

REPORT

Elections Code Section 9111 Report

Responsible Growth Initiative

Prepared for:



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Seifel
CONSULTING INC.

221 Main Street
Suite 420
San Francisco CA
94105

415.618.0700
fax 415.618.0707
www.seifel.com

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Executive Summary

Elections Code Section 9111 Report

Napa County Responsible Growth Initiative

The Responsible Growth Initiative would reenact and amend a number of the County's plans and regulations in order to retain the current 1 percent limit on residential growth in the unincorporated area of Napa County. If approved, the Responsible Growth Initiative would amend and/or reenact portions of the Land Use, Growth Management System, and Housing Elements of the Napa County General Plan as well as sections of the Napa County Code regarding affordable housing and maximum building height. The Initiative would preclude the Board of Supervisors from eliminating or modifying residential growth limits, affordable housing requirements, or the 35-foot, three-story maximum building height limit by requiring a vote of the people for any changes to these regulations.

Unlike the original Measure A, the Initiative does not contain a provision to expire, and thus, the Initiative would remain in effect forever. Following is a summary of the Initiative's potential planning-related, fiscal and legal impacts.

Short Term Planning-Related Impacts of the Responsible Growth Initiative

The short term planning-related impacts of the Responsible Growth Initiative are anticipated to be modest because the Responsible Growth Initiative essentially asks the voters to enact or adopt existing sections of the County's General Plan and ordinances (with some exceptions).

- The Responsible Growth Initiative would not immediately result in internal inconsistencies in the County's General Plan that are substantial enough to violate California General Code Section 65300.5.
- The Responsible Growth Initiative would not significantly impact the proposed 2008 General Plan Update, although it would perpetuate some redundancies and leave in place more complicated language that the proposed General Plan Update would eliminate.
- The Responsible Growth Initiative would not significantly affect the tasks involved in preparation of the 2009 Housing Element Update and is unlikely to constrain the methods—programs, policies and sites—available to the County to meet its Regional Housing Needs Assessment (RHNA) in that timeframe. Thus, the Initiative is unlikely to impact the County's ability to complete a legally compliant Housing Element Update by June 2009.
- Short-term impacts of the Responsible Growth Initiative on vacant land within the County are likely to be modest given that very few areas within the County are designated for housing at a density that would require exemption from the 1 percent limit. In those few locations, the Initiative would tend to discourage property owners from pursuing market-rate housing projects unless they could do so through annexation to one of the incorporated jurisdictions.

- Two applications pending with the Napa County Department of Conservation, Development and Planning could be adversely affected by the Initiative. One is an application for approval of residential development and related changes within the Planned Development (PD) zoning district in the unincorporated community of Angwin. The second is a proposal for a General Plan amendment to permit high-density residential development and other uses on the Napa Pipe site south of the City of Napa. Long Term Planning-Related Impacts of the Responsible Growth Initiative

Long term planning-related impacts of the Responsible Growth Initiative would be more severe. The Initiative's lack of a provision to expire and its preclusion from allowing the Board of Supervisors to modify residential growth limits, affordable housing requirements or existing height limits may in the long term inhibit the County from complying with state law concerning the provision of housing.

- The Board of Supervisors's inability to make modifications to the Growth Management System could make it infeasible for the County to update its Housing Element pursuant to state law in future RHNA cycles. As a result, the County could face additional litigation from housing advocates, including possible challenges to Measure J and policies preventing residential growth around Napa County Airport.
- The Initiative could hinder the development and preservation of affordable housing by inhibiting the development of mixed-income multifamily housing.
- The Initiative would increase the likelihood that the County would need to enter into agreements with one or more incorporated jurisdictions to meet its housing needs in the future, similar to the 2004 agreements with the Cities of Napa and American Canyon.
- By constraining the possibilities for multifamily residential development in the unincorporated County and increasing the likelihood of future housing agreements with incorporated jurisdictions, the Responsible Growth Initiative would also increase the likelihood of further annexations of unincorporated land by incorporated jurisdictions.
- These constraints could also result in the development of sites in unincorporated area into non-residential uses, increasing employment and increasing the need for housing. The resulting jobs/housing imbalance could negatively impact the County's ability to attract and retain future businesses and employment in the future, as demand for new workforce housing would outstrip supply.

Fiscal Impacts

The main short term fiscal impact of the Responsible Growth Initiative would be litigation costs that the County could incur in defending itself from a potential lawsuit. Substantial legal costs would likely be associated with initial challenges to the Initiative's legality. This cost would likely be similar to the defense of Measure J in 1990, which cost the County in excess of \$400,000 (or approximately \$545,000 in 2007 dollars).

The County will likely experience long term adverse fiscal impacts. The County could face significant fiscal impact should it be required to pursue RHNA transfer agreements and annexation agreements in the future. This report summarizes the cost of prior RHNA transfer agreements and discusses the costs associated with annexations.

Legal Analysis

The legal analysis prepared by Nossaman Guthner Knox & Elliott, LLP indicates that the proposed Responsible Growth Initiative is preempted by existing state law and is likely to be invalidated by the courts. The legal analysis concludes that the Initiative suffers from a number of potentially fatal legal flaws, as follows:

- Intrusion into the requirement mandated by state law that the Housing Element be periodically reviewed and updated by the Board of Supervisors.
- Inconsistency of the Initiative with certain requirements related to the provision of housing in which the State has preempted the field.
- Failure of the Initiative proponents to circulate the full text of the plans and ordinances that the Initiative purports to amend.
- Inclusion of more than one subject matter in the Initiative in violation of the “single subject” requirement.
- Violation of certain terms of the court-approved settlement of the DeHaro lawsuit.

If the Initiative is placed on the ballot and passes, it could subject the County to various penalties for violation of state affordable housing laws. Among the various penalties are court-ordered injunctions prohibiting the County from issuing building permits and approving subdivision maps, zone changes, use permits, and other discretionary land use applications.

A. Introduction

This report evaluates the potential impacts of the “Responsible Growth Initiative,” an initiative that has qualified for the ballot in Napa County, California. The full text of the proposed Initiative is included as Appendix A.

If passed, the Initiative would amend and/or reenact portions of the Land Use, Growth Management System, and Housing Elements of the Napa County General Plan. It would also amend and/or reenact Napa County Health and Safety Code Sections 8.02.010–8.02.030, Housing Allocation Program, as well as Napa County Zoning Code Section 18.104.120, Maximum Building Height. The specifics of the Initiative are summarized in Section C, Description of Responsible Growth Initiative, and detailed in Appendix B.

When an initiative is circulated and qualifies for the ballot, Section 9111 of the California Elections Code authorizes a County Board of Supervisors to request a report regarding the potential impacts of the initiative prior to deciding whether to adopt the initiative or to order an election of the voters to approve or reject. Section 9111 is reproduced in full in Appendix C.

On January 8, 2008, the Napa County Board of Supervisors requested that County staff and consultants prepare an analysis of the proposed Responsible Growth Initiative specifically addressing the Initiative’s potential impacts on land use in unincorporated Napa County, potential fiscal impacts, and possible legal issues associated with the Initiative’s language and implementation. This report has been prepared pursuant to Board Resolution 08-05 (included as Appendix D) and will be presented to the Board of Supervisors at its regularly scheduled meeting of February 5, 2008.

B. Scope and Assumptions

The analysis of policy and land use issues included in this report is conducted under the assumption that the provisions proposed by the Responsible Growth Initiative are adopted and not subsequently overturned following judicial review. Pursuant to direction from the Board of Supervisors, the policy and land use analysis addresses the following three implications of the Responsible Growth Initiative:

- Impact on the use of land, in particular the development and use of vacant parcels.
- Impact on the availability and location of housing and the ability of the County to meet its regional housing needs.
- Impact on the County's General Plan, proposed General Plan Update, Housing Element, Housing Element Update, and specific plans.

This report also includes analysis of the fiscal impacts of the proposed Initiative as well as legal analysis prepared by the law firm of Nossaman, Guthner, Knox and Elliott, LLP at the request of the County Counsel. The legal analysis is included in Appendix E.

C. Description of Initiative

Citing concerns about unrestricted residential growth and urban sprawl in the unincorporated area of Napa County, the proponents of the Responsible Growth Initiative propose to reenact and amend a number of the County's growth management regulations in order to:

- Retain the current 1 percent limit on residential growth in the unincorporated area of Napa County.
- Preclude the Board of Supervisors from eliminating or modifying the residential growth limits, the affordable housing requirements, or the existing 35-foot, three-story height limit by requiring voter approval of any changes to these regulations.

As noted, the Initiative would accomplish these actions by amending and/or reenacting portions of the Land Use, Housing and Growth Management System Elements of the Napa County General Plan; the County's Housing Allocation Program found in Title 8 of the Napa County Code; and the portion of the County's Zoning Code governing maximum building height. Detailed summaries of these amendments and reenactments are included in Appendix B.

Moreover, the Initiative authorizes and directs the County to amend any element or provision of the General Plan and Zoning Code, and any and all other County ordinances, policies and programs as soon as possible to ensure consistency with the measures of the Responsible Growth Initiative. If passed, the provisions of the Initiative will supersede any General Plan and Zoning Code provisions adopted between the submission of the Responsible Growth Initiative's Notice of Intention and its adoption. Except as expressly provided in the Initiative, a popular vote would be required to amend or repeal any of the Initiative's provisions. Finally, unlike the original Measure A, the Initiative does not include an expiration date.

D. Background

1. Growth Management in Napa County

This section provides background information about the history and substance of growth management efforts in unincorporated Napa County. Measure A and the Growth Management System form the basis of the regulations concerning residential growth that the proposed Responsible Growth Initiative would reenact. Measure J and the County's agricultural preservation policies, along with regulation of the Airport Industrial Area, comprise additional constraints to residential development in the County's unincorporated area.

a. Measure A and the Growth Management System

History

Voters adopted the Napa County Slow Growth Initiative (Measure A) on November 4, 1980. Measure A called for limiting the annual number of residential building permits issued in unincorporated Napa County to reflect an annual population growth rate no higher than that of the Bay Area region, but in no event to exceed 1 percent. It also stipulated that at least 15 percent of new housing units permitted each year be affordable to persons of average or below-average income. The provisions of Measure A were enacted in the Growth Management System Element of the current Napa County General Plan.

Measure A expired in December 2000. However, the Napa County Board of Supervisors reaffirmed the Measure's growth management policies through the adoption that same year of the Housing Allocation Program in Napa County Code Chapter 8.02 (via Ordinance No. 1178). In 2004, the Board of Supervisors amended the Growth Management System Element and Housing Allocation Program to comply with federal and state land use and fair housing law, as well as to be consistent with the 2004 update to the County's Housing Element. The pending General Plan Update, which was presented to the Planning Commission and the Board of Supervisors on January 15, 2008, includes the existing Growth Management System (as amended in 2004) as a policy in the proposed Agricultural Preservation & Land Use Element.

Provisions of the Growth Management System

The Growth Management System Element and Housing Allocation Program (hereafter GMSE) allow for a fixed number of new residential building permits annually in unincorporated Napa County, such that the number of permits is equal to 1 percent of the existing housing inventory. This number is updated with each decennial U.S. Census and at interim dates specified in the GMSE. The GMSE exempts non-residential development and some limited types of residential construction, including secondary dwelling units. Residential building permits subject to the GMSE are divided into four categories:

- Category 1 permits are for homes built by or for an individual permit holder who is building only one dwelling unit per year. An example would be the construction of one single family home by its owner/occupier or his or her contracted builder.
- Category 2 permits are issued to builders for the construction of more than one home per year, but for projects that do not require discretionary review. An example would be a small-scale homebuilder developing existing building lots.
- Category 3 permits are issued for builders constructing two or more dwelling units that require discretionary review (e.g., subdivision plan, parcel map or use permit). An example would be a new housing subdivision or multifamily development.
- Category 4 permits are for affordable housing units. In the original GMSE, these units must be affordable to persons earning average or below average income. Subsequent amendments have modified this provision to mandate affordability to households of moderate or less than moderate income. Also in the original GMSE, these units were required to remain affordable for a period of ten years. Subsequent amendments to the GMSE extended the affordability period to 40 years.

Permits are issued on a first-approved, first-served basis. In the event that the demand for residential building permits outstrips the supply, permits for each category would be issued through a lottery. Permits cannot be transferred upon the sale of a permitted parcel, nor transferred to a different site or dwelling unit.

Any unused permits can be carried over for future use for up to three years. Category 4 Affordable Housing permits carry over indefinitely. At its discretion, the Board of Supervisors may transfer unused permits from one category to another on an annual basis, however unused permits may be added to Category 4, but not subtracted.

b. Other Growth Control Measures: Agricultural Preservation and Airport Industrial Area Regulation

Napa County's Agricultural Lands Preservation Initiative, also known as Measure J, was approved by voters on November 6, 1990. Measure J prevents the redesignation of parcels classified as Agricultural Resource (AR) or Agricultural Watershed and Open Space (AWOS) at the time Measure J passed for any other use or the subdivision of such parcels into parcels of less than 40 to 160 acres through the year 2020 (30 years). Roughly 90 percent of the County is designated AR or AWOS, and subject to Measure J.

Redesignation of AR and AWOS land is only permissible if approved by a popular vote, by vote of the Board of Supervisors under very limited conditions, or through annexation of the land in question by an incorporated jurisdiction. Measure J was enacted via changes to the Land Use Element of the Napa County General Plan. It was challenged by the lawsuit *DeVita v. County of Napa*, which was appealed to the Supreme Court of California and ultimately upheld in 1995 (Supreme Court of California Case No. S037642).

The Airport Land Use Compatibility Plan, which applies to the area around Napa County Airport, also acts to constrain residential growth in the unincorporated area of Napa County. To comply with the Airport Land Use Compatibility Plan, the Airport Industrial Area Specific Plan that governs uses near the airport precludes residential development, which is considered to be incompatible with airport operations and other industrial activities in that area.

2. Population and Residential Growth in Napa County

As the proposed Initiative is focused on retaining indefinitely County policies regulating residential development, a review of population and household growth statistics for Napa County is relevant, as is history of residential building permit activity under the County's growth management policies.

a. Population and Household Growth

According to the U.S. Census Bureau, the population of Napa County as a whole grew 1.1 percent annually, from 99,199 in 1980 to 110,765 in 1990. Over the same period, population in the unincorporated area declined slightly from 30,938 to 28,500 (an annual decline of 0.8 percent). Between 1990 and 2000, both of these trends continued as Napa County gained population at an annual rate of about 1.2 percent, while the unincorporated area population declined by an annual rate of 0.3 percent. According to the Association of Bay Area Governments (ABAG), from 2000 to 2005 the Napa County population grew by 1.5 percent annually from 124,279 to 133,700, while the unincorporated area gained only 372 residents, or less than 0.5 percent annually. Please refer to Table 1 below.

**Table 1
Population in Napa County 1980–2005**

	Population				Annual Growth		
	1980	1990	2000	2005	1980–1990	1990–2000	2000–2005
American Canyon ^a	5,712	7,706	9,813	14,600	3.04%	2.45%	8.27%
Calistoga	3,879	4,468	5,190	5,200	1.42%	1.51%	0.04%
Napa	50,879	61,842	72,781	76,400	1.97%	1.64%	0.98%
St. Helena	4,898	4,990	5,951	6,100	0.19%	1.78%	0.50%
Yountville	2,893	3,259	2,916	3,400	1.20%	-1.11%	3.12%
Unincorporated Area	30,938	28,500	27,628	28,000	-0.82%	-0.31%	0.27%
Napa County	99,199	110,765	124,279	133,700	1.11%	1.16%	1.47%

a. Prior to 1992, American Canyon was an unincorporated Census Designated Place.

Sources: 1980–2000 from U.S. Decennial Census (STF 3), 2005 estimates from ABAG (Projections 2007).

Similarly, the number of households (which is generally equated with the number of dwelling units) countywide grew 1.2 percent annually from 36,624 in 1980 to 41,185 in 1990, while declining in the unincorporated area by less than 0.25 percent annually, from 9,917 to 9,708. In the period between 1990 and 2000, the number of households in Napa County overall grew modestly from 41,185 to 45,395, or about 1 percent. In the unincorporated area essentially no growth in households occurred, as the unincorporated area of Napa County added only 32 households (0.04 percent). Between 2000 and 2005, the number of households grew roughly 1.7 percent annually on a countywide basis from 45,395 to 49,270, while growing at an annual rate of less than 1 percent in the unincorporated area from 9,746 to 10,090 households. Please refer to Table 2 for information on households.

Table 2
Households in Napa County 1980–2005

	Households				Annual Growth		
	1980	1990	2000	2005	1980–1990	1990–2000	2000–2005
American Canyon ^a	2,285	2,647	3,164	4,870	1.48%	1.80%	9.01%
Calistoga	1,791	1,953	2,029	2,080	0.87%	0.38%	0.50%
Napa	19,714	23,830	27,032	28,730	1.91%	1.27%	1.23%
St. Helena	2,146	2,156	2,378	2,420	0.05%	0.98%	0.35%
Yountville	771	891	1,046	1,080	1.46%	1.62%	0.64%
Unincorporated Area	9,917	9,708	9,746	10,090	-0.21%	0.04%	0.70%
Napa County	36,624	41,185	45,395	49,270	1.18%	0.98%	1.65%

a. American Canyon household total estimated based on countywide average of 2.5 persons per household.

Sources: 1980 from California Department of Finance, 1990–2000 from U.S. Decennial Census (STF 3), 2005 estimates from ABAG (Projections 2007).

These population and household trends indicate consistently higher growth rates in both population and households in the urbanized areas of Napa County, in keeping with the County of Napa policies directing growth toward the incorporated area. These numbers also confirm that the County’s policies have been effective in constraining the rate of residential growth in the unincorporated area to 1 percent or less.

b. Building Permits Issued

Based on an analysis of the available data on building permits, the County generally has not had to conduct the lottery called for when the demand for residential permits exceeds the limits set forth in the Growth Management System. The fact that the building permits requested has not exceeded the allocations for any of the permit allocation categories indicates the likelihood that other constraints to development (e.g., land supply and development costs) are limiting residential growth. Also, almost 90 percent of the building permits issued for new dwelling units have been for Category 1 units (1,454 of the 1,610 permits). The remaining permits issued are as follows: 4 percent for Category 2 units, 4 percent for Category 3 units, and 2 percent for Category 4 units. Please refer to Table 3 on the following page for building permit data.

The last three years have been no exception, and housing production in the County's unincorporated area has primarily involved the construction of single dwelling units by owner/builders. During this time period, no Category 3 or Category 4 permits have been issued for the construction of multifamily or affordable housing units in unincorporated Napa County. Also in this time period, 257 new dwelling permits have been issued, with 189 permits (74 percent) issued through the Growth Management System and 68 permits (or 26 percent) issued through permits exempted from the system, such as second units and guest cottages. Please refer to Table 4 for the specific data.

**Table 3
New Dwelling Unit Permits Issued in Unincorporated Napa County 1980–2007***

	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993
Category 1	80	-	67	100	80	57	77	101	85	77	80	80	-	75
Category 2	16	-	-	-	-	0	0	2	4	4	3	16	-	-
Category 3	16	-	-	-	-	3	6	8	0	0	4	32	-	-
Category 4	6	-	-	-	-	0	0	0	0	0	0	17	-	-
TOTAL	118	-	67	100	80	60	83	111	89	81	87	145	-	75

	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Category 1	38	35	44	45	49	47	64	-	-	-	-	75	53	45
Category 2	0	0	0	0	3	2	2	-	-	-	-	2	6	8
Category 3	1	0	0	0	0	0	0	-	-	-	-	0	0	0
Category 4	0	0	4	0	0	0	0	-	-	-	-	0	0	0
TOTAL	39	35	48	45	52	49	66	-	-	-	-	77	59	53

* 1980–2000, as defined under Voter Initiative Measure A (enacted in 1980 and expired December 31, 2000); 2000–2004, as defined in Ordinance 1178; 10/20/2004–present, as defined in Resolution 04-180. Data is currently unavailable for the years 1981, 1992, and 2001–2004.

Source: Napa County Department of Conservation, Development and Planning, January 2008.

**Table 4
New Dwelling Unit Permits Issued in Unincorporated Napa County
2005–2007**

	Annual Permit Allocation*	Permits Issued		
		2005	2006	2007
Category 1	69	75	53	45
Category 2	14	2	6	8
Category 3	14	0	0	0
Category 4	17	0	0	0
TOTAL Applicable Units	114	77	59	53
Exempt Units**		22	17	29
TOTAL UNITS		99	76	82

*As defined in Board Resolution No. 04-180, Growth Management System.

**Second units, guest cottages, commercial, replacement, and grandfathered units are not included in the Growth Management System.

Source: Napa County Department of Conservation, Development and Planning, January 2008.

3. Housing Element of the Napa County General Plan

In analyzing the impacts of the proposed Responsible Growth Initiative, it is important to understand current law and practice regarding the Housing Element of the County’s General Plan. As one of the seven state-mandated elements of the General Plan, the Housing Element is the County’s primary housing policy document. Accordingly, the Housing Element identifies and analyzes the existing and projected housing needs and establishes policies and programs for the preservation, improvement and development of housing.

Pursuant to state law (California Government Code §65588), jurisdictions are required to update their Housing Element at least every five years. Updated Housing Elements are required to be certified by the State of California Department of Housing and Community Development (HCD). HCD will not certify a Housing Element unless and until it complies with state and federal fair housing laws.

Some public agencies and private foundations will not provide funding for housing and redevelopment-related projects to jurisdictions that do not have a certified Housing Element. Jurisdictions lacking certified Housing Elements have also faced lawsuits from housing advocates and social equity organizations. The County experienced some difficulty in obtaining HCD certification of its third Housing Element Update and the sufficiency of its Housing Element was successfully challenged by a lawsuit brought by affordable housing advocates in 2003.

a. The Housing Element and the RHNA

An important role of the Housing Element is to identify objectives and sites for housing development that are adequate to accommodate the County’s allocation of regional housing needs, particularly affordable housing. State law sets out a process for determining each local jurisdiction’s fair share of regional housing needs, called the Regional Housing Needs Assessment (RHNA). State law does not require that a jurisdiction actually construct its allocated number of units, however, it does require that sufficient land be available in the jurisdiction to accommodate such development after taking into account governmental and non-governmental constraints on development.¹

In each RHNA cycle, HCD assigns the needed number of new housing units for each region to its regional council of governments. Napa County’s regional council is ABAG. For the period from 1999 to June 30, 2006, ABAG assigned a total of 1,969 dwelling units to the County’s unincorporated area. The 1999–2006 RHNA cycle was later extended to June 30, 2007. This time period is interchangeably referred to as the 1999–2006/7 RHNA cycle or the Housing Element cycle.

b. 2003 RHNA Transfer Agreements with Cities of Napa and American Canyon

Because the County was unable to identify sufficient land in the unincorporated area to accommodate its 1999–2006/7 RHNA allocation, it entered into agreements to transfer part of its allocation to the Cities of Napa and American Canyon. These transfers were authorized under California Government Code §65584(c)(5).

