet their respective RHNA housing allocations. LAFCo staff and counsel recently met with planning and management staffs from these cities, Fresno County, and Fresno COG to discuss the specific LAFCo policies and statutes contained within the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000, which the cities believe may inhibit their ability to comply with HCD requirements. The City of Fresno, which was also represented at this meeting, did not identify specific LAFCo policies restricting them from complying with the RHNA.

### **Discussion:**

The Cities of Clovis, Kingsburg, Reedley, Sanger, and Selma have each indicated that, as a result of these requirements, HCD has requested that these cities identify within their Housing Elements, sites that are adequate to accommodate their housing allocation as assigned by the RHNA Plan. While this specific requirement is not new, HCD has historically allowed cities to identify appropriately designated sites both within their boundaries and sites outside their boundaries, but within their Spheres of Influence (SOI), provided these sites were included within and designated for residential development in the local jurisdiction's General Plan.

The Cities state that this is no longer the case. HCD now requires all sites included within a city's RHNA housing site inventory to be located within the city's boundaries, or if a city has identified sites that are outside of the city's boundaries, the city must have a plan indicating these sites will be annexed and appropriately zoned early within the plan period. City of Clovis staff state that HCD staff has defined "early within the plan period" as within two years of certification of the Housing Element. Absent a plan to annex sites outside a city's boundaries, a city cannot include these sites within its housing inventory. Such requirement could create great difficulty for cities that do not already have enough land within their jurisdictional boundaries to meet RHNA site inventory needs, or that cannot rezone lands within their jurisdiction to densities high enough to meet these site inventory needs.

### **Inconsistency with LAFCo Law and Policies:**

HCD's requirement for all land included in a city's RHNA Housing Site Inventory be within a city's boundaries is a significant departure from past practice and raises significant concern. This is because, if a city cannot accommodate the Housing Site Inventory within its boundaries, annexation of sites outside its boundaries would be required to occur within the planning period even if there are no specific development proposals at the time of annexation. This requirement poses a number of conflicts and complications with LAFCo law and LAFCo policies, and could also negatively affect special districts that detach from affected territories as such territories are annexed by cities. These points are discussed further in the paragraphs below.

While the general requirement of cities annexing land proposed for housing development within the RHNA planning period does not appear to explicitly conflict with State LAFCO law, it does appear to be in conflict with the spirit of various provisions of the law as it could prematurely convert agricultural and open space lands by inducing property owners to remove agricultural land from production well before development is proposed. It could also encourage urban sprawl and/or leap frog development as developers may wish to develop territory that has been annexed into a city's boundaries, but that is not adjacent to other urban development. Specific sections of the State law (Government Code Section 56000 et. seq.) which would appear to conflict with HCD requirements include:

- **Section 56301:** *Among the purposes of a commission are discouraging urban sprawl, preserving open-space and prime agricultural lands, efficiently providing government services, and encouraging the orderly formation and development of local agencies based upon local conditions and circumstances.*
  - **Section 56377(b):** *Development of existing vacant or nonprime agricultural lands for urban uses within the existing jurisdiction of a local agency or within the sphere of influence of a local agency should be encouraged before any proposal is approved which would allow for or lead to development of existing open-space lands for non-open-space uses which are outside of the existing jurisdiction of the local agency...*
  - **Section 56668:** *Factors to be considered in the review of a proposal shall include, but not be limited to, all of the following:*
    - (d) *The conformity of both the proposal and its anticipated effects with both the adopted Commission policies on providing planned, orderly, efficient patterns of urban development, and the policies and priorities set forth in Section 56377.*
    - (e) *The effect of the proposal on maintaining the physical and economic integrity of agricultural lands....*
  - The State law includes a number of provisions related to territories located within farmland security zones and parcels under Williamson Act contract. In order for these territories to be brought into a city's SOI or to be annexed to a city, certain circumstances must exist and/or the Commission must be able to make certain findings. Additionally, in order for a city to annex parcels under Williamson Act contract, it must either succeed to the contract or the contract must be cancelled. The presence of these contracts, which provide property owners a benefit in the form of a lower property tax assessment, could complicate the HCD requirement to annex lands identified within a City's Housing Inventory. It could also negatively affect property owners in that if the annexing city protested the contract, and cancels the contract against a property owner's wishes, the land will be assessed at a higher rate.
  - The HCD requirement for all housing sites to be located within the jurisdiction's boundaries would also appear to ignore provisions of State law related to "protest rights". Property owners and/or registered voters residing within a territory proposed for annexation have a right under State law to protest annexation and/or detachment of their property. If a majority of property owners owning 50% or more of the property value in the affected territory in uninhabited annexations, or 50% or more of registered voters residing within the affected territory in inhabited annexations protest the annexation, the annexation is terminated.
- Even absent other provisions of State law identified above, which appear to conflict with the HCD requirement, a successful protest(s) could make it impossible for a city to comply with the HCD requirement. Should an application for a change of organization be terminated as a result of a successful protest, there appears to be no guidance for cities as to how they would be considered in compliance with its RHNA obligations if required to annex additional lands to provide for additional future housing opportunities.

- Additionally, as reported by the cities, HCD appears to have taken a position that it is the responsibility of the cities to ensure that they are able to annex territories necessary to satisfy the RHNA requirement, regardless of statutory or other obstacles that may limit a city's ability to successfully annex additional territories. Included among these potential limitations is the fact that the Commission has statutory authority to approve, deny, or modify reorganization proposals at its discretion. It is not known if HCD, in crafting its requirement, considered LAFCo law and the Commission's lawful discretionary authority as it pertains to reorganization proposals and how this authority may limit a city's ability to annex additional territory.
- Staff does note that while the State law (Section 56001) states that "*providing housing for persons and families of all incomes is an important factor in promoting orderly development*", it does not appear to be necessary for cities to annex lands to be used for housing well prior to the need for such housing and before any development is proposed.
- Staff also notes that the State law requires that the Commission consider various factors as it reviews each proposal, which include "*The extent to which the proposal will affect a city or cities and the county in achieving their respective fair shares of the regional housing needs as determined by the appropriate council of governments . . .*" (Section 56668(l)). This language, however, merely identifies regional housing needs as one of many factors that the Commission must consider and does not suspend, or in any way change, other findings that the Commission must make, or procedures it must follow, under LAFCo law.

The relationship between the HCD requirement and Fresno LAFCo's policies is also of some concern as they are in direct conflict, both explicitly and in spirit, as discussed below:

- **Fresno LAFCo Policy Section 103-03:** *Annexation proposals to cities or districts providing urban services to undeveloped or agricultural parcels shall show that **urban development is imminent** for all or a substantial portion of the proposal area; that urban development will be contiguous with existing or proposed development; and that a planned, orderly, and compact urban development pattern will result. Proposals resulting in a leap-frog, non-contiguous urban development patterns shall be discouraged (emphasis added).*

As indicated above, the HCD requirement may require cities to annex territories even where there are no development proposals in order to bring such territories into the cities' boundaries. This clearly conflicts with LAFCo's policy that development "be imminent". Additionally, as discussed above, if territories are annexed to cities without specific development proposals, it is conceivable that leap-frog, non-contiguous development patterns will result in conflict with LAFCo policies that support efficient extension of services.

- **Fresno LAFCo Policy Section 210-01:** *Proposal is consistent with adopted spheres of influence and does not conflict with the goals and policies of the Commission.*

As discussed above, the HCD requirement appears to be in conflict with provisions of the State law related to preserving agricultural and open space lands. Considering that many LAFCo policies are modeled on or reiterate

provisions of the State law verbatim, the HCD requirement would also be in conflict with LAFCo policies related to preserving agricultural and open space lands. These include Policy Sections 101-05, 103-01, 103-02, and 104-01.

- **Fresno LAFCo Policy Section 210-06:** *Proposal shows that there is existing substantial development or gives indication of future development, thereby requiring urban services. If no existing substantial development, a condition assuring that substantial development will occur upon annexation shall be made a part of the proposal”* (emphasis added).