¹ Governmental constraints include land use controls, fees and exactions, on and off site improvement requirements, building codes, permit and processing procedures, and potential constraints on the development or improvement of housing for persons with disabilities.

The County and the City of Napa on October 7, 2003 agreed to the transfer of 664 units from the County's 1,969-unit RHNA allocation to the City (roughly 34 percent). The units were to include 534 units of housing affordable to households with very low, low and moderate incomes, as well as 130 single family and other units affordable to above moderate-income households. In exchange for this transfer, the County agreed to grant the City of Napa a range of financial and other considerations. These conditions are detailed in Section H, Fiscal Impacts.

On October 16, 2003, the County entered into an agreement with the City of American Canyon to transfer a portion of its RHNA allocation to the City. This transfer comprised 394 (20 percent) of the County's 1,969 allocated units at various levels of affordability: 153 very low and low-income units, 117 moderate-income units, and 124 above moderate income units. In exchange, the County agreed to support the City's annexation of 445 acres at four locations in the unincorporated area.

c. DeHaro Lawsuit and 2004 Housing Element Update

On July 30, 2003, a coalition of affordable housing advocates on behalf of two low income residents of the County filed a lawsuit against the County (DeHaro, et al. v. County of Napa, Napa Superior Court Case 26-22255). This lawsuit alleged that the County was in violation of state and federal laws regarding land use planning for the provision of affordable housing and the prohibition of housing discrimination.

The suit was settled out of court under a stipulated judgment/settlement agreement endorsed June 21, 2004 by the Napa Superior Court. As a result of the DeHaro lawsuit, the County pursued a careful and detailed process to update its housing policies and programs to better address the housing needs of residents of all income levels. In 2004, the County adopted an updated Housing Element that was certified by HCD.

d. 2009 Housing Element Update

In preparation for the fourth Housing Element Update, ABAG is in the process of finalizing the County's housing needs determination for the next Housing Element cycle, which ABAG is referring to as the 2006–2014 cycle. Based on the draft 2006–2014 RHNA, the County anticipates a housing needs allocation of about 650 units for the unincorporated area, significantly less than the 1999–2006/7 cycle.

Accordingly, the County is preparing to update its Housing Element by June 30, 2009 in accordance with state law. Since the most recent update was in 2004 and the County's RHNA allocation for the unincorporated area has been reduced, the County does not anticipate substantive changes in its housing policies.

E. Planning-Related Impacts of the Initiative

As indicated earlier in this report, the Napa County Board of Supervisors has requested an evaluation of the potential effects of the proposed Responsible Growth Initiative on planning matters including the following:

- Internal consistency of the County's General Plan, particularly its Housing Element;
- Impact of the Initiative on the use of land and the availability and location of housing, as well as the ability of the County to meet its regional housing needs; and
- Impact of the Initiative on the uses of vacant parcels of land.

The Board has also requested a comparison between the proposed Initiative and the proposed General Plan amendment (known as the 2008 General Plan Update) that is currently pending before the County Planning Commission and the Board of Supervisors.

The potential effects are addressed below by first looking at possible short term impacts, and then at possible long term impacts. Short term impacts are considered to be those that occur between the effective date of the Initiative and the year 2014. Long term impacts are considered those that occur after 2014.

The year 2014 has been selected as a dividing line between short- and long term impacts because it is assumed to be the approximate end of the Regional Housing Needs Assessment (RHNA) cycle pursuant to California Government Code §65588. (See the discussion of the RHNA process earlier in Section D.3 of this report.) As explained earlier, ABAG has informed the County that its RHNA allocation for the current cycle will be approximately 650 units. Allocations in future cycles (after 2014) are unknown.

F. Short Term Impacts

Because the Responsible Growth Initiative with minor exceptions asks the voters to enact or adopt existing sections of the County's General Plan and ordinances (with the exceptions noted in this section and in Appendix B), its short term planning-related impacts would be modest. First and foremost, adoption of the Initiative would preclude the County Board of Supervisors from changing sections of the General Plan and County code included in the text of the Initiative without a vote of the people.

1. Impact on Internal Consistency of the County's Existing General Plan

The Growth Management System of the County's General Plan limits the number of new housing units in the unincorporated area of Napa County by restricting the number of building permits that can be issued in a given year. While this would appear to be inconsistent with Housing Element policies such as "The County will encourage the construction of new affordable units..." (Policy 2b) and "The County will encourage the development of residential units in conjunction with appropriate commercial and industrial uses to correspond with jobs created..." (Policy 5c), the current Housing Element was carefully crafted in 2004 to avoid creating any inconsistencies. The current Housing Element explicitly embraces the Growth Management System: "The County shall allocate housing growth to ensure that the annual rate of growth does not exceed one percent..." (Goal 12). It also explains how the County's Regional Housing Needs Assessment (RHNA) of 1,969 units for the period January 1, 1999 through June 30, 2007 can be accomplished within the constraints of the Growth Management System.

Logically, the Responsible Growth Initiative would not create any inconsistencies within the General Plan to the extent that it would enact or adopt existing sections of the plan. However, where the Initiative proposes language that is different from the existing plan, this language must be examined for the potential to create inconsistencies. Based on a comparison between the Initiative and the current General Plan, substantive modifications to existing County policies and programs included in the Initiative are as follows:

1. The Initiative's description of Category 4 units in Section 3(1)D of the Growth Management System changes the current requirement for units to remain affordable to "persons of moderate or below moderate income for at least 40 years" to "persons of average or below average income for at least ten years." (The Initiative replaces current policy with text from an expired version of the Growth Management System.)
2. The Initiative's section on "timing" in Section 3(4) of the Growth Management System is changed to allow unused Category 1, 2, and 3 allocations to be redistributed by the Board of Supervisors twice per year instead of once per year.
3. The Initiative's section on "affordable" housing in Section 3(5) of the Growth Management System is changed to refer to "persons with average or below average income" and to redefine "average" as "median," restoring text from an older version of the County General Plan. However, policy 4.1 of the Initiative refers to average or below average income and does not redefine average as the median. More recent General Plan documents refer to "persons with moderate or below moderate income." Median income, rather than average income, is the benchmark used by federal and state housing policy.
4. The Initiative's section concerning the distribution of building permits in Section 3(6) of the Growth Management System is changed to include the statement that "the Board of Supervisors may by resolution alter the procedures for conducting the required lottery so long as the revised procedures are in general accord with the system as described..."

Procedural Modifications

The second item above refers to an aspect of the Growth Management System that is referenced solely within the Growth Management System itself. Therefore, this change addressing timing would not create any internal inconsistencies. Similarly, the fourth item refers to procedural implementation of the Growth Management System and would not create any internal inconsistencies when viewed alongside the Housing Element or other elements of the existing General Plan. The legal analysis presented in Appendix E analyzes whether the text provided in this fourth item would create an inconsistency within the Growth Management System itself.

Policy Modifications

The first and third of the items above initially appear to be inconsistent with certain sections of the Housing Element which state:

To better utilize Category 4 permits to facilitate development of housing for lower income households, this Housing Element establishes a program to amend the Growth Management System to restrict eligibility for Category 4 permits to housing units serving households at or below 80 percent of median as the first priority; however, to encourage more Category 4 permits to be used each year, this Element includes a program to relax the criteria for Category 4 permits to expand the permitted income range for units built with Category 4 permits to 120 percent of median income, to encompass all households considered moderate-income, low- and very low-income, if the targeted minimum number of housing units for very low and low-income households has already been achieved... (p. 56–57)

The County will increase the ceiling for Category 4 permits from 100 percent of median to 120 percent of median income. In allocating Category 4 permits, the County will ensure that it reserves an adequate number of permits to accommodate its remaining unmet need for low- and very low-income units prior to allocating Category 4 permits for moderate-income units. (p. 84)

But not with Land Use Element Policy 4.1, which states:

AFFORDABLE HOUSING—At least 15 percent of those dwelling units permitted each year in the unincorporated portion of Napa County shall be capable of purchase or rental by persons with average or below-average income. The average income shall be based on the average income of residents of the County of Napa, based on the most recent United States Census... (p. 2-25)

The apparent inconsistency between language proposed in the Responsible Growth Initiative for inclusion in the Growth Management System and language in the existing Housing Element appears no more or less severe than the current inconsistency between the existing Housing Element (which includes language similar to the existing Growth Management System Element) and the existing Land Use Element. The County has deemed this discrepancy as insignificant, and does not believe it constitutes an internal inconsistency in violation of California Government Code §65300.5 and §65860.

As explained in the legal analysis presented in Appendix E, the possibility exists that the Initiative could be implemented literally, eliminating policies on referenced pages of the Land Use and Housing Elements that are not explicitly reenacted. If this were the case, a group of policies would be replaced by a sole paragraph, having the effect of eliminating several current County policies. See for example where the Initiative replaces all of page 72 of the Housing Element with a single Goal, Goal 12, thereby eliminating all other Goals on that particular page of the Housing Element. This has the potential to create significant internal inconsistencies, necessitating subsequent general plan amendments to reestablish internal consistency.

2. Effect on the 2008 Proposed General Plan Update

The Napa County Board of Supervisors initiated a comprehensive amendment (update) to the County General Plan in 2005, intending to update all sections of the current General Plan except for the Housing Element, which had just been updated in 2004. After substantial community input, a Revised Draft General Plan Update was provided to the Napa County Planning Commission and the Napa County Board of Supervisors for consideration in early December 2007. The public hearing process began on January 15, 2008 and is tentatively scheduled to conclude prior to the June election on the Responsible Growth Initiative with certification of the Final Environmental Impact Report (EIR) and adoption of the General Plan amendment by the Board of Supervisors.

The proposed General Plan Update makes few substantive changes to the existing General Plan, but attempts to make the plan's language more understandable, eliminate redundancies, and better organize its information, goals and policies. For example, in lieu of including existing Land Use Element Policy 4.1 (which is included in the Initiative for adoption by the voters), the General Plan Update combines the existing Growth Management System Element into the new Agricultural Preservation & Land Use Element as Policy Ag/LU-119 (beginning on p. 77 of the December 3, 2007 Draft of the General Plan Update). This policy contains similar wording to that included in the Initiative, as shown below.

Text in Existing General Plan and the Initiative	Text in Proposed General Plan Update
<p>AFFORDABLE HOUSING—At least 15 percent of those dwelling units permitted each year in the unincorporated part of Napa County shall be capable of purchase or rental by persons with average or below average income. The average income shall be based on the average income of residents of the County of Napa, based on the most recent United States Census... (Land Use Policy 4.1)</p> <p>Affordable Housing: At least 15 percent of those housing units permitted each year shall be for housing capable of purchase or rental by persons with moderate or below moderate income. (Growth Management System Element, Subsection 4(5))</p> <p>Affordable Housing: ...at least 15 percent of those housing units permitted each year shall be for housing capable of purchase or rental by persons with average or below average income...average shall mean the median.” (Proposed Initiative, excerpt of changes to the Growth Management System)</p>	<p>Affordable Housing: At least 15 percent of those housing units permitted each year shall be for housing capable of purchase or rental by persons with moderate or below moderate income. (Ag/LU Policy 119, Subsection 5)</p>

Similarly, the proposed General Plan Update includes a simplified version of existing Land Use Element Policy 4.6, minimizing redundancy with the Growth Management System. The previous version is included for adoption by the voters in the Initiative.

Text in Existing General Plan and the Initiative	Text in Proposed General Plan Update
<p>POPULATION GROWTH RATE—The County will plan for an average annual combined County/City population increase comparable with national, state and regional growth rates. Pursuant to Measure A... the annual number of new housing units permitted in the unincorporated portion of Napa County ... shall be limited to accommodate an annual population growth rate that exceeds neither that of the nine San Francisco Bay Area Counties... nor 1 percent... (Land Use Policy 4.6)</p> <p>Measure A and Ordinance No. 1178 provide that the annual number of new housing units in the unincorporated area of the County of Napa shall be allocated so as to allow an annual population growth rate that shall not exceed the population growth rate of the nine Bay Area counties... provided that the annual population growth rate limit shall not exceed one percent in the County of Napa. (excerpt from Growth Management System Element, Subsection 1)</p>	<p>Develop and implement planning policies which define a rate of population growth that perpetuates our quality of life. (Goal Ag/LU 4, p. 26)</p> <p>Measure A and Ordinance No. 1178 provide that the annual number of new housing units in the unincorporated area of the County of Napa shall be allocated so as to allow an annual population growth rate that shall not exceed the population growth rate of the nine Bay Area counties... provided that the annual population growth rate limit shall not exceed one percent in the County of Napa. (excerpt from Ag/LU Policy 119, p. 78)</p>

The proposed General Plan Update includes the current version of the Growth Management System as a policy in the Agricultural Preservation & Land Use Element with few text changes. The side-by-side comparison of the existing Growth Management System Element and the one proposed in the Initiative generally serves to illustrate the differences between proposed Policy Ag/LU-119 and the version proposed in the Initiative.²

If the General Plan Update is adopted according to the current schedule prior to the June 2008 election and the Responsible Growth Initiative were subsequently adopted by the voters, the Initiative would have the effect of reinstating existing Land Use Element Policies 4.1 and 4.6 verbatim, and replacing proposed Policy Ag/LU-119 with the version of the Growth Management System included in the Initiative. This would perpetuate some redundancies and leave more complex language in place, but would not create significant internal inconsistencies.

² In general, the only changes to the text of the existing Growth Management System proposed in the General Plan Update are to reflect its location within the Agricultural Preservation & Land Use Element rather than as a stand-alone element and to change the date December 31, 2007 to June 30, 2009 for the next review of annual growth rates.

If the General Plan Update is not adopted on the current schedule and is instead adopted after the Responsible Growth Initiative is adopted by the voters, the Initiative would have the effect of requiring the Board of Supervisors to modify the General Plan Update to include the exact language of existing Land Use Element Policies 4.1 and 4.6, and the exact language of the Growth Management System included in the Initiative. Alternatively, the adoption of portions of the General Plan Update would be subject to voter approval, presumably at the November 2008 general election.

3. Impact on the 2009 Housing Element Update

As described earlier, the County's Housing Element must be updated on a regular basis pursuant to state law. The next update is required to be completed by June 2009. The County initiated this update on January 29, 2008, and plans to use a consultant to assist staff with data collection, analysis, public involvement, plan preparation, and environmental review. While a substantial work effort is involved, substantive changes to the Housing Element are not expected to be dramatic because the Housing Element was recently updated in 2004 and the County's Regional Housing Needs Assessment (RHNA) is expected to be approximately 650 units (rather than close to 2,000 units for the previous RHNA cycle).

The Responsible Growth Initiative would not affect the tasks involved in the preparation of the 2009 Housing Element Update and is unlikely to substantively constrain the methods (programs, policies and sites) available to the County to meet its RHNA of 650 units. For this reason, the Initiative is unlikely to impact the County's ability to complete a legally compliant Housing Element Update by June 2009. This conclusion—which is possible because the RHNA number of 650 is so much lower than the County's last RHNA number—is also based on the following assumptions:³

- The RHNA number of 650 units will be reduced by 82 units under an agreement executed with the City of Napa in 2007 (the County will ask ABAG to reduce its RHNA, per CGC §65584.07).⁴
- Some sites identified in the 2004 Housing Element Update and subsequently rezoned for affordable housing continue to be available and feasible for affordable housing development.
- Some policy changes proposed in the General Plan Update, such as allowing second units in the AP zoning district, would tend to increase the production of affordable housing.
- Some action items proposed in the General Plan Update, such as development of a Workforce Housing Ordinance and revisions to the County's Inclusionary Housing Ordinance, would tend to increase the production of affordable housing.

³ If the County's final RHNA allocation is significantly higher than 650 or if any of these assumptions prove false, then impacts to the 2009 Housing Element Update will be more severe based on the probability that the Initiative would make the Napa Pipe site infeasible for housing development as discussed in the next section of this report (Section F.4).

⁴ Refer to Section G.1.b of this report for a description of state law regarding transfers.

- The County continues to collect and allocate Housing Trust Fund monies through its inclusionary housing in-lieu fee payments and commercial linkage fees and utilizes a significant portion of those fees on affordable housing projects in the incorporated jurisdictions.
- The County will continue its facilities planning exercise, which may result in the identification of surplus properties that could be made available for affordable housing development.

The Responsible Growth Initiative would also not preclude the actual provision of 650 units because sufficient permits are available in Category 4 and other categories (due to roll-over provisions in the Growth Management System) to meet this number under the affordability criteria likely to be imposed by ABAG.

The Responsible Growth Initiative would “lock in” some introductory text and policies from the 2004 Housing Element, which could therefore not be changed or eliminated in the 2009 Housing Element Update. This would make it challenging but not impossible to prepare a clear, concise and internally consistent update by June 2009, despite the fact that by continuing the existing limitations on annual building permit allocations in perpetuity, the Responsible Growth Initiative would also continue to constrain the ability of local developers to provide any meaningful amount of affordable housing as an “inclusionary” percentage of larger multifamily housing projects. Affordable housing can be developed without public subsidies via “inclusionary” requirements whereby a developer is required to build one or two affordable units for every nine or ten market rate units (for example). Because the restraints on the number of available permits only allow for the development of very small projects, the number of affordable units produced as an “inclusionary” percentage would continue to be minimal.

4. Effect on Use of Vacant Land and Pending Developments

Two applications pending with the Napa County Department of Conservation, Development and Planning could be affected by the Initiative. One is an application for approval of residential development and related changes within the Planned Development (PD) zoning district in the unincorporated community of Angwin. The second is a proposal for a General Plan amendment to permit high-density residential development and other uses on the Napa Pipe site, south of the City of Napa. The Napa Pipe Project would require an exemption from the County’s Growth Management System and Housing Allocation Program. The Angwin project would benefit from such an exemption, although its proponents have indicated that their project could be phased and accomplished within the constraints of the Growth Management System if the Board of Supervisors combined the allocations in Category 1, 2 and 3 as provided for in the “Timing” section of the Growth Management System.⁵

⁵ Approval of the first phase of the Angwin project in this way would mean that lotteries would occur in subsequent years under the terms specified in the “Process of Distributing Building Permits” section of the Growth Management System, and buildout of the Angwin project might take many years.

Under the County's current General Plan and County Code, an exemption to the Growth Management System (in the form of a General Plan Amendment and a code change) could be granted by majority vote of the Board of Supervisors. If the Responsible Growth Initiative is adopted by the voters, an exemption could only be granted by the voters of the County. Thus, one of the short term impacts of the proposed Initiative would be the potential limitation on development of multifamily housing on the Napa Pipe site, since such development would either require approval of an exemption from the County's 1 percent growth cap by County voters, or it would require annexation of the site to the City of Napa.⁶ Increased difficulty in pursuing multifamily housing on the Napa Pipe site could result in no development in the short term or the potential reuse of the site for non-residential, employment-generating uses.

Short term impacts of the Responsible Growth Initiative on vacant land within the County are likely to be extremely modest, since very few areas within the County are designated for housing at a density that would require exemption from the 1 percent limit. In those few locations, the Initiative would tend to discourage property owners from pursuing market-rate housing projects unless they could do so through annexation to one of the incorporated jurisdictions.

G. Long Term Impacts

The Responsible Growth Initiative's long term impacts (after 2014) are likely to be more severe than the short term impacts. As discussed earlier, unlike the existing Growth Management System and Measure J, the Initiative does not expire. Thus, if the Initiative were to be enacted and become part of the County practice, the County would lose the flexibility to modify affected sections of the General Plan and County Code to meet changing needs, unless the modifications were put to a popular vote. This loss of flexibility could impact the County's compliance with Housing Element law, the amount of affordable housing units created, the uses of vacant land, and modifications to the boundaries of incorporated jurisdictions through annexations.

1. Impact on Ability to Comply with State Housing Element and Other Laws and Programs

Housing Element law, enacted in 1969, mandates that local governments adequately plan to meet the existing and projected housing needs of all economic segments of the community. The law requires that local governments adopt land use plans and regulatory systems that provide opportunities for, and do not unduly constrain, housing development. As a result, housing policy in the State of California rests largely upon the effective implementation of local general plans and, in particular, local Housing Elements.

⁶ Annexation to the City of Napa would require approval of a change to the City's Rural Urban Limit by City voters, as well as approval of the annexation by the City and Local Agency Formation Commission (LAFCO).

Over the past three decades, state Housing Element law has been amended many times to include additional requirements for Housing Element Updates and compliance. For example, last year, the Governor signed a law that requires local jurisdictions to strengthen provisions for addressing the housing needs of the homeless, including the identification of a zone or zones where emergency shelters are allowed as a permitted use without a conditional use permit. In 2004, Housing Element law was amended to clarify the land inventory requirements and to provide greater residential development certainty. Future amendments to state law concerning Housing Elements will most likely continue to add more specifications and requirements.

The Responsible Growth Initiative's lack of an expiration provision and its preclusion from allowing the Board of Supervisors to modify residential growth limits, affordable housing requirements or existing height limits, is likely in the long term to inhibit the County from complying with state law (current law or as amended in the future) concerning the provision of housing.

State law requires that the Housing Element analyze both non-governmental and governmental constraints to meeting a community's housing needs. Governmental constraints include land use controls, fees and exactions, on and off site improvement requirements, building codes, permit and processing procedures, and potential constraints on the development or improvement of housing for persons with disabilities. Consistent with this requirement, the 2004 Housing Element Update analyzed the County's Growth Management System and established a program to better utilize Category 4 permits to facilitate development of affordable housing. To encourage more Category 4 permits to be used each year, the County included a program to expand the permitted income range for units built with Category 4 permits to 120 percent of median income in order to encompass all households considered moderate, low and very low income.