As stated, the HCD requirement could result in annexation of lands where no development proposals exist. Since it is anticipated that the sum of all lands to be annexed in order to comply with the HCD requirement would not be developed until at least the end of the planning period, many reorganizations would not be completed within the one year time limitation required by the State law and would require one or more extensions before this condition could be satisfied. If the Commission chose to impose this condition, the resulting delay in annexation may not be considered acceptable to HCD as the affected territories would not necessarily be annexed in a timely manner.

- **Fresno LAFCo Policy Section 102-04** concerns fire transition agreements. As discussed within this Section, the Commission *has had the long-standing practice of imposing as a condition for approval transition agreements between cities and affected fire protection districts where there are annexations to the cities and detachments from the affected fire protection districts and such reorganizations significantly and adversely affect such fire protection districts.*

The Fresno County Fire Protection District has transition agreements in effect with eight cities at this time. These agreements specify that revenues which would have accrued to the District shall be transferred from the annexing city to the District after the end of the fiscal year in which the city starts to receive the city’s apportionment of the *ad valorem* real property tax revenue generated from the newly annexed territory. The total amount of revenue to be transferred from the city to the District can be quite significant, as it can be up to 90% of the revenues that would have been received by the District for the next ten years (had no reorganization taken place) due payable to the District in a lump sum within 60 days.

The new HCD requirement may complicate these agreements. Staff understands that the transition fees are generally borne by the developer proposing the reorganization. If there is no development proposed on land that the city seeks to annex solely to meet HCD’s requirement, the city will be required to bear the cost of the fire transition fee without any expectation of being able to recoup this cost in the near future, either directly by a developer or by increased tax revenues that would be produced by increased property values from development.

Additionally, it must be considered that, in this scenario, the District’s revenue could also be reduced in the long term. This is because absent an annexation, the District would have continued to collect tax revenues for perhaps a number of additional years and the District would still have received the fire transition fees at the time the property was proposed for development. It would appear that neither the city nor the District gain in these circumstances.

It is possible that the fire transition agreements could be revised to reflect this new HCD requirement, and to minimize its negative impacts of the HCD requirement. Revision of these agreements is entirely up to the respective cities and the district, however, as LAFCo is not a party to these agreements.

- Other special districts could conceivably experience lost revenue, and their customers could experience a loss of services due to this new HCD requirement. Some districts have a long standing practice of detaching from territories as they are annexed by a city. Many districts also have a practice of not providing service to territories outside their boundaries. Where a property is annexed, but no development is proposed, that property owner may be precluded from continuing to receive district services even if that owner desires to continue receiving the district's services. Additionally, many special districts receive a portion of the annual property tax from those territories within their boundaries. This revenue would be prematurely lost to detaching districts as a result of HCD's annexation requirement. Staff is unaware of how many special districts the HCD requirement could impact in this way.
- Staff also notes that HCD's requirement for annexation would conflict with the MOU between the cities and the County of Fresno if there was not any development proposed in conjunction with the annexation. The MOU specifies that, if the area proposed for annexation is not already substantially developed, at least 50% of the area proposed for annexation must have either an approved tentative subdivision map (for single-family residential development) or an approved site plan (for uses other than single-family residential).

While this is not specifically a LAFCo issue (since LAFCo is not party to the MOU), the County's "50% Rule" supports LAFCo's objectives of preserving agriculture and open space as it helps to minimize premature conversion of such land to urban uses thru "speculative annexations". In order to comply with HCD's annexation requirements, this portion of the County/Cities MOU would have to be revised and, in staff's opinion, would remove an important tool for helping to preserve agriculture and open space and to promote logical urban service area boundaries.

Staff has been in contact with a number of other LAFCo's to determine whether similar concerns have been identified by cities within their respective counties. Based upon their responses, it appears that similar concerns have been noted, though the issues identified above do not appear to be uniform to all cities. As a result, it is uncertain whether or not HCD staff, working with Fresno County and its cities, is interpreting certain statutes or regulations such that the new HCD requirement is being applied fairly and equally to all jurisdictions.