If the Responsible Growth Initiative is approved by the voters, future Housing Elements would not be able to include such modifications to the Growth Management System without first going to a popular vote. This requirement could make it infeasible for the County to update its Housing Element pursuant to state law in some future RHNA cycle. As a result, the County could face additional litigation from housing advocates, including possible challenges to Measure J and policies preventing residential growth around Napa County Airport.⁷

⁷ While Measure J expires in 2020, a proposed initiative is being circulated to extend Measure J's effectiveness until 2050. If it qualifies for the November ballot and is approved by the voters, the issues discussed here will continue to be a significant problem and litigation regarding the validity of Measure J will remain a possibility even after the year 2020.

a. Impact on Affordable Housing Development

In the long term, the Initiative might not only affect the County’s ability to comply with Housing Element requirements, but also hinder affordable housing development and preservation. Unlike many other jurisdictions, the County does not have a steady source of revenue that provides a substantial amount of funding for the development of affordable housing. It does not have a redevelopment project area, nor is it a Community Development Block Grant (CDBG) entitlement community, both of which are potential sources of significant amounts of funding for affordable housing.

The only source of funding for affordable housing is the County’s Affordable Housing Trust Fund, which receives funding through commercial linkage fees and inclusionary housing in-lieu fee payments. The Housing Trust Fund generated \$1.6 million in FY 2005/06 and \$2.1 million in FY 2006/07.

The Growth Management System discourages the development of larger scale residential housing developments by limiting to 14 the number of Category 3 permits (permits for any type of residential project for 2 or more units that requires discretionary review). Since Measure A was adopted in 1980, only 6 percent of the permits issued under the system have been Category 3 and 4 permits, and no large scale market rate developments or affordable housing developments have been permitted in unincorporated Napa County under the Measure A permitting system.

The County has recognized that the most feasible scenario for affordable housing production would be through mixed-income housing development. Thus, the County included in its Housing Ordinance a requirement that 15 percent of all units developed would be affordable to households at or below moderate income. However, the amount of land in the unincorporated area of Napa County that is zoned for multifamily housing is constrained and the potential for the development of mixed-income housing is limited.

The 2004 Housing Element included a program for an Affordable Housing Combination District designation that allows densities of up to 12 units per acre with a ministerial permit in specified locations and up to 25 units per acre based on compliance with specific design and development standards. The 2004 Housing Element states that these densities have proven sufficient to allow development of projects with a significant affordable component in jurisdictions with development costs and constraints similar to Napa, in conjunction with subsidies to be provided through the County’s Affordable Housing Fund. The Housing Element also includes a program to provide incentives for large scale builders to make use of Category 4 permits by making a larger allocation of permits available to projects where at least half the units will be affordable.

Given the limited number of Category 3 permits available, it is unlikely that the Affordable Housing Combination District Designation would be used for mixed-income residential developments with large market rate components. Most likely, the developments would be all or mostly affordable without a substantial market rate component and would require substantial subsidies in order to make the development financially feasible.

The Responsible Growth Initiative would require that affordable housing permitted under Category 4 be affordable to persons of average or below average income (redefined in the Initiative however as “median” income) for at least ten years. (As discussed earlier, the existing Growth Management System requires a minimum 40-year affordability period.) Over the past two decades, federal and state laws and programs have extended the length of time that an affordable housing unit must remain affordable in order to meet program or legal requirements. For instance, California redevelopment law formerly required 10 and 30 year affordability periods. However, since January 1, 2002, it now requires affordability covenants of 45 years for ownership units and 55 years for rental units.

Similarly, California’s low income housing tax credit program requires developers seeking tax credit allocations to agree to 55 year affordability covenants on affordable rental units, with very limited exceptions. The initiative’s use of out dated terminology (“average” and “at least ten”) is confusing at a minimum, and in the long term it could impede the preservation of affordable units.

b. Continued Use of Transfers to Meet RHNA Requirements

The likelihood that the County will find it increasingly difficult to comply with Housing Element law and to construct and/or preserve affordable housing should the Initiative be approved by the voters will necessitate future transfer agreements with the County’s incorporated jurisdictions. Such future transfers of Napa County’s RHNA allocation to incorporated jurisdictions will be governed by CGC §65584.07, which allows transfers under certain conditions during the period from the adoption of the final RHNA until the due date of the fourth Housing Element. Under this section of the law, ABAG may reduce the County’s RHNA if the following conditions are satisfied:

1. One or more incorporated jurisdictions within the county agree(s) to increase its/their share(s) in an amount equivalent to the reduction.
2. The transfer of shares shall only occur between a county and incorporated jurisdictions within that county.
3. The county's share of low income and very low income housing is reduced only in proportion to the amount by which the county's share of moderate and above moderate income housing is reduced.

Future transfer agreements with incorporated jurisdictions like the 2004 agreements would impact the use of vacant land and increase the potential for future annexations as discussed in Section G.2 below, and would also result in fiscal impacts as described in Section H.

2. Impacts on Uses of Vacant Land and Annexations

The proposed Responsible Growth Initiative’s restrictions on residential development may have unintended consequences for the use of vacant land in the County’s unincorporated area, and may also encourage further annexations of County land by incorporated jurisdictions.

If the current restrictions are continued indefinitely as proposed by the Responsible Growth Initiative, development of new subdivisions and multifamily housing will remain difficult for the foreseeable future, and almost certainly constrain the production of affordable housing and the County's ability to comply with state housing requirements. What housing production is feasible will likely be small-scale and scattered or heavily subsidized affordable housing on overlay sites.

As a result of constraints on housing development, vacant land is more likely to be used for non-residential development, potentially resulting in the creation of more jobs than residential units. That in turn has the potential to increase the RHNA requirements as the property is redeveloped for job creating nonresidential development. The resulting jobs/housing imbalance could have negative impacts on the County's ability to attract and retain future businesses and employment in the future, as demand for new workforce housing outstrips supply. A lack of local housing, particularly housing at affordable prices and rents, could reduce business competitiveness and intensify traffic conditions as an increasingly far-flung workforce commutes to employment nodes within the County.

Pressure for residential development may also impact agricultural and open space land adjacent to or near city boundaries. If annexed by an incorporated jurisdiction, agricultural and open space land can be redesignated for other uses. As a result, housing demand could lead to the annexation and development of agricultural and open space land in direct or close proximity to existing urbanized areas. Should the County be required to pursue significant future transfers of its housing needs to incorporated jurisdictions through the types of agreements discussed previously, it is likely that such agreements would prohibit the county from opposing such annexations despite longstanding policies to preserve agricultural and open space land.

Moreover, requiring any residential development proposal exceeding the Initiative's provisions to win public approval through a ballot measure seriously reduces the feasibility of such developments.⁸ Thus, denser smart growth housing developments of a scale that could support inclusionary housing, brownfield remediation, increased transit opportunities, compact development, and/or privately provided infrastructure components, such as improved roadways or private wastewater treatment, are less likely to be developed in the unincorporated County.

H. Fiscal Impacts

1. Short Term Fiscal Impacts

The principal short term fiscal impact of the proposed Responsible Growth Initiative would be litigation costs that the County could incur in defending itself from a potential lawsuit alleging that the Initiative is invalid. Any such lawsuit would inevitably involve allegations that a Housing Element cannot be amended by initiative. Such litigation is likely to be appealed to the Court of Appeals and the California Supreme Court is likely to accept review of any decision by the Court of Appeals.

⁸ Measures could be placed on the ballot by initiative or by the Board of Supervisors itself. The County has enacted procedures to place General Plan Amendments on the ballot by the Board of Supervisors in the case of a General Plan Amendment requiring a Measure J vote. Presumably similar regulations would be adopted to address affordable housing votes should the Initiative be approved by the voters.

A reasonable worst-case scenario would involve a lawsuit similar to that brought against the County to challenge Measure J in 1991, DeVita v. County of Napa. Litigation of this suit took place over four years and eventually ended with the Supreme Court of California upholding Measure J in 1995. The cost to the County of defending this suit was approximately \$400,000. If those costs are escalated using the U.S. Bureau of Labor Statistics Consumer Price Index, the cost of such a suit would be approximately \$545,000 in 2007 dollars.

Another fiscal impact to the County will be the administrative costs incurred as the County legal and planning staff work to incorporate the General Plan text required by the Initiative and the proposed General Plan Update, and to ensure that the resulting plan is both internally consistent and compliant with state law. These costs are expected to be minimal.

2. Long Term Fiscal Impacts

Because of the increased potential for additional transfer agreements and annexations, the County will likely experience adverse long term fiscal impacts. The agreements that the County entered into in 2003 in order to transfer a portion of the unincorporated area's RHNA housing allocation to the Cities of Napa and American Canyon required the County to provide a number of considerations, both political and financial. Table 5 below details the financial obligations that the County incurred by entering into these agreements. The one-time costs to the County total \$8.8 million and the annual obligations over a 20-year period total \$2.44 million for a total 20-year cost of \$11.24 million.

Table 5
Financial Commitments in RHNA Transfer Agreements

	Amount	Timing	Source
City of American Canyon			
One-Time Payments			
Affordable Housing Project	\$1,200,000	FY 04-05	Napa County Housing Trust Fund
Annual Payments			
Tax sharing Arrangement*	\$22,000	Annual	Property Tax (in perpetuity)
City of Napa			
One-Time Payments			
Youth and Recreation Funding	\$100,000	FY 04-05	State Proposition 40 Allocation
Affordable Housing Project	\$900,000	FY 04-05	Napa County Housing Trust Fund
Parking Garage Land & Development Costs	\$6,600,000	FY 06-07	Napa County General Fund
Annual Payments**			
Parking Garage Operations & Maintenance	\$100,000	Annual for 20 years	
Total One-Time Payments	\$8,800,000		\$8,800,000
Total Annual Payments	\$122,000	(x 20 years)	\$2,440,000
20-Year Total			\$11,240,000

* The Tax Sharing was based upon original property values; these would likely increase substantially over time.

**The City of Napa agreement originally included an additional ongoing commitment which was eliminated in subsequent negotiations.

The County could face significant fiscal impact should it be required to pursue similar agreements in the future. The County would also bear the liability of ongoing property tax or cost sharing agreements that are negotiated to support any affordable units that are actually built under these transfer agreements.

In general, annexations have positive and negative fiscal impacts on the County because they invariably result in both increased costs and increased revenues over the long term. Annexed land is typically undeveloped, and generally does not have a high property value, so the tax revenue that the County loses upon annexation is minimal, and the costs to provide services to the area are also minimal. However, as the land is developed, the assessed value of the property increases dramatically and the property taxes generated by the property increase significantly. At the same time, development of the property means new residents and/or businesses benefit from or impact County services, and the County's share of the (increased) property taxes is not always sufficient to cover these increased costs. Also, if commercial uses are developed on the property, the County does not generally benefit from sales tax and/or Transient Occupancy Taxes (TOT), and instead, the revenues would be allocated to the jurisdiction that annexed the property.

Typically, when land is annexed, the County and the annexing jurisdiction execute a tax sharing agreement. The 2003 tax sharing agreement with the City of American Canyon will be costly to the County in the long term. For specific parcels, the City of American Canyon received 75 percent of the property tax revenue, while the County received 20 percent and the County Fire District received 5 percent. As explained above, when the annexations are completed and the land is developed, County costs will likely exceed the County's share of property tax revenues.

Finally, because the Initiative provisions would not expire at some point in the future, long term legal costs could be substantial given the possibility of multiple lawsuits over the years. The potential for further litigation by affordable housing advocates would be significant, particularly if the voters rejected proposed changes to the terms of the Initiative needed to meet state housing requirements in future years. While future lawsuits would not be expected to reach the California Supreme Court, the costs at the trial and appellate levels would approximate \$200,000 to \$300,000 for each case filed.

Appendices

Napa County Elections Code Section 9111 Report Responsible Growth Initiative

- Appendix A. Responsible Growth Initiative Text**
- Appendix B. Summary of Responsible Growth Initiative Provisions**
- Appendix C. California Elections Code 9111**
- Appendix D. County of Napa Board of Supervisors Resolution No. 08-05**
- Appendix E. Legal Analysis**

Appendix A:
Responsible Growth Initiative Text

To the Honorable Board of Supervisors of the County of Napa:

We, the signers of this petition, registered and qualified voters and residents of the County of Napa, comprising not less than ten percent of the number of votes cast within the County for all candidates for Governor on November 7, 2006, hereby propose an ordinance as set forth herein and request that the proposed ordinance be immediately passed by the Board of Supervisors or otherwise be submitted to a vote of the people at the earliest regular or special election for which the petition qualifies pursuant to the California Elections Code. The text of the proposed ordinance and accompanying exhibits are set forth below and on subsequent pages.

[Deletions are indicated by ~~striketrough~~ text. Additions are indicated by underlined text.]

The people of the County of Napa ordain as follows:

Section 1. Findings and Purposes.

- A. The people of the County of Napa are concerned that unrestricted residential growth leads to urban sprawl that, in turn, causes conditions harmful to the public health, safety, and general welfare of local residents. Unrestricted growth also places undue pressure on government services including, but not limited to, adequate fire and police protection, adequate parks and recreation facilities. Unrestricted growth also results in the cumulative loss of open space, increases air pollution, and contributes to the overcrowding of local schools. It also dramatically increases the cost of said services to all who depend in these services for maintaining an acceptable quality of life.
- B. This Initiative is intended to protect the scale and quality of future development in Napa County to be consistent with the County's scenic beauty and visual character which are major assets to the local economy including, but not limited to, the wine industry, which supports a thriving local and regional tourist economy. Preservation of existing views by residents and travelers are also served by a continuation of existing responsible growth regulations.
- C. Specifically, this Initiative will:
 1. Protect county agricultural and open space lands by retaining the current 1% limit on residential growth in the unincorporated areas of Napa County;
 2. Protect groundwater and other County resources by encouraging larger residential developments to locate within the cities of the County where support services are readily available;
 3. Require that 15% of all new residential units constructed in the unincorporated areas of Napa County be set aside for affordable housing;
 4. Protect the visual character of the unincorporated County lands by retaining the existing 35 foot/3 story height limits for all new construction; and
 5. Preclude the Board of Supervisors from eliminating or modifying the residential growth limits, the affordable housing requirements, or the existing height limit by mandating a vote of the people for any changes to these policies.

Section 2. Definitions.

Unless the context requires otherwise, the definitions in this section shall govern the interpretation of the provisions of this Initiative.

- A. “Building permits” means permits for the construction of new dwelling units on a site, not including rebuilding, remodeling, renovating or enlarging existing units, moving an existing dwelling from one unincorporated site to another unincorporated site, or units exempted by “grandfathering.”
- B. “Growth management system element” means the comprehensive plan which is a part of the county’s general plan, Housing Allocation Program codified in Chapter 8.02 of the County Code and related ordinances, if any, which this Chapter implements.
- C. “Housing capable of purchase or rental by persons with average or below average income” means that not more than thirty percent of the (gross) household income shall be spent on housing costs such as rent, mortgage payments, insurance, taxes, necessary utilities, and condominium membership fees.
- D. “Moderate” shall mean up to one hundred twenty percent of the county median income.
- E. “New housing units” means a room or connected rooms constituting a separate, independent housekeeping establishment for owner occupancy or rental or lease on a monthly or longer basis, physically separate from other rooms or dwelling units in the same structure, and containing independent cooking and sleeping facilities. New housing units may also be referred to as “dwelling units” or “residential units” and shall include mobilehomes, not including mobilehomes within the federal take line at Lake Berryessa. New housing units shall not mean the rebuilding of an existing unit, the replacement of an existing unit by another, or the movement of an existing unit or units exempted by grandfathering.
- F. “Nine Bay Area counties” means the counties of Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara, Sonoma, and Solano.
- G. “Persons per household” means the population in households divided by the number of occupied dwelling units within the County of Napa.
- H. “Population growth rate” means the change in the total population in one year’s time stated as a percentage either increasing or decreasing, based on relevant data from the California Department of Finance’s Demographic Research unit and supplemented by the United States Census whenever available for the unincorporated area of Napa County adjusted for annexations and incorporations and the entirety of the nine San Francisco Bay Area counties.
- I. “Reflect any changes in the annual population growth” means a change in the maximum population growth which matches that of the nine Bay Area counties, but in no case greater than one percent.
- J. “Relevant data” means information needed to calculate the actual number of dwelling units to be permitted.
- K. “United States Census” means censuses conducted by the United States Bureau of the Census, including Decennial Census and the Mid-Decade Census.
- L. “Vacancy rate” means the number of vacant year-round dwelling units divided by the total number of year-round dwelling units in the unincorporated area.
- M. “Year round housing units” means those dwelling units which are capable of year-round occupancy, but not including less than monthly rentals and dwelling units within the federal take line at Lake Berryessa.

Section 3. General Plan Amendments.

A. Land Use Element Amendments.

1. Page 2-25 of the Land Use Element of the Napa County General Plan is hereby amended as follows:

4.1 AFFORDABLE HOUSING - At least 15% of those dwelling units permitted each year in the unincorporated portion of Napa County shall be capable of purchase or rental by persons with average or below-average income. The average income shall be based on the average income of residents of the County of Napa, based on the most recent United States Census. (Added pursuant to Measure A, a citizen initiative passed in November 1980, reenacted in section 8.02 of the Health and Safety Code of the County Code.)

2. Page 2-26 of the Land Use Element of the Napa County General Plan is hereby amended as follows:

4.6 POPULATION GROWTH RATE - The County will plan for an average annual combined County/City population increase comparable with national, state and regional growth rates. Pursuant to Measure A (a citizen initiative passed in November, 1980, reenacted in section 8.02 of the Health and Safety Code of the County Code), the annual number of new housing units permitted in the unincorporated portion of Napa County, ~~through the year 2000~~, shall be limited to accommodate an annual population growth rate that exceeds neither that of the nine San Francisco Bay Area Counties (Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara, Sonoma and Solano), nor 1%. The most recent United States Census shall be used for determining population, persons per household, and the vacancy rate of year-round dwelling units.

B. Housing Element Amendments.

1. Pages 1 through 5 of the Housing Element of the Napa County General Plan are hereby amended as follows:

I. INTRODUCTION

A. Housing Element Purpose

The purpose of this Housing Element is to adopt a comprehensive, long-term plan to address the housing needs in the unincorporated areas of Napa County. Along with seven other mandated elements, state law requires that a Housing Element be a part of the Napa County General Plan. The Housing Element is Napa County's primary policy document regarding the development, rehabilitation, and preservation of housing for all economic segments of the population within its jurisdiction. Accordingly, this Housing Element identifies and analyzes the existing and projected housing needs of the County and states goals, policies, quantified objectives, and implementation programs for the preservation, improvement, and development of housing. This Housing Element also identifies sites for housing development that are adequate to accommodate the County's allocation of the regional housing need. Napa County intends to implement a set of programs and projects to meet the goals, policies, and objectives included in this Element, in

addition to coordinating its housing efforts with those occurring within the incorporated areas of Napa County.

B. Authority

Housing elements are required as a mandatory element of General Plans by section 65302(c) of the Government Code. Specific requirements for Housing Elements are set forth beginning at section 65580 of the Government Code and additional guidance is provided by the General Plan Guidelines (2003) issued by the Office of Planning and Research and by guidance provided by the State Department of Housing and Community Development (HCD). This Element addresses all applicable requirements of state law.

C. Status

This document is an update to the Housing Element of Napa County's General Plan. The Board of Supervisors adopted the last version of the Housing Element on May 28, 1991. A draft update was submitted to HCD in August 2001, but was not adopted by the Board. This update focuses on housing needs through June 2007, in accordance with the Housing Element planning period for San Francisco Bay Area jurisdictions established by State law.

D. Consistency with the General Plan

State Law requires that a general plan and its constituent elements “comprise an integrated, internally consistent and compatible statement of policies.” All elements have equal legal status and no one element is subordinate to any other element. Accordingly, the Housing Element must be consistent with population projections and land use goals and policies set forth in the Land Use Element as well as the goals and policies of the remaining elements of the General Plan. As part of the implementation process for this Housing Element, the County of Napa will initiate and complete amendments to the County General Plan and other County policies and programs as necessary to achieve internal consistency. Specific actions in this regard that have been identified as part of the Housing Element update process have been incorporated into Section V (Goals, Policies, Objectives, and Programs) of this Housing Element.

E. Statement of Intent

It is the intent of this Element to set forth a five-year housing program that maximizes the limited opportunities for new housing construction in the Unincorporated Area of the County while developing the capacity for assisting in the affordability, maintenance and rehabilitation of the existing housing stock. Priority in both new construction and rehabilitation will be provided to very low-, low- and moderate-income households, and special needs populations.

F. Public Participation

The Napa County Board of Supervisors convened a Housing Element Steering Committee to oversee the development of a draft Housing Element Update. The Steering Committee included representatives of many key local stakeholder groups, including the Napa County Farm Bureau, the Napa Valley Grape Growers Association, the Napa Valley Vintners Association, the Napa County Non-Profit Coalition, the Farmworker Housing Task Force, and the real estate community, as well as representatives from the County Planning Commission and the County Board of Supervisors. Appendix A contains a listing of Steering Committee members and their affiliations. Steering Committee meetings were conducted as public meetings. In total, the Steering Committee met with County staff and project consultants eight times during the course of the Housing Element Update project, alternating between locations in the City of Napa (south county) and St. Helena (up-valley). The Steering Committee assisted County staff and project consultants to review the existing Housing Element, analyze local housing needs and constraints, and develop updated goals, policies, and objectives. Finally, the Steering Committee also

assisted in revising Housing Element programs. The Steering Committee also hosted two public workshops to explain the importance of a Housing Element, to present information on local housing needs, challenges, and opportunities, and to solicit input from concerned citizens and stakeholders. One workshop was held in St. Helena on May 29th, 2001 and one was held in Napa on May 31st, 2001. To publicize these workshops, County staff sent a press release regarding the workshops to the three major local papers in Calistoga, the City of Napa, and St. Helena, and gave a short informational interview on a local radio station. Workshop attendees included residents of the unincorporated areas, representatives of non-profit organizations, and residents of some of Napa County's incorporated cities. Direct mail was sent to interested parties. County staff and consultants incorporated comments from the two workshops into the Housing Element document where appropriate and forwarded the draft document for review and consideration by the Napa County Planning Commission and Board of Supervisors. On June 26th, 2001, the Napa County Board of Supervisors considered the Draft Housing Element Update and referred it to the County Planning Commission for review and recommendations for revisions. The Planning Commission reviewed the Draft Housing Element at its July 18, 2001 meeting. This review was conducted as a public hearing and comments were invited from members of the public. Based on the Planning Commission's deliberations as well as comments from the public, the Planning Commission directed staff and consultants to revise the document and forward it to the State Department of Housing and Community Development (HCD) for their review and comment. On October 23, 2001, HCD provided a number of comments on the draft update. Staff and consultants prepared a revised draft based on HCD's October 23, 2001 comments. In response to suggestions made by HCD, the County engaged in a major supplementary planning process with the cities of Napa and American Canyon to develop an integrated approach to meeting the housing needs in the area. This process is described in more detail in the section below. Public review of the revised draft began in early June 2004.

G. Background on Housing Efforts in the Unincorporated Area

In May 1991, the County Board of Supervisors adopted an updated Housing Element, which was certified by HCD. That Element recognized the severe constraints to residential development in the County outside of the incorporated cities. Chief among these are:

- Lack of water supplies sufficient to support high density residential development in many parts of the County;
- Lack of water supply delivery or sewage infrastructure to support high density residential development in many parts of the County; and
- Public safety requirements precluding residential development within the vicinity of the Napa airport

The County recognized a need to designate a substantial amount of land for residential development, including high-density residential development, to accommodate job growth expected in connection with the Airport Industrial Area (AIA) which is the primary area where job growth is expected to occur in the unincorporated County. When the AIA was designated for significant industrial development in the 1986 Specific Plan, the County anticipated the resulting need for residential development. The 1991 Housing Element confirmed the plan to accommodate that development in nearby (1-2 miles) American Canyon. American Canyon was one of the few areas in the County not subject to the constraints described above and had the advantage of being located near a major employment center.

This planning strategy was largely successful. The 1991 Housing Element contemplated development of as many as 600 affordable housing units, primarily in American Canyon by

1995. Since 1991, over 1500 new homes have been built in American Canyon in the areas designated in the 1991 Housing Element but since incorporated into the city of American Canyon. The 1991 Element identified a total of approximately 7,000 dwelling units in the area that is now the City of American Canyon. Since 1998, an additional 507 acres have been annexed into the city from the unincorporated County, much of which is zoned for residential use. An additional 177 acres have been annexed into the City of Napa since the 1991 Element was adopted. Although we cannot currently identify how many housing units were created on these lands, most of this acreage is also zoned for residential use. Although the plan for residential development in American Canyon was developed and adopted by Napa County, the residents of the American Canyon area voted to incorporate in 1992. Accordingly, actual development of the housing contemplated in the Housing Element occurred under the land use jurisdiction of the newly formed City of American Canyon. Because the sites designated by the County in the Housing Element were no longer in the unincorporated part of the County, the County's Housing Element was decertified by HCD. American Canyon's incorporation left the County with virtually no significant areas for housing development, with the minor exceptions of Angwin, Deer Park, and the small communities around Lake Berryessa. Outside of these areas, other portions of the unincorporated County are not appropriate for residential development, particularly at densities appropriate for affordable housing due to the constraints noted above. The reasons for this, ~~which will be described in greater detail in Sections III G & H,~~ include lack of existing infrastructure as well as the fact that the County does not provide nor control water or sewer services; furthermore, the vast majority of land in the unincorporated area is designated for agriculture in the County's General Plan and currently in active production. Despite the factors that limit dense housing development outside the incorporated cities, Napa County has facilitated development of affordable housing in many ways, including operation of and financial contributions to homeless shelters and the County-wide farmworker housing system, and the development and utilization of a Housing Trust fund (over \$16 million in 10 years) to support affordable housing projects in the incorporated and unincorporated parts of the County. These efforts have resulted in the development of several hundred low- and very low-income housing units over the past decade. ~~Appendix B shows projects supported by County trust fund dollars between 1993 and December 31, 2003.~~ AB2430 (originally AB3452) specifically allows the County to take credit for housing units it helps to fund but which are built in the County's incorporated cities, up to 15% of the County's allocation for very low- and low-income units. This amounts to a maximum of 102 units in this particular round. Notwithstanding this limit, the County has continued to make contributions from its Housing Trust Fund to additional housing developments within the cities, even though it receives no further credit for them. Since the beginning of 2000, the County has funded about 250 lower income units in cities and expects to fund roughly 300 more by June 2007. This is in addition to any monies that will be given to the cities to support affordable housing in connection with the transfer agreements described below. HCD's October 23, 2001 comments on the initial draft of this update expressed several concerns, focusing on the lack of sufficient locations and building permit availability to facilitate the development of affordable housing. In this letter, HCD recommended the utilization of opportunities afforded by Government Code Section 65584 (c) (5), which allows the reallocation of a portion of a county's Regional Housing Needs to one or more of the cities in the county. In order to address the State and regional housing requirements and in response to HCD's comments, Assemblywoman Patricia Wiggins convened a meeting with elected representatives from the five cities and Napa County in November 2001 for the express purpose of addressing

Napa County's housing issues. A strong supporter of smart growth principles and agricultural lands preservation, Assemblywoman Wiggins retained David Early of Design, Community and Environment to facilitate discussion and consensus on a community-wide process leading to the development of a Napa County Housing Element which complies with State law, while maintaining the communitywide goals of guiding urban development into the County's urban areas and preserving Napa County's agricultural land. As a direct result of these meetings, Napa County joined the five cities of the Napa County League of Municipalities to create a new association called the Napa County League of Governments (NCLOG). A sub-committee of NCLOG with elected city council representatives from each of the five cities and elected Board of Supervisors members was formed as the Countywide Land Use and Housing Strategy Committee ("Committee"). The Committee was charged with assisting the County with housing issues as well as a number of broader countywide issues, such as land use, transportation, tourism, and water. The Committee retained the services of Moore, Iacofano and Goltsman (MIG) to facilitate this process. Elected representatives from Napa County and the cities of American Canyon and Napa began meetings to ascertain the feasibility of entering into transfer agreements whereby the cities would accommodate a portion of the County's Regional Housing Need Allocation while at the same time preserving the HCD-certified status of the Cities' housing elements for the current and subsequent housing cycles. After two years of intense negotiations, facilitated by Daniel Iacofano of MIG, the County entered into agreements with the cities of Napa and American Canyon for the transfer of a portion of the County's Regional Housing Needs Allocation to each of the cities. Under these historic agreements, the County would provide the cities with a higher share of its property taxes, support for proposed annexations, and financial contributions to affordable housing, recreation, and other projects that provide urban services to residents and visitors alike, such as a downtown parking garage in the City of Napa. ~~A copy of the transfer agreements is included in Appendix C.~~ These agreements preserve the community-wide goals of preserving and protecting Napa County's agricultural land by guiding urban growth into the urban areas where sufficient community facilities and essential public services exist. The agreements represent an unprecedented cooperation among the five cities and Napa County and may serve as a model for other communities around the State. This approach reconciles several previously conflicting goals of local as well as regional and statewide interest. For example, the "smart growth" approach to development, which has been the basic approach to Napa County land use decisions for decades, will be retained and enhanced. This is critical for several reasons, including the preservation of the multi-billion dollar agricultural industry that is the lifeblood of Napa County and an important economic engine of the State. Additionally, new affordable housing will be developed in appropriate locations where infrastructure and other urban services already exist (thereby reducing the cost of the housing) and at densities that will conserve land and water. The transfer agreements are based on a detailed land use evaluation of the two cities establishing that each city has the capacity to accommodate the increased housing allocation. A study was completed in Spring of 2003 by Baird & Driskell Community Planning which concluded that the two cities each contained sufficient capacity (under current zoning designations) to accommodate their own regional housing needs for both the current cycle and another 7-year cycle, while retaining sufficient capacity to easily accommodate the transferred units.

2. Pages 56 through 57 of the Housing Element of the Napa County General Plan are hereby reenacted as follows:

Napa County Measure A. County voters approved Measure A in 1980. This initiative required the County Board of Supervisors to adopt a Growth Management System Element to implement it. The voter-approved Measure A was scheduled to expire December 31, 2000 and was renewed by the Board of Supervisors in November of 2000. The Growth Management System Element sets a one percent annual residential growth limitation, which is translated to a maximum of 114 housing units per year. The system creates an incentive for the creation of affordable housing by reserving 15 percent of the annual residential permit allocation for affordable housing. Unlike permit allocations for market-rate units, unused annual allocations for affordable housing units are accumulated and carried over for use in future years. Currently, affordable units are those units made available to households earning at or below the average household income in Napa County. The Growth Management System defines the term “average” to formally mean “median”; thus, the implementation of the Growth Management System targets affordable units to households earning no more than the median household income for the County. The impact of using the County median income as the limit for Category 4 permits is to extend the number of households who would be eligible to obtain a building permit through Category 4 as compared to the number that would qualify if the County restricted Category 4 permits to households at or below the low income (80% of median) level. On one hand, this indicates that the County is creating greater opportunity for the use of Category 4 permits; however, on the other hand, there is the possibility that not all of the housing units built with Category 4 permits will serve households technically classified as lower-income, since households between 80 and 100 percent of median would be considered “moderate” income households. To better utilize Category 4 permits to facilitate development of housing for lower income households, this Housing Element establishes a program to amend the Growth Management System to restrict eligibility for Category 4 permits to housing units serving households at or below 80 percent of median as the first priority; however, to encourage more Category 4 permits to be used each year, this Element includes a program to relax the criteria for Category 4 permits to expand the permitted income range for units built with Category 4 permits to 120 percent of median income, to encompass all households considered moderate-income, low- and very low-income, if the targeted minimum number of housing units for very low- and low-income households has already been achieved. This Element also includes a program to provide incentives for large scale builders to make use of Category 4 permits by making a larger allocation of permits available to projects where at least half the units will be affordable to households with moderate or below-moderate incomes. As structured at present, the growth management system could somewhat constrain the County’s ability to accommodate its allocated share of the regional housing need. The County’s original Regional Housing Needs Allocation (RHNA) requires the County to plan for development of an average of 263 housing units per year during the 1999 to June 30, 2007 time frame and the growth management system allocates building permits for no more than 114 housing units per year. According to the Growth Management System Element, the annual number of permits that can be allocated is calculated as one percent of the number of housing units reported for the Unincorporated Area by the most recent U.S. Census. This has the effect of maintaining a constant numeric housing unit growth potential for an approximately ten-year period (the intervening period between the release of decennial census results). This had left the County with reduced flexibility to accommodate fluctuations in the housing markets. The County will therefore modify the Growth Management System Element and related ordinances to require more frequent review of relevant demographic data. The Growth Management System Element

will be amended at the time the Housing Element is adopted. It will be amended again by December 31, 2007 (to coincide with the next housing element update cycle) and at least every five years thereafter to reflect any changes in the annual population growth rate for the Nine Bay Area Counties. In setting the annual number of new housing units to be allocated, the County will use the most recent census and other relevant data provided by the State Department of Finance's Demographic Research Unit for determining the persons per household and the vacancy rate of year round housing units. The United States Census may be used as a supplementary resource if available. The County allows a carryover of Category 4 permits for affordable housing developments. Presently, there are approximately 466 Category 4 permits available. Additional flexibility is provided by the fact that Measure A does not apply to development of second units. This Element provides additional flexibility by establishing a program to allow all unused permits in categories 1 through 3 to carry over and accumulate for a rolling 3-year period to allow the ceiling to be exceeded in any given year for projects. (Category 4 permits already carry over and accumulate until used.) The County will reserve 466 Category 4 permits for development of units affordable to moderate-, low- and very low-income households at sites subject to the Affordable Housing Combination District, until June 30, 2007.¹²

¹² Footnote [Monticello (174), Angwin (130), Spanish Flat (55) and Moskowite Corner (50). Note that this compares to an available pool of Category 4 permits by that date of 536, thereby leaving at least 127 for the next housing cycle, with an additional 17 permits that would become available each year.

3. Page 72 of the Housing Element of the Napa County General Plan is hereby reenacted as follows:

GOAL 12: The County shall allocate housing growth to ensure that the annual rate of growth does not exceed one percent (1.0%) to maximize protection of its agricultural lands, to match housing growth with the ability of the county to provide services, to protect its open space resources, to reduce impacts on area transportation facilities and to direct growth toward existing urban areas as required by the County's Land Use Element.

4. Page 74 of the Housing Element of the Napa County General Plan is hereby reenacted as follows:

Policy 2e The County will continue its program of accumulating unused Category 4 building permits as part of its Housing Allocation Program so that these permits can be made available to developers of affordable units. The County will revise its Category 4 Growth Management System permit criteria to allow their use for housing units affordable to households at up to 120 percent of median income. Policy 2f The County shall provide incentives for the use of accumulated Category 4 permits.

5. Page 75 of the Housing Element of the Napa County General Plan is hereby reenacted as follows:

Objective 2c The County will maintain the indefinite “rollover” status of unused Category 4 permits and will facilitate the development of affordable housing using rollover Category 4 permits by making modifications to the Growth Management System.

- 6. Page 76 of the Housing Element of the Napa County General Plan is hereby reenacted as follows:

Program 2e The County will continue the program to accumulate unused Napa County Growth Management System Category 4 building permits, and make them available to developers who provide affordable units.

Program 2h The County will continue its program of exempting secondary residential units from the annual growth limitations of Measure A.

- 7. Page 80 of the Housing Element of the Napa County General Plan is hereby reenacted as follows:

Objective 4a The County shall make available permits for construction of up to 114 new dwelling units per year, exclusive of permits for secondary residential units, and exclusive of permits for “carryover” affordable housing units that may be issued. Permits for non-affordable housing units not issued in one year may be issued in any of the following three years. The County will set aside a minimum of 17 permits each year for affordable housing units, as defined in the County’s Growth Management System Element, in addition to the approximately 485 such permits currently available for issuance for units affordable to moderate income households.

Program 4a The County will implement the Growth Management System Element to regulate the number of annual residential building permits granted by the County, reserving at least 15 percent of available permits each year for affordable housing units.

- 8. Pages 86 through 87 of the Housing Element of the Napa County General Plan are hereby reenacted as follows:

Table 19: Summary of Housing Element Program Actions

Plan Policy	Plan Objective	Action Step	Source of Financing	Action Agency	Action Date	
2. Affordability						
2e	Expand the use of Category 4 (Meas. A) permits (affordable units); Reserve 409 Category Permits for development	Expand eligibility and maintain “rollover” status for Category 4. Reserve 409 Category 4 permits for development	Increase the ceiling to 120% of median	N/A	CDPD	2004-2007

of units affordable to moderate, low, and very low income households at sites subject to the Affordable Housing Combination District, until June 30, 2007	of units affordable to moderate, low, and very low income households at sites subject to the Affordable Housing Combination District, until June 30, 2007				
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C. Growth Management System Amendments.

The Growth Management System of the Napa County General Plan is hereby amended as follows:

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1. INTRODUCTION

The Growth Management System Element of the Napa County General Plan was adopted as ~~required by following the passage of Measure A, the Slow Growth Initiative, in 1980~~Measure A. Measure A established a housing allocation program for unincorporated Napa County. Measure A expired in December 2000. The Board of Supervisors passed Ordinance No. 1178 in November 2000 reaffirming the establishment of the housing allocation program. This program is codified in Chapter 8.02 of the Napa County Code, and is set forth in Appendix A of this Element.~~The Board of Supervisors made the implementation of Measure A, a matter of high priority.~~ The Conservation, Development and Planning Department ~~has~~was given primary responsibility to administer the Growth Management System Element of the General Plan and the housing Allocation Program pursuant to Chapter 8.02 of the Napa County Code.~~prepare a~~

~~Growth Management System~~ which satisfied both the intent and letter of Measure A, while at the same time limited government controls.

The Growth Management System Element of the General Plan describes the development and administration of the annual housing allocation program, the derivation of the number of annual dwelling units (D.U.) that may be allocated under the program 109 dwelling unit (D.U.) annual allocation, the division of the annual allocation into housing type categories, the timing and methods used for issuing building permits, and the required provisions for affordable housing units.

While the Growth Management System Element of the General Plan is not a mandatory general plan element (in the sense of Government Code Sec. 65302) it satisfies the requirement (Government Code 65302.8) that the County is accommodating its share of regional need for housing for the following reasons:

First, the Growth Management System Element sets a specific number of building permits that may be issued annually. The allocation is determined by multiplying the number of housing units in the unincorporated area by 1%. Therefore, the annual building permit allocation is not population based but is instead based on the number of housing units in the unincorporated area. Moreover, the annual allocation of building permits relates to permits for the construction of new residential units on a site—it does not affect permits related to rebuilding, remodeling, renovating or enlarging existing units, or moving an existing dwelling from an unincorporated site to another unincorporated site. 1% population growth rate (as translated to an annual allocation of 138 D.U./year) approximates the Bay Area population growth rate of 1.62%.

Second, the total number of new dwelling units allocated each year is augmented by dwelling units D.U.'s grandfathered by the Growth Management System Element will augment the annual allocation, in terms of the total number of units permitted.

Third, unallocated permits for new market rate construction are allowed to accumulate and carry over for a three year rolling period; allocations for dwelling units capable of purchase or rental by persons with moderate or below moderate income may accumulate indefinitely. plans for Napa County, its constituent cities and ABAG, all call for city-centered urban development, which reduces the unincorporated area's proportional share of the County's total share of the regional housing needs.

Fourth, historically there has been a surplus of building permits available for new construction. The Housing Element adopted in 2006 provides additional mechanisms to ensure that the County will continue to meet its RHNA.

Fifth, the number of building permits for new construction to become available at the start of every calendar year will be based on the best data available which will be taken from the State of California Department of Finance's Demographic Research Unit, and may be supplemented by the United States Census, whenever it is available. Increases in population will be reflected in increases in the number of new residential building permits that may be allocated under the Growth Management system Element.

Sixth, the County of Napa and the City of American Canyon entered into a long term agreement (no. 6151) in October 2003 to allow for the transfer of portions of the County Regional Housing Needs to the city. This agreement, approved by the Association of Bay Area Governments and certified as part of the County's 2004 Housing Element, ensures that the County can meet its housing goals.

Seventh, the State Department of Housing and Community Development certified the County's Housing Element in 2004. The County's Housing Allocation Program and its agreement with the City of American Canyon were both incorporated into the certified Housing Element.

2. ANNUAL GROWTH RATE CALCULATION

The annual allocation of building permits, until December 31, 2007 and every five (5) years thereafter (or to coincide with the Housing Element updates) or the next U.S. Census ~~or the year 2000~~, whichever is soonest, will be 114109 D.U., not counting exempted/grandfathered units. The 114109 D.U. allocation was determined using data from the 2000~~April, 1990~~ U.S. Census, in the following manner:

- 1) Multiplying the number of housing units in the unincorporated area by 1%. Subtract 2,850 (the approximate number of housing units reported in the 1990 census within the area incorporated as the City of American Canyon effective January 1, 1992) from the unincorporated housing unit count of Napa County. (resulting housing unit count = 10,916)
- 2) Multiply the number of housing units in the unincorporated area 12,202 in 1980) by 0.01 to account for 1% annual growth. Dwelling units permitted each year (109) may be converted to population by multiplying by the "average household size." In the 1990 census, there were 2.92 persons per occupied housing unit.

3. BUILDING PERMIT ALLOCATION

1) The annual allocation of new residential building permits (114) is distributed into four categories as described below~~Character: Measure A defines "Character" as "the aesthetic and physical qualities which may be controlled, including density, building type (e.g., single family detached or attached, apartment, mobilehome parks) setbacks, height limits, landscaping, building coverage, color, siding material, roof overhang material, accessory buildings, parking, orientation, style and signing". Regulated building types are divided into the following four categories:~~

- A) Category 1 is a single dwelling built by or for a permit holder (owner-builder or his contractor) who is building only one dwelling unit per year.
- B) Category 2 is any type of dwelling which requires no discretionary review, but the permit holder is building more than one dwelling unit per year. A good example would be the small scale builder using existing lots.
- C) Category 3 is any type of residential project for 2 or more dwelling units which requires discretionary review (e.g., subdivision, parcel map, use permit). A large-scale housing project would be a good example.
- D) Category 4 is housing which is affordable to persons with average or below average income. This category would require an agreement signed by the developer and the County; the agreement shall contain guarantees that the dwelling units would be affordable to persons of average or below average income for at least ten years.

Categories 1 and 2 permits would be issued from those applications for residential building permit which do not require discretionary review (*i.e. a use permit or subdivision approval*). Category 3 (and most of Category 4) permits would be issued from those applications associated with an approved project that has undergone discretionary review (which according to state law, has included environmental review and a finding of consistency with the General Plan).

2) Exempted Development:

The following types of construction are exempt from the provisions of the Growth Management System:

- 1) Industrial
- 2) Commercial
- 3) Commercial-Residential (rental for less than a thirty-day period)
- 4) Replacement housing (on the same site as a pre-existing unit which has been removed, demolished or burned within the past two years) (but not in conjunction with #5).
- 5) Relocation of existing units (already in the unincorporated area, but not inside the Lake Berryessa Take-Line).
- 6) Additions, renovations, and refurbishments of existing dwelling units.
- 7) Dwelling units located inside the Lake Berryessa Take-Line.
- 8) Accessory buildings of any type (except dwelling units).
- 9) Guest Cottages as defined by Chapter 18.08.300 of the Napa County Code.
- 10) Dwelling units for which building permit applications were filed by July 28, 1981.
- 11) Dwelling units covered by development agreements approved prior to July 28, 1981.
- 12) Dwelling units covered by both use permits and development plans approved prior to July 28, 1981 (i.e., ~~Napa Meadows (434 D.U.), Silverado (280 D.U.), Meadowood (7 D.U.), Brookfield/World Marine MHP (125 D.U.), and Villa Berryessa MHP (96 D.U.), and Napa Estates MHP (208 D.U.).~~
- 13) Second units exempted pursuant to Gov. Code Sec. 65852.2 and defined by Chapter 18.08.550 of the Napa County Code.

~~3) Location of Growth: The Growth Management System defines "Location" as "Within the County, which sub-area, whether inside or outside the cities, or where on a specific site". The County's General Plan Population Distribution Policy reads, "...the County will plan for and accommodate the distribution of population among the sub-areas of the County, giving preference to the existing incorporated and urban areas". Higher density development would normally occur in the urban areas as a result of the availability of water and/or sewer facilities. Preference is to be given to the urban areas identified in the County's General Plan such as unincorporated American Canyon, Angwin and those County islands surrounded by the City of Napa.~~

4) Timing: The Growth Management System defines "Timing" as "the relationship of the number of building permits issued in one year to the total number of permits issued over several years". The annual allocation of building permits has been established at ~~114~~¹⁰⁹ D.U. per year. When an annual allocation has not been used, the remainder may be reallocated or carried over as provided in the 2004 Housing Element update. Unused permits for new residential dwelling units in Categories 1, 2 and 3 may accumulate for a three-year rolling period. Category 4 permits may accumulate indefinitely one year, except for Category 4, which may carry over indefinitely. The remainder ("X") which is carried over from "year 1" is immediately and continuously available in "year 2" (as described in Section 6 of the Growth Management System Element). However, the remainder at the end of "year 2" must be reduced by "X" (but not made less than zero) on December 31st of "year 2". Category 1, 2 and 3 permits which would otherwise cease to exist at the end of "year 2" may be applied toward Category 4. At the discretion of the Board of Supervisors, the unused allocation in Categories 1, 2 and 3 could be transferred from one category to another (including additions to, but not subtractions from Category 4) in June and December. The Commission shall review the year's construction permit record and consider transfer of surplus allocations at its first meeting in June and its second

meeting in November, each year. Following their review the Commission shall forward to the Board of Supervisors their recommendations for such changes in the allocation system, as they feel are warranted for the balance of the year, along with the supporting data for their recommendations.