Staff has also contacted the California Association of Local Agency Formation Commissions (CALAFCO) concerning this issue. The CALAFCO Executive Director stated that, after being informed of this issue, he contacted HCD and that he plans to meet with HCD staff in coming weeks. Additionally, CALAFCO intends to form a task force made up of LAFCo Executive Officers from throughout the State, including Fresno LAFCo's Executive Officer, to include in this meeting to ensure these concerns are fully addressed.

Given the various concerns identified above, and as a prelude to the future meeting with HCD, staff believes it would be appropriate to formally notify HCD of Fresno County Governments concerns at this time. Staff has prepared a formal response (Attachment "A") identifying identified concerns for the Chair's signature.

**Recommended Actions:**

Authorize the Chairman to sign the attached letter and send it to HCD expressing LAFCo's concerns of the conflicts that exist between State law and local adopted policies with HCD annexation and zoning requirements of local cities.

November 5, 2008

Lynn L. Jacobs, Director  
Department of Housing and Community Development  
1800 Third Street  
Sacramento, CA 95811-6942

Dear Ms. Jacobs:

Subject: Identified Conflicts Existing Between State Law/LAFCo Adopted Polices and Department of Housing and Community Development Requirements

As the Chairman of the Fresno Local Agency Formation Commission (LAFCo), I am writing to express LAFCo's concern regarding the Department of Housing and Community Development's (HCD) implementation of the Housing Element requirements, which appear to be in conflict with State law and Fresno LAFCo adopted policies. We understand that HCD has conditioned its approval of local Housing Element updates upon the following:

- Identify all housing sites to be included within the city's inventory of new dwelling unit sites pursuant to the city's Regional Housing Needs Allocation (RHNA).
- All housing sites identified in the inventory must be located within the city's corporate boundaries and must be appropriately zoned for the designated housing type.
- If housing sites identified in the inventory are not already within the city's corporate boundaries, the housing element must include a plan identifying how the city will facilitate annexing and appropriately zoning these sites early within the planning period. (We understand that "early within the planning period" means that the annexation and zoning must be completed within two years following certification of the housing element.)

It is this last point that causes LAFCo significant concern. This is because a city that cannot accommodate the RHNA Housing Site Inventory within its existing corporate boundaries would be required to annex sites within HCD's specific time requirement, even if there is not a specific development proposal at the time of annexation. This requirement poses a number of potential conflicts and complications related to State Law and Fresno LAFCo's policies, and could also negatively affect special districts, as such annexed territory may detach from special districts. These concerns are addressed more thoroughly below.

LAFCo is governed by the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (LAFCo Law) found in Government Code Section 56000 *et. seq.* Pursuant to Government Code Section 56301, LAFCo is charged with *discouraging urban sprawl, preserving open-space and prime agricultural lands, efficiently providing government services, and encouraging the orderly formation and development of local agencies...*

Additional Sections of the Government Code include:

- Government Code Section 56377(b): *Development of existing vacant or nonprime agricultural lands for urban uses within the existing jurisdiction of a local agency or within the sphere of influence of a local agency should be encouraged before any proposal is approved which would allow for or lead to development of existing open-space lands for non-open-space uses which are outside of the existing jurisdiction of the local agency...*
- Government Code Section 56668: *Factors to be considered in the review of a proposal shall include, but not be limited to, all of the following:*
  - (d) *The conformity of both the proposal and its anticipated effects with both the adopted Commission policies on providing planned, orderly, efficient patterns of urban development, and the policies and priorities set forth in Section 56377.*
  - (e) *The effect of the proposal on maintaining the physical and economic integrity of agricultural lands...*

While these provisions of the State law do not explicitly prohibit cities from annexing land where there is no development proposed, taking such an action would appear to conflict with the purpose of these provisions as it would prematurely bring agricultural and open space lands into a city's jurisdiction, perhaps inducing property owners to remove (sometimes prime) agricultural lands from production well before development is proposed. It could also encourage urban sprawl and/or leap-frog development as developers may wish to develop territory that has been annexed into a city's boundaries, but which is not adjacent to other urban development.

While we note that the State law does state that *"providing housing for persons and families of all incomes is an important factor in promoting orderly development"* (Section 56001) and that LAFCo must factor the extent to which the proposal will affect a city's fair share of regional housing needs [Section 56668(l)], it does not appear to be necessary for cities to annex lands to be used for housing well prior to the need for such housing and before any development is proposed.