5) "Affordable" Housing: Chapter 8.02 of the Napa County Code Measure A requires that "at least 15% of those housing units permitted each year shall be for housing capable of purchase or rental by persons with average or below average income". The 15% affordability housing requirement is described in the definition section of the report as follows:

"Income information provided annually by HUD shall be used; average shall mean the median. Capable of purchase or rental shall mean that not more than 30% of the (gross) household income shall be spent on housing costs such as rent payment, mortgage payment, insurance, taxes, and condominium membership fees". Income figures are published annually by the federal government (Department of Housing and Urban Development (HUD)) and the state (Department of Housing and Community Development (HCD)). Depending on rental or sale, inflation, interest rates, downpayment requirements, insurance, taxes, utility costs and miscellaneous fees, many housing developments might qualify as "affordable". Affordable housing can be of any type (single family, multiple, mobilehome). It is estimated that mobilehomes and farm labor housing will meet the affordability criteria more readily than other types of dwellings.

Development of affordable housing (pursuant to Category 4 in the Growth Management System) requires a written agreement with the County and any designated agency prior to issuance of the building permits. It is the developer's responsibility to identify how the unit(s) will meet the "affordable" criteria, and this documentation will be included as part of the agreement. (See the Housing Element regarding incentives to the construction of affordable housing.) Developers may count appreciation and tax write-off advantages to the owner into ownership affordability calculations. The most recent HUD/HCD information will be used in calculating affordability. The most recent HUD/HCD figures at the time the unit is marketed may be used or an adjustment using the Consumer Price Index will be allowed if one year has passed and HUD or HCD has not issued a new figure.

6) Process of Distributing Building Permits: The Growth Management System assigns a share of the annual allocation to each of four categories of regulated development as shown below:

FIGURE 50: RESIDENTIAL BUILDING PERMIT CATEGORIES, SHARES OF ANNUAL ALLOCATION, BUILDING PERMIT AVAILABILITY DATES

CATEGORY	SHARE OF ANNUAL ALLOCATION	BUILDING PERMIT AVAILABILITY DATES* January 1
1) Owner-Occupied	6967 D.U.	6967 D.U.
2) Small-scale Builder	1413 D.U.	1413 D.U.
3) Large-scale Builder	1413 D.U.	1413 D.U.
4) "Affordable" House	1716 D.U.	1716 D.U.
*Unused permits in Categories 1, 2 and 3 will be considered for redistribution each June and November by the Conservation, Development and Planning Commission.		

FIGURE 51: MEASURE A GROWTH MANAGEMENT SYSTEM; BUILDING PERMIT DISTRIBUTION SYSTEM

Category of Regulated	Annual	Building Permit Distribution Process:
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	Development*	Allocation**	When Supply Exceeds Demand	When Demand Exceeds Supply
1	Owner-Builder (one building permit per year)	<u>6967</u>	First approved, First served	Lottery (Annually)
2	Small-Scale Builder (2 or more permits) (no discretionary review required) (final map must be recorded)	<u>1413</u>		
3	Large-Scale Builder (2 or more permits) (discretionary review required)	<u>1413</u>	Discretionary Review; First approved, First served	Discretionary Review, Lottery (Annually)
4	Affordable House (Written rent/sale price limitation agreement required)	<u>1716</u>	May require discretionary review; Housing Agreement, First approved, First served	May require discretionary review; Development Agreement; Lottery (Annually)
<p>*Note that the Following types of development are exempted from regulation of the Growth Management System: industrial, commercial, commercial-residential (less-than-monthly rental), replacement housing, additions to and renovations of existing dwelling units, certain house moving, dwellings inside the Lake Berryessa Take line, accessory buildings, guest cottages, units covered by development agreements approved prior to July 28, 1981, and units covered by both development plans and use permits approved prior to July 28, 1981.</p> <p>**Unused permits in Categories 1, 2 and 3 will be considered for redistribution once a year no later than November.</p>				

In order to distribute the shares of the annual allocation to ensure fairness to all applicants, the following two-step distribution system is recommended: In the first step, building permits would be issued on a first-approved, first-served basis until all the permits in that allocation period for that category have been used. When the demand for permits in any category exceeds the supply available, the second step process, a lottery, is initiated. For example, in Category 1, (in which 80 additional building permits become available each year, each applicant whose plans have received all necessary approvals can immediately receive a building permit, if one is available. the first day of each January, an additional 80 building permits is added to the Category 1 supply. Category 1 applicants whose plans are fully approved, can be issued permits until there are no more permits available in Category 1 supply. In the second step, permits are issued on the basis of a lottery. Building permit applications enter a lottery when they:

- a) Are approved for issuance of a building permit; but
- b) None is available in their category, and
- c) The backlog of approved applications exceeds the next available allocation of permits in that category. All applications approved in the first half-year in which the supply ran out are drawn from the lottery as long as the new supply of permits lasts, until none of those approved applications is left. After all of those applications are assigned permits, the next time period of approved applications would be included in the lottery and those applications would be drawn

from the lottery until they all were assigned permits. The lottery would continue until there was a surplus of permits available, which would allow a return to the first step process (first approved, first served). For example, assume Category 1 experiences a surplus of applications during the last half of 1993, and the last available permit is issued October 19, 1993. All Category 1 applicants wishing to receive a permit between then and January 1, 1994 must wait until January 1st for permits to become available, at which time they could immediately be issued permits, if the backlog of fully approved applications is no more than 67. If there was a backlog of ten (10) approved applications as of January 1st, those applications would have permits reserved in their names which permits could be issued any time in the next 180 days. (If these reserved permits were not issued in 180 days, they would revert to the Category 1 supply and be available to other applicants.) If the backlog on January 1st was 77, there would be a drawing at the first opportunity. The first 67 applications drawn would have permits reserved, as above, and the remaining ten would have to wait until January 1, 1995, at which time they would be guaranteed a reserved permit, as above. In this example, there would be no Category 1 permits issued in 1994 except to those applicants in whose name a permit was reserved. The advantages of this system are as follows:

- 1) Applicants for building permits would experience minimum frustration since they would have some degree of certainty as to when they would get their permits and could plan their construction accordingly.
- 2) Applicants would realize it was to their benefit to submit complete plans as soon as they could, especially when asked for necessary additional information.
- 3) Administrative work would be kept to a minimum, since there would be no need for the County to select or grade applications by their relative merit. The choice of who gets a permit would be random, except that there would be some regard for precedence.
- 4) The main advantage of this system of distribution of building permits is that it limits governmental control. If the supply of building permits exceeds the demand for permits, there is no growth management control at all.

Various details of the system are as follows:

The Board of supervisors may by resolution alter the procedures for conducting the required lottery so long as the revised procedures are in general accord with the system as described below:

- 1) Lotteries, when necessary, would be by category. Lotteries for Category 1, held annually until a backlog is eliminated, would be for single permits, drawn one at a time. Lotteries for Category 2, held in January (when necessary) would be for single permits, drawn one at a time. Lotteries for Categories 3 and 4 would be held in January or later if necessary.
- 2) Fully approved applications would be listed by Assessor's parcel number in order of approval on a chronological master list. That number would correspond to a numbered, three-part card; one part is mailed to the applicant, one part is copied and entered in the lottery and one part is kept on file.
- 3) Only one entry per person (household, business, corporation) could be included in each lottery. (This would not keep a contractor from building several homes, each under contract to a separate owner nor would it keep an individual from participating in a number of separate ventures.)
- 4) Lottery cards would be dropped into a ballot box, one at a time, by the lottery secretary, mixed and drawn out one at a time by the lottery judge until all numbers have been drawn and listed in the order in which they were drawn.

- 5) A list of all the cards in the lottery would be displayed prior to the drawing; during the drawing the sequential order in which the cards were drawn would be noted on the xerox list. All cards would be drawn and listed, even if the number of permits available was exceeded, so each applicant would be assured he was not left out of the drawing.
- 6) The drawing operation must be conducted so as to be beyond reproach; the person who draws the numbers must be someone whose integrity and involvement bespeaks honesty and objectivity; for example, a clergyman.
- 7) Improvements required as a condition of approval for category 3 and 4 proposals could be deferred by written agreement until permits are reserved; but would have to be completed between the times that the permits are reserved and issued. Once the underlying discretionary County permit is "used", the period for issuance of the reserved permits would be extended to one year (rather than 180 days).
- 8) All issued permits are subject to the UBC non-use revocation provision; revoked, surrendered or returned permits will be added to the supply of permits in the category in which they were issued, but will be made available only through lottery, in order to avoid speculation.
- 9) Permits are neither transferable upon sale of the parcel, nor transferable to a different site or substitutable for a different dwelling. Minor design changes are acceptable; major/structural changes, can be made only in case of 1) redesign for energy efficiency or 2) down-scaling due to economic necessity.

APPENDIX A: Chapter 8.02 HOUSING ALLOCATION PROGRAM

8.02.010 Definitions—Generally.

Unless the context requires otherwise, the definitions in this section shall govern the interpretation of the provisions of this chapter.

“Building permits” means permits for the construction of new dwelling units on a site, not including rebuilding, remodeling, renovating or enlarging existing units, moving an existing dwelling from one unincorporated site to another unincorporated site, or units exempted by ‘grandfathering.’

“Growth management system element” means the comprehensive plan which is a part of the county’s general plan and related ordinances, if any, which this chapter implements.

“Housing capable of purchase or rental by persons with average or below average income” means that not more than thirty percent of the (gross) household income shall be spent on housing costs such as rent, mortgage payments, insurance, taxes, necessary utilities, and condominium membership fees.

“Moderate” shall mean up to one hundred twenty percent of the county median income.

“New housing units” means a room or connected rooms constituting a separate, independent housekeeping establishment for owner occupancy or rental or lease on a monthly or longer basis, physically separate from other rooms or dwelling units in the same structure, and containing independent cooking and sleeping facilities. New housing units may also be referred to as “dwelling units” or “residential units” and shall include mobilehomes, not including mobilehomes within the federal take line at Lake Berryessa. New housing units shall not mean the rebuilding of an existing unit, the replacement of an existing unit by another, or the movement of an existing unit or units exempted by grandfathering.

“Nine Bay Area counties” means the counties of Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara, Sonoma, and Solano.

“Persons per household” means the population in households divided by the number of occupied

dwelling units.

“Population growth rate” means the change in the total population in one year’s time stated as a percentage either increasing or decreasing, based on relevant data from the California Department of Finance’s Demographic Research unit and supplemented by the United States Census whenever available for the unincorporated area of Napa County adjusted for annexations and incorporations and the entirety of the nine San Francisco Bay Area counties.

“Reflect any changes in the annual population growth” means a change in the maximum population growth which matches that of the nine Bay Area counties, but in no case greater than one percent.

“Relevant data” means information needed to calculate the actual number of dwelling units to be permitted.

“United States Census” means censuses conducted by the United States Bureau of the Census, including Decennial Census and the Mid-Decade Census.

“Vacancy rate” means the number of vacant year-round dwelling units divided by the total number of year-round dwelling units in the unincorporated area.

“Year round housing units” means those dwelling units which are capable of year-round occupancy, but not including less than monthly rentals and dwelling units within the federal take line at Lake Berryessa.

8.02.020 Allocation rate—Affordable housing.

A. The annual number of new housing units in the unincorporated area of the county of Napa through December 31, 2020, shall be allocated so as to allow an annual population growth rate that shall not exceed the population growth rate of the Nine Bay Area counties as such rate is reflected in the relevant data provided by the California Department of Finance’s Demographic Research Unit and as supplemented by the United States Census if available; provided that the annual population growth rate limit shall not exceed one percent in the county of Napa.

B. At least fifteen percent of the housing units allocated each year shall be for housing capable of purchase or rental by persons with moderate or below moderate income.

8.02.030 Implementation.

A. General Plan and Growth Management System. The county shall implement the provisions of this chapter in accordance with the Growth Management System Element of the Napa County general plan and such other ordinances as may be, or may have been, enacted to carry out the provisions of such Growth Management System Element. The county reserves the right to amend the Growth Management System Element in accordance with the requirements of applicable law.

B. Periodic Review. The board of supervisors shall modify the Growth Management System Element and related ordinances by July 1, 2005, again by December 31, 2007 and at least every five years thereafter to reflect any changes in the annual population growth rate for the Nine Bay Area counties. In setting the annual number of new housing units (and building permits) allocated in the future, the board of supervisors shall use the most recent census and other relevant data provided by the California Department of Finance’s Demographic Research Unit for determining the persons per household and the vacancy rate of year round housing units. The United States Census may be used as a supplementary resource whenever available.

~~TEXT OF MEASURE A ADOPTED BY VOTERS NOVEMBER 4, 1980 NAPA COUNTY
SLOW GROWTH INITIATIVE MEASURE A Full Text of Ordinance INITIATIVE
ORDINANCE FOR A SLOW GROWTH GENERAL PLAN, REDUCTION OF COSTLY
URBAN SPRAWL, AND THE PRESERVATION OF THE COUNTY'S UNIQUE~~

~~CHARACTER AND AGRICULTURAL LANDS. TO THE BOARD OF SUPERVISORS OF THE COUNTY OF NAPA:~~

~~We, signators hereof, being duly qualified and registered electors of the County of Napa, California, hereby petition the Board of Supervisors of said County and request that the following proposed ordinance be submitted immediately to a vote of the people at a regular or special election pursuant to the Election Code of the State of California, or that, in lieu of an election, the Board of Supervisors enact said proposed ordinance pursuant, to said Election Code. To the degree practicable, we would encourage that the proposed ordinance be placed on the ballot at the general election to be held November, 1980. The People of the County of Napa do ordain as follows:~~

~~Section 1. Findings. The People of the County of Napa find that mismanaged and unlimited residential growth causes conditions harmful to the public health, safety and general welfare and results in substantial increase in the cost of government services, loss of irreplaceable agricultural land, inadequate police and fire protection, increased traffic congestion, inadequate parks and recreation facilities, loss of open space, increased air pollution, deterioration of older urban areas, general urban sprawl, increased crime rate and overcrowded schools.~~

~~Section 2. Purpose.~~

~~The People declare that the foregoing conditions can be avoided, or alleviated, by the enactment of this Ordinance.~~

~~Section 3. Standards.~~

~~(a) The annual number of new housing units permitted in the County of Napa (unincorporated area), through the year 2000, shall be limited to accommodate an annual population growth rate that shall not exceed that of the Nine San Francisco Bay Area Counties (Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara, Sonoma, and Solano) as such rate is reflected in the United States Census; provided, however, that said annual population growth rate limit shall not be permitted to exceed 1% in the County of Napa (unincorporated area). In setting the annual number of new housing units permitted, the Board of Supervisors shall use the most recent United States Census for determining the persons per household and the vacancy rate of the year-round housing units. (b) At least 15% of those housing units permitted each year shall be for housing capable of purchase or rental by persons with average or below average income. The average income shall be based on the average income of residents of the County of Napa, based on the most recent Federal Census.~~

~~Section 4. Programs.~~

~~(a) General Plan Revision and Growth Management System. Within nine (9) months of the date this Ordinance becomes effective, the County of Napa shall amend its General Plan to comprehensively carry out the provisions enacted by this Ordinance, and shall enact, as part of the General Plan, a Growth Management System and such ordinances as are required to implement the intent of this ordinance, to regulate the character, location, amount, and timing of future residential development, in conformity with the standards and procedures contained in this Ordinance. If the County of Napa does not adopt a revised General Plan and Growth Management System and related ordinances as required by this ordinance within nine (9) months of date this Ordinance becomes effective, no building permits for new construction of residential units shall thereafter be issued by the County of Napa, nor shall any subdivision of land thereafter be approved, until such time as said General Plan revision and Growth Management System and related ordinances as required by this Ordinance are adopted as provided herein. (b) Review Following Census. The Board of Supervisors, as soon as it receives the relevant data~~

~~taken during the most recent Census (U.S. Decennial Census and Mid-Decade Census), shall modify the Growth Management System to reflect any changes in the annual population growth rate for the Nine San Francisco Bay Area Counties as reflected in said census; provided, however, that all modifications shall be consistent with the provisions of this Ordinance and in accordance with the standards contained in Section 3 herein.~~

~~Section 5. Severability.~~

~~If any portion of this Ordinance is hereafter determined to be invalid, all remaining portions of this Ordinance shall remain in full force and effect, and to this extent the provisions of this Ordinance are separable.~~

~~Section 6. Amendment.~~

~~No part of this Ordinance shall be amended or repealed, except by a vote of the people.~~

~~Section 7. Effective Date.~~

~~This Ordinance shall take effect as provided by law.~~

~~Section 8. Ordinance Supersedes.~~

~~The provisions of this Ordinance shall be held to be the minimum requirements for the promotion of the public safety, health, convenience, comfort, prosperity, and general welfare. This Ordinance shall supersede any other ordinance, rule or regulation which has been previously adopted by the Board of Supervisors, or by a vote of the people to the extent that said Ordinance is not intended to interfere with, abrogate, annul, or repeal any ordinance, rule or regulation which has been previously adopted and is not in conflict with any of the provisions of this Ordinance.~~

APPENDIX B: DEFINITION OF TERMS AND PHRASES CONTAINED IN THE MEASURE A GROWTH MANAGEMENT SYSTEM

(Terms and phrases are listed in the order in which they appear in Measure A.)

1) ~~New Housing Units: A room or connected rooms constituting a separate, independent housekeeping establishment for owner occupancy or rental or lease on a monthly or longer basis, physically separated from other rooms or dwelling units in the same structure, and containing independent cooking and sleeping facilities. May also be referred to as "dwelling units" or "residential units" and shall include mobile homes (excepting those within the Lake Berryessa Take Line). Shall not include the rebuilding of an existing unit, the replacement of an existing unit by another, or the movement of an existing unit (currently outside the Lake Berryessa Take Line), or units exempted by "grandfathering".~~

2) ~~Unincorporated Area: All of the County area located outside of the city/town limits.~~

3) ~~Population Growth Rate: The change in total population in one year's time stated as a percentage either increasing or decreasing. Calculations shall be based on U.S. Census data for the unincorporated part of Napa County (adjusted for annexations and incorporations), and the entirety of the 9-County Bay Area.~~

4) ~~United States Census: Shall refer to censuses conducted by the U.S. Bureau of the Census, including the Decennial Census, and the Mid-Decade Census also referred to as the quinquennial Census, provided that the Mid-Decade information includes all of the data required by the Growth Management System. May also be referred to as the most recent Federal Census (11).~~

5) ~~Persons Per Household: The population in households divided by the number of occupied dwelling units in the unincorporated portion of Napa County. (Consistent with the 1970 Census definition App 4, PHC (1)-223). "The verage population per household is obtained by dividing the population in households by the number of household heads. Head of Household. One person~~

in each household is designated as the "head", that is, the person who is regarded as the head by the members of the household. However, if a married woman living with her husband was reported as the head, her husband was considered the head for the purpose of simplifying the tabulations. Two types of household heads are distinguished—the head of a family and a primary individual. A family head is a household head living with one or more persons related to him by blood, marriage or adoption. A primary individual is a household head living alone or with nonrelatives only."

~~6) Vacancy Rate: The number of vacant year-round dwelling units divided by the total number of year-round dwelling units in the unincorporated portion of Napa County.~~

~~7) Year-Round Housing Units: Those dwelling units which are capable of year-round occupancy; excluding less than monthly rentals and dwelling units within the Lake Berryessa Take Line.~~

~~8) At Least 15% of Those Housing Units Permitted Each Year: 15% of the annual number of permits which can be issued must be reserved for units capable of purchase or rental by persons with average income.~~

~~9) Housing Capable of Purchase Or Rental By Persons With Average Or Below Average Income: Income information provided annually by HUD or HCD shall be used; average shall mean the median. Capable of purchase or rental shall mean that not more than 30% of the (gross) household income shall be spent on housing costs such as rent payment, mortgage payment, insurance, taxes, necessary utilities and condominium membership fees.~~

~~10) Residents of the County of Napa: Persons who have a Napa County address as their primary residence, as specified by the Bureau of the Census on Page 1 of the 1990 Census form.~~

~~11) Most Recent Federal Census: (See 4).~~

~~12) Growth Management System: The comprehensive plan which is part of the County's General Plan and together with related ordinances (20), implements the Slow Growth Initiative, Measure A.~~

~~13) Character: Aesthetic and physical qualities which may be controlled, including density, building type (e.g., single family detached or attached, apartments, mobilehome parks), setbacks, height limits, landscaping, building coverage, color, siding material, roof overhang and material, accessory buildings, parking, orientation, style and signing.~~

~~14) Location: Within the County; including sub-area, whether inside or outside the cities, or where on a particular site.~~

~~15) Amount: The number of new housing units approved for construction in one year.~~

~~16) Timing: The relationship of the number of building permits issued within one year to the total number of permits issued over several years.~~

~~17) Future Residential Development: The number of dwelling units to be permitted in the future through the controlled issuance of building permits in the unincorporated part of Napa County.~~

~~18) Adopt: To formally accept by vote of the Board, after public hearing and discussion, in the same manner as a General Plan element.~~

~~19) Revised General Plan and Growth Management System: (See 12).~~

~~20) Related Ordinances: (See 12).~~

~~21) Building Permits for New Construction of Residential Units: Permits for the construction of new dwelling units on a site. Does not include rebuilding, remodeling, renovating or enlarging existing units, or moving an existing dwelling unit from one unincorporated site (outside the Berryessa Take Line) to another unincorporated site, or units exempted by "grandfathering".~~

~~22) Any Subdivision of Land: Divisions of land which require discretionary action by the County; shall not include lot line adjustments.~~

~~23) Relevant Data Taken During the Most Recent Census: Information necessary to calculate the annual number of dwelling units to be permitted (see 4).~~

~~24) Reflect Any Changes in the Annual Population Growth Rate: The maximum growth rate allowed shall be changed to match that of the 9 Bay Area Counties as soon as new information is available from the Census, but in no case can be greater than one percent.~~

Section 4. Health and Safety Code Amendments.