It is significant to note that, while HCD appears to be requiring cities to have adequate land within their corporate boundaries early in the planning period, this requirement does not appear to take into account certain requirements that are beyond a city's control as it relates to facilitating annexation of additional territory. The State law has granted LAFCo the sole and exclusive authority to approve, deny, or modify annexations and other proposed changes of organization at LAFCo's discretion

(Government Code Section 56100). Therefore, while a city may apply to LAFCo to annex additional territories, it is conceivable that LAFCo will deny such a proposal pursuant to provisions of the State law and/or pursuant to LAFCo's policies and procedures.

Addressing LAFCo policies, the State law (Government Code Section 56375) grants LAFCo the power to "adopt written procedures for the evaluation of proposals" and to "adopt standards for any of the factors enumerated in Section 56668" which enumerates 15 different factors for consideration. Included among these factors [Section 56668(d)], is "the conformity of both the proposal and its anticipated effects with both the adopted commission policies on providing planned, orderly, efficient patterns of urban development, and the policies and priorities set forth in Section 56377." (Section 56377(b) is identified above.)

Pursuant to these policy provisions and the goals of the State law, the Commission has adopted policies that would likely be in conflict with HCD's requirement for a city's housing inventory sites to be included within its corporate boundaries if a city is forced to annex lands that are not proposed for development at the time of annexation. Included among these policies are Policy 103-03, which requires that urban development be imminent for all or a substantial portion of an area proposed for annexation; and Policy 210-06, which requires that if a site proposed for annexation is not already substantially developed, the Commission will place a condition on its approval that assures substantial development will occur upon annexation. Applying this condition to a proposal would not allow a city to annex sites where there are no development proposals.

Also of significance are the due process "protest rights" granted by State law to property owners and registered voters residing within a territory proposed for annexation. If a majority of property owners owning 50% or more of the property value in the affected territory in "uninhabited" annexations (areas containing fewer than 12 registered voters), or 50% or more of registered voters residing within the affected territory in "inhabited" annexations (areas containing 12 or more registered voters) protest the annexation, then the annexation is automatically terminated. If this occurs, then a city cannot annex that territory and may not reapply to annex the same or substantially similar area for one year. Consequently, if a proposal is successfully protested, a city will not have annexed the affected land and would be out of compliance with HCD's requirements.

HCD's annexation requirement could also negatively impact special districts and property owners. Many special districts detach territories as they are annexed by cities, and, consequently, stop providing services to those territories. If there is no development proposed for the annexed territory, however, and the property owner desires to continue receiving district services, that owner may be precluded from continuing to receive district services and may be unable to continue to use the property in the same way as prior to the annexation, if district services are necessary to continue the existing use.

Similarly, the premature annexation of territories before development is proposed could negatively affect special districts and the County of Fresno as it relates to tax revenues, which would no longer be received by these agencies.

We understand that the Executive Director of the California Association of Local Agency Formation Commissions (CALAFCO) has arranged to meet with HCD staff in the near future to discuss the concerns identified in this letter. We hope that HCD will reconsider requiring cities to include all sites identified in their RHNA housing inventory within their corporate boundaries, where such a requirement would force a city to annex lands even when there is no proposed development.

If you have any questions, please do not hesitate to contact the Fresno LAFCo Executive Officer, Rick Ballantyne at (559) 495-0604.

Sincerely,

VICTOR LOPEZ, Chairman  
Fresno Local Agency Formation Commission

Cc: Cathy E. Cresswell, Deputy Director, Department of Housing and Community  
Development  
Ken Price, LAFCo Counsel  
Assemblyman Juan Arambula  
Bill Chiat, Executive Director, CALAFCO  
Tina Sumner, City of Clovis  
Corrina Nunez, City of Fresno  
Terry Schmal, City of Kingsburg  
Dianne Guzman, City of Reedley  
Ralph Kachadourian, City of Sanger  
Greg Martin, City of Selma  
Will Kettler, County of Fresno  
Clark Thompson, Fresno COG  
Jeff Roberts, BIA