Reenact Chapter 8.02 of the Health and Safety Code as follows:

8.02.010 Definitions—Generally.

Unless the context requires otherwise, the definitions in this section shall govern the interpretation of the provisions of this chapter.

“Building permits” means permits for the construction of new dwelling units on a site, not including rebuilding, remodeling, renovating or enlarging existing units, moving an existing dwelling from one unincorporated site to another unincorporated site, or units exempted by ‘grandfathering.’

“Growth management system element” means the comprehensive plan which is a part of the county’s general plan and related ordinances, if any, which this chapter implements.

“Housing capable of purchase or rental by persons with average or below average income” means that not more than thirty percent of the (gross) household income shall be spent on housing costs such as rent, mortgage payments, insurance, taxes, necessary utilities, and condominium membership fees.

“Moderate” shall mean up to one hundred twenty percent of the county median income.

“New housing units” means a room or connected rooms constituting a separate, independent housekeeping establishment for owner occupancy or rental or lease on a monthly or longer basis, physically separate from other rooms or dwelling units in the same structure, and containing independent cooking and sleeping facilities. New housing units may also be referred to as “dwelling units” or “residential units” and shall include mobilehomes, not including mobilehomes within the federal take line at Lake Berryessa. New housing units shall not mean the rebuilding of an existing unit, the replacement of an existing unit by another, or the movement of an existing unit or units exempted by grandfathering.

“Nine Bay Area counties” means the counties of Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara, Sonoma, and Solano.

“Persons per household” means the population in households divided by the number of occupied dwelling units.

“Population growth rate” means the change in the total population in one year’s time stated as a percentage either increasing or decreasing, based on relevant data from the California Department of Finance’s Demographic Research unit and supplemented by the United States Census whenever available for the unincorporated area of Napa County adjusted for annexations and incorporations and the entirety of the nine San Francisco Bay Area counties.

“Reflect any changes in the annual population growth” means a change in the maximum population growth which matches that of the nine Bay Area counties, but in no case greater than one percent.

“Relevant data” means information needed to calculate the actual number of dwelling units to be permitted.

“United States Census” means censuses conducted by the United States Bureau of the Census, including Decennial Census and the Mid-Decade Census.

“Vacancy rate” means the number of vacant year-round dwelling units divided by the total number of year-round dwelling units in the unincorporated area.

“Year round housing units” means those dwelling units which are capable of year-round occupancy, but not including less than monthly rentals and dwelling units within the federal take line at Lake Berryessa.

8.02.020 Allocation rate—Affordable housing.

A. The annual number of new housing units in the unincorporated area of the county of Napa through December 31, 2020, shall be allocated so as to allow an annual population growth rate that shall not exceed the population growth rate of the Nine Bay Area counties as such rate is reflected in the relevant data provided by the California Department of Finance’s Demographic Research Unit and as supplemented by the United States Census if available; provided that the annual population growth rate limit shall not exceed one percent in the county of Napa.

B. At least fifteen percent of the housing units allocated each year shall be for housing capable of purchase or rental by persons with moderate or below moderate income.

8.02.030 Implementation.

A. General Plan and Growth Management System. The county shall implement the provisions of this chapter in accordance with the Growth Management System Element of the Napa County general plan and such other ordinances as may be, or may have been, enacted to carry out the provisions of such Growth Management System Element. The county reserves the right to amend the Growth Management System Element in accordance with the requirements of applicable law.

B. Periodic Review. The board of supervisors shall modify the Growth Management System Element and related ordinances by July 1, 2005, again by December 31, 2007 and at least every five years thereafter to reflect any changes in the annual population growth rate for the Nine Bay Area counties. In setting the annual number of new housing units (and building permits) allocated in the future, the board of supervisors shall use the most recent census and other relevant data provided by the California Department of Finance’s Demographic Research Unit for determining the persons per household and the vacancy rate of year round housing units. The United States Census may be used as a supplementary resource whenever available.

Section 5. Zoning Code Amendments.

Reenact and amend section 18.104.120 of the Zoning Code as follows:

18.104.120 Maximum building height.

A. Except as otherwise provided elsewhere in this chapter, ~~Section 18.104.010 or subsections of this section~~, no structure other than a telecommunication tower shall exceed thirty-five feet in height when measured to the mid-point of the cord of the roof using the procedure outlined in Figures 4-4 and 4-5 of the Uniform Building Code.

B. Single-family residences shall not exceed three stories or thirty-five feet in height, whichever is less.

C. Towers, spires, cupolas and similar architectural features not including roof structures themselves, chimneys, antennae, aerials, water tanks, utility structures, mechanical features and other similar appurtenances necessarily and normally attached to a structure may be constructed to a height of not more than fifteen feet above the maximum building height in the zoning district, but any additional space created shall not be habitable, used for eating or sleeping purposes, or employed for any commercial or advertising use.

D. Freestanding towers, chimneys, antennae, aerials, and water tanks may extend to a maximum height of not more than fifteen feet above the maximum building height in the zoning district. No such structure shall contain habitable space nor be used for eating, sleeping, commercial, or advertising purposes.

E. Structures necessary for the excavation or processing of nonorganic materials of any nature may extend to a maximum height of one hundred feet above the average grade at the area covered by the foundation of the structure, provided:

1. A use permit (Section 18.124.010) and a surface mining permit (Section 16.12.090) are obtained;
2. The commission determines as part of the permit procedure that the height of the structure will not adversely affect the public health, safety and welfare. The commission shall consider the visual impact of the structure upon surrounding properties.

Section 6. Implementation and Enabling Legislation.

To the extent permitted by law, the County is hereby authorized and directed to amend any elements or provisions of the General Plan and Zoning Code, and any and all other County ordinances, policies and implementation programs or policies as soon as possible in order to implement this Initiative and to ensure consistency between this Initiative and all other elements of the General Plan and Zoning Code. This enabling legislation shall be interpreted broadly pursuant to *Pala Band of Mission Indians v. Board of Supervisors* (1997) 54 Cal.App.4th 565, to promote the requirement that a general plan constitute an integrated and consistent document. The County is also hereby authorized and directed to amend all charts and graphs contained in the General Plan, Zoning Code, or in any other documents to reflect the changes made to the General Plan and Zoning Code by this Initiative.

Section 7. Interim Amendments.

The General Plan and Zoning Code in effect at the time the Notice of Intention to propose this Initiative (“Notice of Intention”) was submitted to the County Clerk, and the General Plan and Zoning Code as amended by this Initiative comprise an integrated, internally consistent and compatible statement of policies for the County. In order to ensure that the General Plan and Zoning Code remain an integrated, internally consistent and compatible statement of policies for the County, the General Plan and Zoning Code provisions adopted by this Initiative shall prevail over any conflicting revisions to the General Plan and Zoning Code adopted between the date of the Notice of Intention and the date the amendments adopted by this Initiative are inserted into the General Plan and Zoning Code, or are otherwise adopted. To this end, any conflicting revisions to the General Plan or Zoning Code adopted between the date of the Notice of Intention and the date the amendments adopted by this Initiative were inserted into the General Plan and

Zoning Code or otherwise adopted shall be null and void in their entirety and without any legal effect whatsoever.

Section 8. Conflicting Measures.

- A. In the event that another ballot measure (hereafter, “competing initiative”) appears on the same ballot as this Initiative which seeks to adopt or impose any General Plan or Zoning Code designations or requirements, or any other regulations, that differ in any regard to, or supplement, those contained in this Initiative, the voters hereby express and declare their intent that if both the competing initiative and this Initiative receive a majority of votes cast, and if this Initiative receives a greater number of votes than the competing initiative, this Initiative shall prevail in its entirety over the competing initiative without regard to whether specific provisions of each measure directly conflict with each other. Under these circumstances, the competing initiative shall have no force or effect and shall be void.
- B. In the event that both the competing initiative and this Initiative receive a majority of votes cast, and the competing initiative receives a greater number of votes than this Initiative, this Initiative shall be deemed to be complementary to the competing initiative. To this end, and to the maximum extent permitted by law, the provisions of this Initiative shall be fully adopted except to the extent the specific provisions contained in each measure are deemed to be in direct conflict with each other on a “provision by provision” basis pursuant to *Yoshisato v. Superior Court* (1992) 2 Cal.4th 978.

Section 9. Severability.

If any portion of the Initiative is declared invalid by a court, that invalidity shall not affect other provisions or application of the Initiative which can be given effect without the invalid provision, and to this end the provisions of this Initiative are severable. The voters of the County hereby declare that they would have circulated for qualification and/or adopted this Initiative and each portion regardless of the fact that an invalid portion or portions may have been present in the Initiative.

Section 10. Amendment.

Except as expressly provided by this Initiative, the provisions of this Initiative shall not be amended or repealed except by the voters.

Section 11. Effective Date.

This Initiative shall go into effect ten (10) days after the date on which the election results are declared by the Board of Supervisors or immediately upon adoption of the Initiative by the Board of Supervisors. Upon the effective date of this Initiative, the General Plan amendments contained within the Initiative are hereby inserted into the General Plan as amendments hereof; provided, however, that if the four amendments permitted by state law for any given calendar year have already been utilized prior to the effective date of this Initiative, the General Plan Amendment shall be inserted into the General Plan on January 1 on the following year.

Appendix B:
Summary of Responsible Growth Initiative Provisions

APPENDIX B—SUMMARY OF RESPONSIBLE GROWTH INITIATIVE PROVISIONS

Napa County General Plan Land Use Element

1. Amend Page 2–25 of the Land Use Element to explicitly reference the Housing Allocation Program (Napa County Code Section 8.02).
2. Amend Page 2–26 of the Land Use Element to explicitly reference the Housing Allocation Program (Napa County Code Section 8.02), and to eliminate the sunset of the 1 percent growth provision in the year 2000.
3. Applies definitions from Chapter 8.02 of the Napa County Code to all provisions of this Initiative.

Napa County General Plan Housing Element

1. Amend Pages 1 through 5 of the Housing Element, Introduction, in the following ways:
 - Eliminate the reference to Sections III G and H when discussing the inappropriateness of much of the County’s unincorporated land for residential development.
 - Eliminate reference to Appendix B, a list of projects supported by the County’s Affordable Housing Trust Fund between 1993 and 2003.
 - Eliminate reference to Appendix C, which consists of copies of 2003 Memoranda of Understanding between the County and the City of Napa and between the County and the City of American Canyon regarding the transfer to the cities of dwelling units from the County’s Regional Housing Needs Assessment allocation.
2. Reenact Pages 56–57 of the Housing Element, Land Use Controls, detailing the provisions of 1980 voter-approve ballot initiative Measure A and the Growth Management System Element of the Napa County General Plan.
3. Reenact Page 72 of the Housing Element, Goal 12, which limits the rate of annual housing growth to 1 percent.
4. Reenact Page 74 of the Housing Element, Policy 2e and 2f, which provide for the accumulation of Category 4 Affordable Housing Permits, for the use of such permits for housing of households earning up to 120 percent of median income, and providing incentives for the use of such permits.
5. Reenact Page 75 of the Housing Element, Objective 2c, which maintains the indefinite “rollover” status of unused Category 4 permits and mandating modifications to the Growth Management System to facilitate affordable housing development.
6. Reenact Page 76 of the Housing Element, Program 2e and 2h, continuing the accumulation of Category 4 permits, and exempting secondary residential units from the annual growth limitations of Measure A.
7. Reenact Page 80 of the Housing Element, Objective 4a and Program 4a.

- Objective 4a directs the County to make 114 building permits for dwelling units available per year, excluding secondary units and “carryover” affordable housing permits. It allows for the issuance of non-affordable housing permits within three years from their original creation. It also directs the County to reserve a minimum of 17 permits for affordable housing per year, in addition to any accrued surplus of unused affordable housing permits.
 - Policy 4a directs the County to implement the Growth Management System Element, and to reserve at least 15 percent of available permits for affordable housing units.
8. Reenact Pages 86–87 of the Housing Element, Table 19: Summary of Housing Element Program Actions, a restatement of Policy 2e, identifying the County Preservation and Planning Department as the action agency. The original table reenacted also specifies a policy time frame of 2004–June 30, 2007.

Napa County General Plan Growth Management System Element

1. Amend Growth Management System Element, Appendix A to replace the text of Measure A with the text of Napa County Code Chapter 8.02 Housing Allocation Program.
2. Amend Growth Management System Element to eliminate Appendix B, Definitions.
3. Amend Growth Management System Element, Introduction, to include an account of the County’s reaffirmation of Measure A policies through the passage of Ordinance No. 1178 and the enactment of the Housing Allocation Program in Napa County Code Chapter 8.02 and to eliminate reference to the 1990-2000 annual allocation of 109 permits.
4. Amend Growth Management System Element, Introduction, to alter the first in a list of reasons given why the County is accommodating its share of regional housing needs to provide a more general description of the permit allocation process and eliminate references to out of date statistics and allocations.
5. Amend Growth Management System Element, Introduction, to alter the second in the list of reasons to change phrasing stating that units grandfathered under the Growth Management System augment the annual allocation of units.
6. Amend Growth Management System Element, Introduction, to add four additional reasons to the list:
 - A fourth reason noting the historical surplus of building permits and additional mechanisms in the 2006 [sic] Housing Element ensuring that the County meets its RHNA.
 - A fifth reason stating that the number of permits to become available will be based on the best available data from the State of California Department of Finance’s Demographic Research Unit.
 - A sixth reason, noting the agreements the County entered into with the Cities of Napa and American Canyon to allow for transfer to the Cities of the County’s regional housing needs.
 - A seventh reason noting the certification of the County’s 2004 Housing Element by HCD.

7. Amend Growth Management System Element, Section 2—Annual Growth Rate Calculation, as follows:
 - Stipulate the updating of the annual allocation of building permits every five years (or coinciding with Housing Element Updates).
 - Update the annual housing unit allocation from 109 to 114.
 - Change a reference to the 1990 Census to a reference to the 2000 Census.
8. Amend Growth Management System Element, Section 2—Annual Growth Rate Calculation, to simplify the description of the annual growth rate calculation.
9. Amend Growth Management System Element, Section 3—Building Permit Allocation, to replace the description of “Character” with a statement that the annual allocation of 114 units is distributed into the four categories found in the original Growth Management System.
10. Amend Growth Management System Element, Section 3—Building Permit Allocation, to add a reference to Chapter 18.08.300 of the Napa County Code to define “Guest Cottages”.
11. Amend Growth Management System Element, Section 3—Building Permit Allocation, to eliminate the exemption for several projects with use permits and development plans approved prior to July 28, 1981:
 - Napa Meadows (434 Dwelling Units)
 - Brookfield/World Marine MHP (125 Dwelling Units)
 - Napa Estates (208 Dwelling Units)
12. Amend Growth Management System Element, Section 3—Building Permit Allocation, to reference Chapter 18.08.550 of the Napa County Code to define “Second Units”.
13. Amend Growth Management System Element, Section 3—Building Permit Allocation, to add a reference to Chapter 18.08.300 of the Napa County Zoning Code to define “Guest Cottages”.
14. Amend Growth Management System Element, Section 3—Building Permit Allocation, to eliminate language from the definition of “Location of Growth”. Language to be eliminated:

“The County's General Plan Population Distribution Policy reads, ‘...the County will plan for and accommodate the distribution of population among the sub-areas of the County, giving preference to the existing incorporated and urban areas’. Higher density development would normally occur in the urban areas as a result of the availability of water and/or sewer facilities. Preference is to be given to the urban areas identified in the County's General Plan such as unincorporated American Canyon, Angwin and those County islands surrounded by the City of Napa.”
15. Amend Growth Management System Element, Section 4—Timing, as follows:
 - Changing the annual permit allocation from 109 to 114,
 - Changing the rollover provisions to reflect the 2004 Housing Element Update, including the three year rollover period and the indefinite accumulation of Category 4 permits.
16. Amend Growth Management System Element, Section 5—Affordable Housing, to change a reference to Measure A into a reference to Chapter 8.02 of the Napa County Code.
17. Amend Growth Management System Element, Section 6—Process of Distributing Building Permits, Figures 50 and 51 to reflect the updating of the annual allocation from 109 to 114 units.

18. Amend Growth Management System Element, Section 6—Process of Distributing Building Permits, to simplify the description of the building permit lottery process.
19. Amend Growth Management System Element, Section 6—Process of Distributing Building Permits to state that the Board of Supervisors may alter the lottery procedures provided that revised procedures are in general accord with the existing details of the lottery system.
20. Amend Growth Management System Element, Appendix A, to replace the text of Measure A with the text of the Housing Allocation Program (Napa County Code Chapter 8.02).
21. Amend Growth Management System Element, Appendix B – Definitions, to delete Appendix B.

Napa County Code Chapter 8—Health and Safety Code

1. Reenact Chapter 8.02 of the Napa County Code (Health and Safety Code Sections 8.02.10-30– Affordable Housing). This measure reenacts the Housing Allocation Program.

Napa County Code Chapter 18.104.120—Zoning—Maximum Building Height

1. Reenact Section 18.104.120 as written, and also amend Section 18.104.120.A to eliminate reference to Section 18.104.010 (Parcel Design).

Appendix C:
California Elections Code 9111

California Elections Code §9111

§9111. Report from county agencies on effect of proposed initiative measure

(a) During the circulation of the petition or before taking either action described in subdivisions (a) and (b) of Section 9116, or Section 9118, the board of supervisors may refer the proposed initiative measure to any county agency or agencies for a report on any or all of the following:

(1) Its fiscal impact.

(2) Its effect on the internal consistency of the county's general and specific plans, including the housing element, the consistency between planning and zoning, and the limitations on county actions under Section 65008 of the Government Code and Chapters 4.2 (commencing with Section 65913) and 4.3 (commencing with Section 65915) of Division 1 of Title 7 of the Government Code.

(3) Its effect on the use of land, the impact on the availability and location of housing, and the ability of the county to meet its regional housing needs.

(4) Its impact on funding for infrastructure of all types, including, but not limited to, transportation, schools, parks, and open space. The report may also discuss whether the measure would be likely to result in increased infrastructure costs or savings, including the costs of infrastructure maintenance, to current residents and businesses.

(5) Its impact on the community's ability to attract and retain business and employment.

(6) Its impact on the uses of vacant parcels of land.

(7) Its impact on agricultural lands, open space, traffic congestion, existing business districts, and developed areas designated for revitalization.

(8) Any other matters the board of supervisors request to be in the report.

(b) The report shall be presented to the board of supervisors within the time prescribed by the board of supervisors, but no later than 30 days after the county elections official certifies to the board of supervisors the sufficiency of the petition.

Appendix D:

**County of Napa Board of Supervisors
Resolution No. 08-05**

RESOLUTION NO. 08-05

A RESOLUTION OF THE COUNTY OF NAPA, STATE OF CALIFORNIA, ORDERING THE PREPARATION OF A "ELECTIONS CODE SECTION 9111 REPORT" FOR THE PURPOSE OF EVALUATING THE "NAPA COUNTY RESPONSIBLE GROWTH INITIATIVE ORDINANCE OF 2008"

WHEREAS, the initiative process is available to adopt changes to a county general plan and zoning code; and

WHEREAS, on October 4, 2007, James Marshall, (hereafter the "Initiative Proponent"), presented to the Elections Division of the Office of the Napa County Recorder/Clerk (hereafter "Elections") a Notice of Intention to Circulate an initiative petition; and

WHEREAS, the Initiative Proponents did not designate a title for said Initiative when filing it with Elections but identified the initiative as the "Napa County Responsible Growth Initiative" (hereafter the "Initiative") on the Receipt of Intent to Circulate issued by the Registrar of Voters to the Initiative Proponents on October 4, 2007; and

WHEREAS, the Initiative, if enacted, will amend the Napa County General Plan and County Code to (i) limit the amount of new residential development built annually, (ii) require 15% of residential developments to qualify as affordable housing, (iii) limit the height of single family residences and various other structures, and (iv) make conforming changes to the land use, housing and growth management system elements of the Napa County General Plan as well as to titles 8 and 18 of the Napa County Code; and

WHEREAS, said Notice of Intent was referred to the Napa County Counsel, who prepared the required Ballot Title and Summary within the time required by law, all pursuant to Elections Code section 9105; and

WHEREAS, the Napa County Counsel delivered the required Ballot Title and Summary to Elections on October 19, 2007, who in turn provided the Ballot Title and Summary to the Initiative Proponent on that same day; and

WHEREAS, the Notice of Intent and Ballot Title and Summary prepared by the Napa County Counsel was published in a newspaper of general circulation in the County on October 21, 2007 in the manner required by subsection (b) of Elections Code section 9105 and proof of publication was filed with the Elections Department on October 26, 2007; and

WHEREAS, on or after October 21, 2007, the Initiative Proponents circulated the petition and on December 10, 2007, submitted signatures to the ROV; and

WHEREAS, the Elections Department has determined that the number of votes cast within the County for all candidates for Governor at the last gubernatorial election preceding the publication of the Notice of Intent was 43,472; and

WHEREAS, prior to the expiration of the circulation period the Initiative Proponent filed signatures with Elections equal in number to more than ten percent (10%) but less than twenty percent (20%) of the number of votes cast within the County for all candidates for Governor at the last gubernatorial election preceding the publication of the Notice of Intent; and

WHEREAS, Elections subsequently prepared a report which included a certification that sufficient valid signatures had been gathered by the initiative proponent equal to more than 10% of the total persons who voted for all candidates for Governor at the last statewide election preceding the publication of the Notice of Intent and submitted same to the Clerk of this Board on or about December 26, 2007; and

WHEREAS, on January 8, 2008, the Board accepted said certification and report and ordered same filed by the Clerk of this Board; and

WHEREAS, as a result, on January 8, 2008, this Board is required by Elections Code sections 9111 and 9118 to do one of the following:

a) Order a report that discusses one or more of the following: (i) the fiscal impact of the initiative; (ii) the effect of the initiative on the internal consistency of the County's general and specific plans, including the housing element; (iii) the effect of the initiative on the consistency between the planning and zoning regulations of the County; (iv) the effect of the initiative on the limitations imposed on the County by Government Code section 65008 (discrimination in housing), section 65913 et seq. (affordable housing) or section 65915 et seq. (low income housing and density bonuses); (v) the effect of the initiative on the use of land, the impact on the availability and location of housing, and the ability of the county to meet its regional housing needs; (vi) the impact of the initiative on funding for infrastructure of all types, including, but not limited to, transportation, schools, parks, and open space as well as costs related thereto; (vii) the impact of the initiative on the community's ability to attract and retain business and employment; (viii) the impact of the initiative on the uses of vacant parcels of land; (ix) the impact of the initiative on agricultural lands, open space, traffic congestion, existing business districts, and developed areas designated for revitalization; and/or (x) any other matters the Board might wish to have included in the report; or

b) Adopt a resolution calling an election and consolidating it with the next statewide election for the purpose of enabling the people of Napa County to approve or reject the Napa County Responsible Growth Initiative; or

c) Adopt the ordinance proposed by the initiative without change and without

a vote of the people within 10 days after certification of the petition is presented to the Board; and

WHEREAS, this Board has determined and concluded that adopting a Resolution ordering the preparation of a report pursuant to section 9111 of the Elections Code is the most appropriate manner in which to proceed.

NOW THEREFORE BE IT RESOLVED that a report shall be prepared by the Conservation, Development and Planning Department in consultation with other County Departments and returned to the Board for review and acceptance not later than February 5, 2008 addressing the following issues:

- 1. The fiscal impact of the initiative;
- 2. The effect of the initiative on the internal consistency of the County's general and specific plans, including the housing element;
- 3. The effect of the initiative on the consistency between the planning and zoning regulations of the County;
- 4. The effect of the initiative on the limitations imposed on the County by Government Code section 65008 (discrimination in housing), section 65913 et seq. (affordable housing) or section 65915 et seq. (low income housing and density bonuses);
- 5. The effect of the initiative on the use of land, the impact on the availability and location of housing, and the ability of the county to meet its regional housing needs;
- 6. The impact of the initiative on funding for infrastructure of all types, including, but not limited to, transportation, schools, parks, and open space as well as costs related thereto;
- 7. The impact of the initiative on the community's ability to attract and retain Business and employment;
- 8. The impact of the initiative on the uses of vacant parcels of land;
- 9. The impact of the initiative on agricultural lands, open space, traffic congestion, existing business districts, and developed areas designated for revitalization; and/or
- 10. The following additional matters:

Potential cost and risk of litigation.

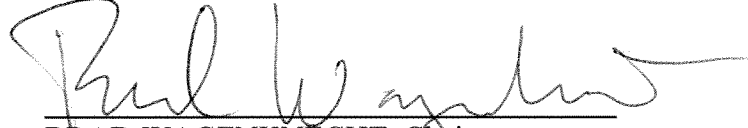
The foregoing resolution was duly and regularly adopted at a regular meeting of the Board of Supervisors of the County of Napa, State of California, held on the 8th day of

January, 2008, by the following vote:

AYES: SUPERVISORS DODD, LUCE, DILLON, MOSKOWITE,
and WAGENKNECHT

NOES: SUPERVISORS NONE

ABSENT: SUPERVISORS NONE



BRAD WAGENKNECHT, Chair
Napa County Board of Supervisors

ATTEST: GLADYS I. COIL
Clerk of the Board

BY: Gladys I. Coil

<p>Approved by the Napa County Board of Supervisors</p> <p>Date: January 8, 2008</p> <p>Processed by: <u>Sherry Bellman</u> Deputy Clerk of the Board</p>

<p>APPROVED AS TO FORM Office of County Counsel</p> <p>By: <u>Robert Westmeyer</u> (by e-signature) County Counsel</p> <p>Date: _____</p>

Appendix E:
Legal Analysis

NOSSAMAN, GUTHNER, KNOX & ELLIOTT, LLP
MEMORANDUM

TO: Board of Supervisors
County of Napa

FROM: Nossaman, Guthner, Knox & Elliott, LLP

DATE: January 31, 2008

RE: Legal Analysis of Responsible Growth Initiative
300218-0001

Pursuant to the request of County Counsel Robert Westmeyer, we have prepared the following legal analysis of the Responsible Growth Initiative (referred to herein as the “initiative”) for inclusion in the Elections Code § 9111 Report.

I. Executive Summary

In December, 2007, certain citizens of Napa County proposed an initiative which they have entitled the Responsible Growth Initiative. This initiative will amend the County’s General Plan and certain related provisions found in the Napa County Code addressing growth management and height limitations. If passed, the initiative will shift from the Board of Supervisors (Board) to the Napa County electorate the authority to modify the Growth Management System Element of the County’s General Plan, certain portions of the Housing and Land Use Elements of the County’s General Plan and various provisions of the Napa County Code relating to zoning and growth management. The initiative also proposes adoption and amendment of certain provisions of an outdated Growth Management Systems Element that would affect the placement of affordable housing and the manner in which the requirement for such housing is calculated.

The initiative suffers from a number of potentially fatal legal flaws that may be summarized as follows:

- ✓ Intrusion into the requirement mandated by state law that the Housing Element be periodically reviewed and updated by the Board of Supervisors.
- ✓ Inconsistency of the initiative with certain requirements related to the provision of housing in which the state has preempted the field.
- ✓ Failure of the initiative proponents to circulate the full text of the plans and ordinances that the initiative purports to amend.
- ✓ Inclusion of more than one subject matter in the initiative in violation of the “single subject” requirement.

- ✓ Violation of certain terms of the court approved settlement of the *DeHaro* lawsuit.

If the initiative is placed on the ballot and passes, it could subject the County to various penalties for violation of State affordable housing laws. Among the various penalties are court-ordered injunctions prohibiting the County from issuing building permits and approving subdivision maps, zone changes, and other discretionary land use applications.

Finally, if your Board should conclude on advice of counsel that the Responsible Growth Initiative is invalid, there remains the issue of whether your Board has the power to reject the initiative before putting it on the ballot. The larger question is whether your Board (that is, the County) should bring a procedural or substantive pre-election challenge to the initiative – whether your Board decides to put the initiative on the ballot first or not.

In connection with our analysis, the County Counsel has asked us to analyze the following issues for the Section 9111 Report:

1. What is the likelihood that the initiative will be set aside by a court of law (either in whole or in part) if it is approved by the voters and then challenged?

(a) What is the ability of the voters to amend portions of a county's housing element. Inherent in this first issue is the question of whether, since housing (and in particular, affordable housing) is an area of statewide concern, state law preempts or prevents any changes that are inconsistent with it;

(b) What is the ability of the voters to adopt, but not change, portions of a county's housing element for the express purpose of preventing changes to those portions of a housing element by the Board of Supervisors without a vote of the people;

(c) What is the ability of the voters to impose a growth management system which limits the number of annual building permit applications that may be issued;

(d) What is the effect of the confusion resulting from the initiative's use of an old version of the Growth Management Element? Inherent in this question is whether the initiative is misleading to the public, and if it is, what does that mean for the initiative?

(e) The extent to which a portion of the initiative can survive the invalidation of the remainder of the initiative despite the existence of the standard initiative severability clause contained in section 9 of the initiative; and

(f) Whether there is an inconsistency between the statement found on page 17 of the initiative which allows the Board of Supervisors to alter procedures for conducting the lottery and other sections of the initiative and what effect any such inconsistency would have.

2. Will the initiative, if adopted, violate terms of the *DeHaro* settlement agreement and if so, what would be the potential consequences and remedies?

3. What would be the potential legal consequences and remedies if the initiative is adopted and eventually constrains the County from meeting its Regional Housing Needs Assessment (RHNA)?

4. The initiative defines the “average” as meaning the “median”. What effect does adding this phase have on the types of income that are eligible for Category 4 Permits?

There are additional issues that merit analysis as well, including:

5. Does the initiative violate the “single subject” rule?

6. Does the initiative result in an internally inconsistent General Plan, and if so, can the initiative withstand a challenge?

Finally, County Counsel has asked us to discuss the legal principles that are involved should your Board wish to consider the possibility of rejecting the initiative at the outset before putting it on the ballot or bringing a pre-election challenge.

II. Background and Overview of Initiative

In 2007, certain citizens of Napa County prepared an initiative that proposes to readopt certain provisions of the 2004 Housing Element and purports to readopt the current GMSE. However, the initiative proponents apparently mistakenly prepared an initiative based on the outdated version of the GMSE.

The initiative focuses on five areas, all of which are designed to limit residential growth in the County. These five areas include:

1. Protecting County agricultural and open space lands by retaining the current 1% limit on residential growth in unincorporated areas;

2. Protecting groundwater by encouraging larger residential developments to locate within the cities of the County;

3. Requiring that 15% of the new residential units constructed in the unincorporated areas of the County be set aside for affordable housing and that any affordable housing agreements be for a minimum of 10 years;

4. Protecting the visual character of the unincorporated County by retaining the existing 35 foot height limitation in the case of new construction; and

5. Precluding the Board from eliminating or modifying the residential growth limits, affordable housing requirements, and existing height limits without a vote of the people. (Initiative, § 1(C).)

According to the initiative, it is necessary because “unrestricted residential growth leads to urban sprawl that, in turn, causes conditions harmful to the public health, safety, and general welfare of local residents.” (Initiative, § 1(A).) The initiative is “intended to protect the scale and quality of future development in Napa County.” (Initiative, § 1(B).) Importantly, the initiative makes no mention of Regional Housing Needs Assessments (RHNA). The initiative does permit periodic updates to the GMSE to “reflect any changes in the annual population growth rate for Nine Bay Area Counties.” (Initiative, § 8.02.030, at p. 20.) Accounting for changes in population alone, however, may not provide the Board of Supervisors with sufficient latitude to make adjustments in future RHNAs without a vote of the electorate.

The large majority of the initiative’s proposed amendments to the Housing Element are non-substantive in nature. However, the initiative purports to amend the County’s General Plan to preclude the Board from eliminating or modifying the residential growth limits and the affordable housing requirements without a vote of the people. (Initiative, § 1(C)(5).)

Additionally, while not affecting the validity of the initiative, certain of the amendments appear to be out of date or obsolete. For example, the initiative recommends that pages 86 through 87 of the Housing Element be reenacted, which includes certain affordability elements with action dates of “2004-2007.” (Initiative, §3B(8), at p. 10.) It is unclear whether this language is intentional or an oversight. The 2004 GMSE contemplated a readjustment of the housing numbers by the end of 2007, but this has not yet occurred. Inclusion of the 2007 date may have been intentional and designed to force the County to do in 2008 what it was supposed to have done in 2007.

With respect to the GMSE, many of its provisions are commonly found in land use elements of general plans. However, the amendments to the GMSE in the initiative are almost all related to housing, including some substantive housing provisions. For example, the initiative amends the GMSE to provide that the number of building permits issued annually would be based on the number of housing units in the unincorporated areas of the County, not on population. The allocation, which allegedly “satisfies the requirement” of Government Code section 65302.8, will be determined “by multiplying the number of housing units in the unincorporated area by 1%,” unless a vote of the people allow otherwise. (Initiative, §3 C(1), at p. 12, and § 1(C)(5).) It also contains findings that directly implement the Housing Element and the RHNA (Initiative §3 C(1), at p. 12); it contains a formula for annual growth rate calculation which provides that the annual allocation of building permits will be 114 D.U., “not counting exempted/grandfathered units” (Initiative, § 3C(2), at p. 13); it exempts “Guest Cottages” from the provisions of the Growth Management System (Initiative, § 3C(3)(D)(2)(9), at p. 14); and it locks in the “15% affordable housing requirement” so that it cannot be changed without a vote of the electorate (Initiative, § 3C(3)(D)(5).) Overall it appears that the initiative proposes amendments to the GMSE which attempt to place most of the affordable housing in the City of American Canyon, thereby shifting the County’s burden to comply with state mandated housing RHNA requirements to the City of American Canyon. (Initiative, § 1, p. 13 (reciting the County’s affordable housing agreement with the City of American Canyon), and § 3, p. 14 (adding the City of American Canyon to the definition of “Location” within the GMSE).) These

amendments could tie the County's hands with regard to compliance with future RHNA requirements involving the placement of affordable housing.

In short, those portions of the GMSE that the initiative proposes to amend largely deal with issues related to the provisions of housing. As such, the analysis related to the GMSE here will necessarily overlap with the analysis relating to the Housing Element amendments proposed by the initiative.

III. Analysis

1. **What is the likelihood that the initiative will be set aside by a court of law (either in whole or in part) if it is approved by the voters and then challenged?**

There is a likelihood that all or substantial portions of the initiative would be set aside by a court in either a pre-election (somewhat likely) or post-election challenge (very likely) because it impermissibly intrudes into the state preempted field of housing. Preempted housing matters are so intertwined through the initiative, including the portion that would amend the GMSE, that severability may be impossible. We conclude this would occur even if the voter approval provision were severed from the initiative. While it is true that if the voter approval provision found at section 10 of the initiative is eliminated, thereby possibly exempting the initiative from Elections Code section 9125, the probability that the initiative would survive increases, it is uncertain whether severing the voter approval provision would save the initiative because overall it intrudes into an area of law occupied by the state and is therefore preempted. This conclusion is explained further below.

The power of the initiative is one that is not granted. Rather, it is reserved to the people. (*Rossi v. Brown* (1995) 9 Cal. 4th 688, 695.) As such, it has long been "judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right not be improperly annulled." (*Ibid.*) The power of the electorate to legislate via initiative is not without limits, however. (*See, id. and see, also, DeVita v. County of Napa* (1995) 9 Cal. 4th 763.) With respect to a county's general plan, the power to legislate via initiative is unquestioned insofar as it relates to land use and planning. (*See, generally, DeVita, supra*, 9 Cal. 4th at p. 793 n. 11; Gov. Code, § 65302.) However, the same may not be true for housing elements. (*DeVita, supra*, 9 Cal. 4th at p. 793 n. 11.) Regardless, there are several basic principles which govern the analysis of the initiative as it relates to the Housing Element and GMSE which are set forth herein.

The California Supreme Court has described a county's general plan as its "'constitution' for future development." (*De Vita, supra*, 9 Cal. 4th at p. 773.) A general plan "consists of a statement of development policies . . . setting forth objectives, principles, standards, and plan proposals. The plan must include seven elements – land use, circulation, conservation, housing, noise, safety and open space—and address each of these elements in whatever level of detail local conditions require." (*Id.*) Additional discretionary elements may be included in a general plan. (Gov. Code, § 65303.) "General plans are also required to be comprehensive [and] long-term as well as 'internally consistent.'" (*De Vita, supra*, 9 Cal. 4th at p. 773 (internal citations omitted).)

As a general rule, some elements of a general plan may be amended by initiative including a land use element. (*See, generally, De Vita, supra*, 9 Cal. 4th at p. 793 n. 11 (deciding that the land use element of general plan can be amended by initiative).) However, while judicial policy typically favors deference to the initiative power as one of those rights reserved by the people, the presumption in favor of the right of initiative is rebuttable upon a definite indication that the Legislature, as part of the exercise of its power to preempt all local legislation in matters of statewide concern, has intended to restrict that right.^[1] (*De Vita, supra*, 9 Cal. 4th at p. 776.) This rebuttable presumption stems from the State Constitution’s prohibition of the enactment and enforcement of initiatives which conflict with the general laws. (Cal. Const., art. XI, § 7.) Such a conflict arises when an ordinance either duplicates, contradicts, or enters an area fully occupied by state law, either expressly or by legislative implication. (*Building Industry Assn. v. City of Livermore* (1996) 45 Cal. App. 4th 719, 724.) If state law has fully occupied the subject matter or field of the legislation, there is no room for supplementary or complementary local legislation, even if the subject otherwise could be properly characterized as a “municipal affair.” (*Building Industry Assn., supra*, 45 Cal. App. 4th at p. 724; *see, also, De Vita, supra*, 9 Cal. 4th at p. 776 (“the initiative and referendum power cannot be used in areas in which the local legislative body’s discretion was largely preempted by statutory mandate.”).) An ordinance which intrudes upon such preempted areas is void. (*Building Industry Assn., supra*, 45 Cal. App. 4th at p. 724.)

In addition to the foregoing, there are other grounds on which a court may invalidate the initiative, as discussed below.

(a) What is the ability of the voters to amend portions of a county’s general plan housing element?

The ability of voters to amend portions of a housing element is arguably curtailed on the premise that the Legislature has occupied the field of housing, and thereby preempts amendment of that general plan element by initiative, as discussed above. For example, the Legislature has unequivocally declared that availability of low-income housing is an area of statewide concern. Government Code section 65580 states, “[t]he availability of housing is of vital statewide importance, and the early attainment of decent housing and a suitable living environment for every California family is a priority of the highest order.”^[2] (§65580 (emphasis added).) Similarly, the State Department of Housing and Community Development (HCD) has stated: “Unlike the other mandatory general plan elements, the housing element, required to be updated every five years, is subject to detailed statutory requirements and mandatory review by a State agency (Department of Housing and Community Development). Housing elements have been

^[1] In *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal. 3d 491, 511 (*COST*), the Supreme Court set forth a test to determine whether the legislature intended to preclude the use of initiatives or referenda to amend a general plan. “The paramount factors recognized by *COST* are: (1) statutory language, with reference to ‘legislative body’ or ‘governing body’ deserving of a weak inference that the Legislature intended to restrict the initiative . . . power, and reference to ‘city council’ and/or ‘board of supervisors’ deserving of a stronger one . . . ; (2) the question whether the subject at issue was a matter of ‘statewide concern’ or a ‘municipal affair,’ with the former indicating a greater probability of intent to bar initiative . . . Any other indications of legislative intent were, of course, also to be considered.” (*De Vita, supra*, 9 Cal. 4th at p. 707 *citing COST, supra*, 45 Cal. 3d at pp. 501, 505-507 and 511.)

^[2] Unless otherwise noted, all citations herein are to the Government Code.

mandatory portions of general plans since 1969. This approach reflects the statutory recognition that the availability of housing is a matter of statewide importance and that cooperation between government and the private sector is critical to attainment of the State's housing goals. The regulation of the housing supply through planning and zoning powers affects the State's ability to achieve its housing goal of 'decent housing and a suitable living environment for every California family' and is critical to the State's long-term economic competitiveness." (*State Housing Element Law*, Department of Housing and Community Development, <http://www.hcd.ca.gov/hpd/hrc/plan/he/heoverview.pdf>, 8/31/05.)

Repeatedly, the courts have recognized "as common knowledge" the state's preemption of the area of promoting construction of low cost housing. (See, e.g., *Building Industry Assn. v. City of Oceanside*, 27 Cal. App. 4th 744, 770 ("the three cited Government Code sections, taken together, clearly show an important state policy to promote construction of low income housing and to remove impediments to same"); *Buena Vista Gardens Apartments Assn. v. City of San Diego Planning Dept.* (1985) 175 Cal. App. 3d 289, 306 (the legislature and the judiciary have "found the need to provide adequate housing to be a matter of statewide concern"); *Bruce v. City of Alameda* (1985) 166 Cal. App. 3d 18, 21-22 ("locally unrestricted development of low cost housing is a matter of vital state concern").)

In *Building Industry Assn. v. City of Oceanside*, *supra*, 27 Cal. App. 4th at p. 770, the court reviewed the legality of a residential growth control initiative which proposed annual numerical allotments for construction of residential units. Opponents of the initiative contended that it was inconsistent with the state's clear policy to promote low-cost housing. (*Id.* at p. 767.) Proponents objected to the contention, stating that the proposed ordinance was in fact neutral with regard to the statewide policy. (*Id.* at p. 769.) The court ultimately determined that the initiative conflicted with the statewide policy and declared the initiative invalid. (*Id.* at p. 771.) In making its determination, the court noted that, notwithstanding the "neutral" language of the initiative, affordable housing had taken a dramatic decline since the effective date of the measure. (*Id.* at pp. 770-771.) The court also noted that the measure acted to favor development of larger units on larger lots, with more amenities. (*Id.* at p. 771.)

The Legislature's intent to occupy the field in the area of affordable housing is illustrated in the comprehensive scheme for amending the housing element of a general plan. The Legislature's statutory scheme is intended to assure cities and counties contribute to the supply of affordable housing by preparing and implementing housing elements which, along with federal and state programs, move toward attaining the state housing goals. (§ 65581(a), (b).) The Legislature recognized each locality is "best capable of determining what efforts are required by it to contribute to the attainment of the state housing goal, provided such a determination is compatible with the state housing goal and regional housing needs." (§ 65581(c).) In furtherance of these goals, Government Code section 65588 requires, among other things: (1) that each local government review its housing element "as frequently as appropriate" to evaluate the attainment of state housing goals (§ 65588(a)); (2) requires that the local government revise the housing element not less than every five years to reflect the results of its periodic review (§ 65588(b)); and that local governments take into account statutory requirements for low-income housing in the coastal zone (§ 65588(c)). Moreover, any draft

amendment to the housing element must be submitted to the HCD for review and comments. (§ 65585.)

In light of the foregoing, there are two possible problems with the initiative. First, because the legislature has occupied the field of affordable housing and the initiative intrudes into this field, the initiative is arguably invalid. This stands in contrast to land use planning generally, which is primarily a matter of local concern. (*See, generally, De Vita, supra.*) “While land use planning is fundamentally a local issue, the availability of housing is a matter of statewide importance. The (Regional Housing Need Assessment) process requires local governments to be accountable for ensuring what projected housing needs can be accommodated.” (*State Housing Element Law, supra*, <http://www.hcd.ca.gov/hpd/hrc/plan/he/heoverview.pdf>.)

Second, while at first blush it appears that the initiative makes only minor changes to the Housing Element and that it does not seek to amend the Housing Element substantively, there is one overarching problem. If the initiative is adopted, any changes to the Housing Element are subject to approval by a vote of the people. This part of the initiative arguably is in direct conflict with Government Code sections 65588 and 65585, which require the County to revise and review its Housing Element periodically, and which do not make any provisions for voter approval. While it might be argued that the initiative simply adds another layer to the review and approval of the Housing Element (e.g., it does not preclude or prevent the County from complying with Government Code sections 65588 and 65585, but only adds another layer of approval onto the Housing Element), it is equally true that the County could be prevented from complying with its statutorily mandated duties to review and update the Housing Element if the voters do not approve future changes authored by the County and recommended by the State to meet regional housing needs as required by state law.

In the *De Vita* case, the Supreme Court expressly declined to apply the scope of its opinion to the housing element of the general plan, noting that “the housing element, unlike the other mandatory elements (in a general plan), must be amended every five years. (Gov. Code, § 65588(b).) Moreover, any draft amendment to the housing element must be submitted to the State Department of Housing and Community Development for review and comments. (Gov. Code, § 65585.)” (*De Vita, supra*, 9 Cal. 4th at p. 793 n. 11.) In explaining the decision not to address the issue of whether a housing element could be amended by an initiative, the *De Vita* Court explained that the measure at issue in that case “neither purport[ed] to amend the housing element nor was found inconsistent with it.” (*Id.*) This reservation in the Supreme Court’s opinion lends further support to the conclusion that, unlike the land use element, the housing element of a general plan simply cannot be amended by initiative – particularly one which entrusts to the people (as opposed to the legislature) approval of updates and other state-mandated requirements.^[3]

^[3] It is also possible to read this part of the *De Vita* opinion as a signal that the Court would only curtail an initiative that purports to amend a housing element if the initiative also caused the general plan to be inconsistent with the housing element that was already on the books and approved by the state. (*De Vita, supra*, 9 Cal. 4th at p. 793 n. 11.) In either case, however, the initiative here would be problematic. The fact that the housing element of the initiative is predicated on voter approval makes the initiative inconsistent with the requirement that HCD approve

(b) What is the ability of the voters to adopt, but not change, portions of a county's housing element for the express purpose of preventing changes to those portions of the housing element by the Board of Supervisors without a vote of the people?

Any ordinance proposed by initiative and adopted either by a vote of the electorate or by the Board of Supervisors shall not be repealed or amended without a vote of the people. (Elec. Code, § 9125.) As such, the Elections Code encompasses a situation where an initiative amending a general plan could pass, but still not change the substantive law in any way, and yet require a vote of the people to amend that portion of a general plan to which it relates. We are not aware of any law that prohibits the adoption of an existing ordinance by initiative. Indeed, the power of initiative has been broadly interpreted. (*See, e.g., DeVita, supra.*) As discussed above, however, the voters arguably may not condition modification of a housing element on a vote of the people because it impermissibly intrudes into an area of law occupied by the State. For that reason, there is considerable doubt as to whether the voters may validly adopt this initiative even though portions of its do not make substantive amendments to the existing Housing Element.

(c) With respect to the portions of the initiative revising and readopting the Growth Management System Element (GMSE) of the General Plan, what is the ability of the voters to impose a growth management system which limits the number of annual building permit applications that may be issued?

Unlike the housing element of a general plan, other elements may be amended by initiative so long as they do not result in an internally inconsistent general plan and the amendments “conform with all of the formal requirements imposed on general plan amendments enacted by the legislative body.”^[4] (*De Vita, supra*, 9 Cal. 4th at p. 796 n. 12.) However, as Resolution No. 04-180 makes clear, the GMSE goes far beyond simple locations and extent of use of land for housing. Rather, it contains express references to the *DeHaro* settlement and housing element provisions referenced in Government Code sections 65584 and 65585. (*See, generally*, Resolution No. 04-180.) In short, it overlaps considerably with the Housing Element

any housing element changes. Put differently, it conflicts with state law. Thus this portion of the initiative is extremely problematic.

^[4] Government Code section 65302 states that the land use element of the general plan must designate the “proposed general distribution and general location and extent of the uses of the land for housing, business, industry, open space,” and many other uses. (§ 65302(a).) As such, it expressly contemplates some overlap between the housing and land use elements of the general plan. However, this overlap is generally confined to the general location and the extent of the use of land for housing, and the “housing element” of the general plan is geared more towards County compliance with RHNA requirements and other housing requirements of State law. (*Id.* and § 65302(c).) What really distinguishes the housing element from the land use element of the State law general plan requirements is the involvement of the State, via HCD, in the housing element adoption process, including the requirement for periodic updates, etc. In this regard, the County’s GMSE overlaps substantially with the housing element requirements.

of the General Plan. Similarly, the initiative amendments concerning the GMSE are particularly intertwined with the Housing Element of the General Plan. For example, the GMSE portion of the initiative contains findings that directly implement the Housing Element and the RHNA (Initiative 3§ C(1), at p. 12); and it locks in the “15% affordable housing requirement” so that it cannot be changed without a vote of the electorate. (Initiative, § C(3)(D)(5).) Further, the GMSE portion of the initiative may be inconsistent with RHNA requirements that may be imposed in the future. For example, Government Code section 65584 provides that “any ordinance, policy, or standard of a city, county or city and county which directly limits, by number, the building permits which may be issued for residential construction . . . shall not be a justification for a determination or a reduction in a local government’s share of the regional housing need,” and makes a narrow exception only for health and safety reasons. (§ 65584(1)(d).) . Since RHNA requirements are not static but are subject to change as demographic and other indices of housing requirements change over time, even if current RHNA requirements were to be met, the requirement of a popular favorable vote is almost certain to conflict with the ability of the County to comply with RHNA requirements in the future.

Because of the overlap between the GMSE and the housing element that permeates both the 2004 version of the GMSE and the initiative amendments, it is arguable that the GMSE is actually part and parcel of the Housing Element. As such, it is conceivable that, if the initiative were to pass, the County would be put in the position of defending the initiative’s 15% requirement against higher future RHNA requirements. This in turn could lead to penalties being assessed, and lawsuits filed, against the County, as discussed below.

We also address here the question of whether the GMSE can be incorporated into the Housing Element, thereby insulating it from amendment by initiative. So long as the County has a General Plan that contains all of the seven mandatory elements of a general plan per section 65302 of the Government Code, it may include all or relevant provisions of the GMSE in the Housing Element. (*See, generally*, § 65302; *DeVita, supra*, 9 Cal. 4th at p. 796 n. 12.) However, if the GMSE is placed entirely into the housing element of the general plan to purposely insulate it from voter initiatives, those provisions that are not preempted by state law would not be insulated. (*See, discussion infra.*)

(d) With respect to the portions of the initiative revising and readopting the Growth Management System Element (GMSE) of the General Plan, what is the effect of the confusion resulting from the initiative’s use of an old version of the Growth Management Element?

Inherent in this question is whether the initiative is misleading to the public, and, if so, the legal consequences for the initiative. The answer is based in part upon an analysis of what is known as the full text requirement, and in part upon Elections Code provisions that prohibit confusing and misleading initiatives from being circulated.

(i) Is the initiative misleading?

First, the text of the portion of the initiative pertaining to the GMSE is based on an outdated version of that General Plan element. Despite this, however, the initiative defines the GMSE as being “the comprehensive plan which is part of the county’s general plan” (Initiative, § 2(B).) (Emphasis added.) Obviously, the definitions section is incorrect. The inclusion of a definition that refers to a different GMSE than the one that the initiative is proposing to amend gives rise to the question of whether the initiative is misleading or internally inconsistent.

As discussed above, any amendment to a general plan may not itself be internally inconsistent; nor can it cause the general plan as a whole to become internally inconsistent. (*DeVita, supra*, 9 Cal. 4th at p. 796 n. 12.) Here, the reference to the GMSE in the definitions section and the GMSE that the initiative purports to amend are two different GMSEs, producing an obvious internal inconsistency. This internal inconsistency is arguably very misleading. Indeed, it could cause the general public to believe that the GMSE the initiative purports to amend is the current GMSE. This is not the case.

The Elections Code prohibits the circulation or publication of any intentionally “false statement or misrepresentation concerning the contents, purport or effect” of any state or local initiative. (Cal. Elec. Code, § 18600.) Where such an initiative petition is submitted, a writ may issue against it. (*San Francisco Forty-Niners v. Nishioka* (1999) 75 Cal. App. 4th 637, 650.) For example, in *Forty-Niners*, an initiative was declared invalid by the court on grounds that it contained false and misleading statements in order to induce voters to sign the petition, in violation of section 18600. (*Id.* at 642.) Even if the material is not intentionally misleading, if it results in voter confusion, that may be grounds to reject the initiative. (*Hebard v. Bybee* (1998) 65 Cal. App. 4th 1331, 1338.) Here, it is arguable that the initiative is in fact misleading and that it should be rejected and withheld from the ballot because the GMSE portion of the initiative is not part of the County’s General Plan, as it purports to be. In this regard, it should be noted that a member of the public might bring a challenge to the initiative under Elections Code section 9190. If that occurred, the County may have to defend, or pay for the defense of, the Registrar of Voters, the County official against whom a writ of mandate ordering placement of the initiative on the ballot would be directed. Alternatively, the Registrar of Voters may challenge the initiative under Election Code section 9190.

We also note that the fact that the initiative changes the term of affordable housing agreements from a minimum of 40 years to a minimum of 10 years is also arguably confusing because it is contrary to the *DeHaro* settlement agreement (which requires a minimum of 40 years). The implication of this initiative provision is that the voters may amend the terms of the settlement agreement, which they cannot.

(ii) Does the initiative violate the full text requirement?

The Elections Code allows for any proposed ordinance to be submitted to the Board of Supervisors by filing an initiative petition with the county elections official. When it is submitted, the initiative petition shall “contain a full and correct copy of the notice of intention

and accompanying statement including the *full text* of the proposed ordinance.” (Cal. Elec. Code, § 9101 [emphasis added].) The questions here are what does the “full text” requirement mean, and does the full text requirement bar the placement of the initiative on the ballot?

The purpose of the full text requirement is to provide sufficient information so that registered voters can intelligently evaluate whether to sign the initiative petition and to avoid confusion. (*Alliance for a Better Downtown Millbrae v. Wade* (2003) 108 Cal. App. 4th 123, 132.) Does this mean ONLY that the full text of the initiative itself must be circulated to those who sign the petition, or that the full text of the initiative AND the full text of any portions of the general plan that the initiative purports to amend be circulated? In *Mervyn's v. Reyes* (1998) 69 Cal. App. 4th 93, the Court implied that the latter was true. In *Mervyn's*, the City of Hayward adopted a general plan which changed the land use of several acres of land owned by Mervyn's to open space, parks and recreation, thereby preventing development of it. (*Mervyn's, supra*, 69 Cal. App. 4th at p. 96.) Thereafter, in 1996, a voter initiative to re-enact the open space land use designations of the general plan, including the land owned by Mervyn's, was circulated. (*Id.*, at pp. 96-97.) The initiative also provided that it would prevail over any previously approved ordinances or development agreements, among other things, that were not “fully vested.” (*Id.*, at p. 97.)

Although the initiative in that case clearly impacted the general plan and Hayward's land use policies, “[n]o part of the actual text of the general policies plan map or the supporting policies of the City of Hayward was attached to the initiative petition.” (*Id.*) Nor were the plan map or supporting policies submitted to the Hayward City Clerk for certification and placement upon the ballot. (*Id.*, at pp. 97-98.) The *Mervyn's* court determined that the initiative violated the full text requirement, in part, because the failure to attach the general policies plan map or the supporting policies prevented the (1) “[p]rospective signers” of the initiative “from being fully informed of the substance of the ordinance” (*id.*, at p. 102); and (2) the clerk “from dispatching her ministerial function of ascertaining whether there was compliance with the full text . . . requirements.” (*Id.*, at p. 104.) In reaching this conclusion, the *Mervyn's* court did not require that the factual record include affidavits or voter declarations concerning the full text requirement. Rather, it focused only on what was finally submitted to the Clerk. (*Id.*, at p. 104, quoting *Hebard, supra*, 65 Cal. App. 4th at p. 1343 (“While the court may consider relevant evidence presented by the parties, we are not persuaded that a party's failure to present a particular kind of evidence (such as voter declarations) deprives the court of the ability to determine the legal issue of substantial compliance.”))

Similarly, in *Nelson v. Carlson*, (1993) 17 Cal. App. 4th 732, a citizens group sought to overturn a resolution by the city council adopting a general plan. (*Id.*, at p. 735.) They circulated a petition to require the city council to rescind the resolution or submit it to a vote of the city's electorate. (*Id.*) The petition specifically incorporated the general plan into it, and the general plan was supposed to be attached as an exhibit to the petition. (*Id.*, at pp. 735-736.) Despite this, however, the proponents failed to submit a copy of the general plan along with their initiative to the city clerk. (*Id.*) The initiative proponents left it out in part because it was too voluminous to attach. (*Id.*, at pp. 736 and 740.) The court invalidated the petition, holding that the failure to attach the general plan to the referendum petition was “a fatal defect.” (*Id.*, at p.

739.) The court explained that “[w]ithout the plan individuals reviewing the petition had no way of informatively evaluating whether to sign it,” and the clerk could not perform her ministerial duties because the full text was not presented. (*Id.*, at pp. 739 and 741.) Notably, the court held this despite the fact that there was conflicting evidence as to whether the plan was available for review to signatories at the time the petition was circulated. (*Id.*, at 736.)

Here, it is arguable that the proper text of the County’s General Plan and the GMSE were not submitted to those signing the petition to place the initiative on the ballot. To the contrary, if the GMSE was available to those signing the petition, the wrong version of the GMSE was available. Indeed, even if a court were to find that the entire GMSE need not be attached to the initiative, it might still require that those portions that are being amended be attached to the initiative. But even then the wrong version would have been attached, and thus the full text requirement could not be satisfied under the *Mervyn’s* line of cases.^[5]

Later cases have narrowed the scope of the *Mervyn’s* decision indicating that the full text requirement “requires only the text of the measure proposed to be enacted”, and that Elections Code section 9101 “does not require that a petition include the text of every plan, law or ordinance the measure might affect.” (*We Care – Santa Paula v. Herrera* (2006) 139 Cal. App. 4th 387, 390-391 (interpreting an analogous statute, Elections Code § 9201).) Put differently, the fact that the initiative does not contain the full text of the measure to be amended is not grounds in and of itself to withhold the initiative from the ballot or to uphold a “full text” violation. Rather, close reading of the *We Care* case and other cases such as *Costa v. Superior Court* (2006) 37 Cal. 4th 986 suggest that an initiative, as presented to the voters, must be clear enough so that there is little likelihood of confusion to those who sign the petition. As explained in *Costa*, when “determining whether a departure from statutory requirements imposed on initiative or referendum petitions by election law provisions should be viewed as invalidating a circulated petition, past California decisions have been most concerned with departures that affect the integrity of the process by misleading (or withholding vital information from) those persons whose signatures are solicited.” (*Costa, supra*, 37 Cal. 4th at p. 1016.) Indeed, “[i]n addition to instances in which courts have found an initiative or referendum petition invalid because it contained a materially misleading or inadequate short title, the type of defect that most often has been found fatal is the failure of an initiative or referendum petition to comply with the statutory requirement of setting forth in sufficient detail the text of the proposed initiative measure or of the legislative act against which the referendum is brought so that registered voters can intelligently evaluate whether to sign the initiative and to avoid confusion.” (*Id.*, at n. 22 (citing *Mervyn’s, supra*) (emphasis added).) Thus, taking this as the operative rule of law, the question becomes again, is the initiative confusing? As discussed above, we believe it is. Accordingly, even if a court were to determine that the initiative does not violate the full text requirement per

[5] The same would be true if the full text requirement were applied to the Housing Element. It is undisputed that the Housing Element was not attached to the version of the initiative that we received, and if it was not attached to the initiative that was circulated, this would be problematic. And, even if the court were to hold that the entire 150+ page Housing Element need not be attached, the portions that were being amended should have been attached. Assuming they were not, the full text requirement would not be satisfied. Strikethroughs pose a similar problem under *Mervyn’s, supra*. (See, also, *We-Care, supra*.)

se because it contained the full text of the entire initiative that the proponents planned to enact, the initiative may still be invalid because it is actually the wrong text insofar as the GMSE is concerned.

As for the proposed amendments to the Housing Element, it is arguable that the initiative contains the full text of the measure the proponents plan to enact because it states, word for word, all of the amendments proposed. On the other hand, however, it is also arguable that the full text requirement is violated because the initiative states only that certain parts or pages of the Housing Element will be amended. For example, the initiative states, “Page 75 of the Housing Element . . . is reenacted as follows,” and then contains only one paragraph of the page (versus the entire page). (Initiative at p. 10.) Whether the initiative violates the full text requirement in this regard would depend on whether the court adopted the more expansive view set forth under *Mervyn’s*, requiring that the proponents must include the portions of the general plan to which they are referring along with the initiative, or whether the court would apply the narrower view set forth in *We Care, supra*.

We conclude that even if a court were to find that the full text requirement may not have been violated, the initiative as presented is confusing because it purports to amend the existing GMSE when, in fact, it does not (among other reasons discussed above) and may therefore be invalid.

(e) What is the extent to which a portion of the initiative can survive the invalidation of the remainder of the initiative despite the existence of the standard initiative severability clause contained in section 9 of the initiative?

“It is a general rule supported by an unbroken line of decisions that a provision in, or a part of, an act may be unconstitutional without invalidating the entire act.” (13 *Cal. Jur. 3d Const. Law* § 76.) “The accepted doctrine in such case is that the constitutional portions of a statute may stand alone and remain in force, if they can be separated from the portions that are void.” (*Id.*) The same principle of severability applies in equal force to a local ordinance that intrudes upon a state-occupied area of law. (*See, e.g., Verner, Hilby & Dunn v. Monte Sereno* (1966) 245 Cal. App. 2d 29, 33.) Thus, “[a]n ordinance may contain provisions which are invalid, either because of conflict with state law or for any other reason, and other provisions which appear to be valid, and in such case the question arises whether the good may be separated from the bad and allowed to stand. Sometimes the legislative body declares its intent, by a severability clause, that each part of its enactment stand or fall on its own merits, regardless of the others, and considerable weight is given to such a clause.” (*People v. Commons* (1944) 64 Cal. App. 2d Supp. 925, 932-933.) However, a severability clause is not without its limits. “It is settled that such a clause, even if broadly drawn, does not deprive the judiciary of its normal power and duty to construe the statute and determine whether the unconstitutional part so materially affects the balance as to render the entire enactment void. In other words, the presence of a severability clause does not change the rule that an unconstitutional enactment will be upheld in part only if it can be said that that part is complete in itself and would have been

adopted even if the legislative body had foreseen the partial invalidation of the statute.” (*Verner, supra*, 245 Cal. App. 2d 29, 35.) Put differently, “where the invalid portions of the statute are so connected with the rest of the statute as to be inseparable, it is clear that the act must fall.” (*Commons, supra*, 64 Cal. App. 2d Supp. at p. 933.)

The initiative here contains a severability clause. (Initiative, § 9, p. 26.) Thus, the question is whether the invalid portions of the initiative can be separated from the statute to save it. Because the GMSE portion of the initiative is so infused with Housing Element matters and so affects affordable housing, and because it restricts and/or prevents the County from complying with state law by making any changes to the GMSE or the Housing Element of the General Plan without voter approval, the problematic parts of the initiative are arguably inseparable from the valid parts. The problem is further compounded by the fact that the initiative amends the wrong version of the GMSE. As such, there is a strong argument that the severability clause cannot save the initiative.

- (f) Is there an inconsistency between the statement found on page 17 of the initiative which allows your Board to alter procedures for conducting the lottery and other sections of the initiative and, if so, what effect would any such inconsistency have?**

Simply because the initiative permits the Board of Supervisors to amend the lottery procedures, does not create an inconsistency. Amendment of lottery procedures is non-substantive and would not affect the initiative so long as the new procedures adopted by your Board do not prejudice the outcome or in any other way violate the other provisions of the initiative.

- 2. Will the initiative, if adopted, violate the terms of the *DeHaro* settlement agreement and if so, what would be the potential consequences and remedies?**

On June 21, 2004, the County entered into a settlement agreement with the plaintiffs in *Jorge DeHaro v. County of Napa*, Napa County Superior Court Case No. 26-22255. The *DeHaro* lawsuit, filed on July 30, 2003, contained “seven causes of action alleging noncompliance with provisions of state and federal laws concerning land use planning for the development of affordable housing and housing discrimination.” (*DeHaro* Stipulation and Order, June 21, 2004, ¶ 1 (*DeHaro* Settlement Agreement.) Per the *DeHaro* Settlement Agreement, the County is obligated to adopt a particularized housing element for the 2001-2007 compliance period, among other things. (*See, e.g., DeHaro* Settlement Agreement, ¶¶ 2,3, 9.)

We conclude that the initiative likely violates the terms of the *DeHaro* Settlement Agreement. Review of Resolution No. 04-180 indicates that the Environmental Assessment upon which the resolution is based was prepared and adopted in accordance with and pursuant to the *DeHaro* Settlement Agreement. (Res. No. 04-180, p. 3.) Thus, to the extent that the initiative re-adopts and reinstates the old GMSE and eviscerates the most recently adopted

GMSE, it is arguable that the initiative directly violates the *DeHaro* Settlement Agreement. In this regard, the initiative and Resolution 04-180 differ in their description of “Affordable Housing”, the subject of the *DeHaro* litigation. (Compare, Resolution No. 04-180 at p. 10 ¶ 5 with Initiative, p. 15 ¶ 5.) Similarly, the fact that the GMSE changes the term of affordable housing from 40 to 10 years (Initiative, GMSE § 3(1)(D) at p. 13) is contrary to the express terms of the *DeHaro* litigation settlement (and Resolution 04-180). (Compare, GMSE § 3(1)(D) at p. 13 with *DeHaro* Settlement Agreement.)

In the event the County breaches the *DeHaro* Settlement Agreement, the *DeHaro* plaintiffs can bring an action in the Napa County Superior Court to enforce the terms of the Settlement Agreement. (*DeHaro* Settlement Agreement, ¶ 29.) It appears that the *DeHaro* lawsuit generally employed the remedies found in Government Code section 65750 et seq. (*See, DeHaro* Settlement Agreement, ¶ 24 (Injunction).) These remedies, described in more detail below, would be available to the *DeHaro* plaintiffs in the event of a breach caused by adoption of the initiative.

As for whether a court could hold the County in contempt of the *DeHaro* order under these circumstances, the answer cannot be stated with certainty, but appears to be “no”. “The facts essential to jurisdiction for a contempt proceeding are (1) the making of the order; (2) knowledge of the order; (3) ability of the respondent to render compliance, (and) (4) willful disobedience of the order.” (*In re Liu* (1969) 273 Cal. App. 2d 135, 140; *Uhler v. Superior Court of Fresno County* (1953) 117 Cal. App. 2d 147, 154 (In “contempt proceedings an intent to commit a forbidden act is as essential to guilt as in the case of a criminal offense.”); but see *In re Jasper* (1973) 30 Cal. App. 3d 985, 988 (“Ordinarily, a specific wrongful intent is not an essential element in contempt proceedings . . . and a disavowal of intentional disrespect or wrongful intent is not a defense therein.”).) If the initiative were to be placed on the ballot and pass, resulting in an inability of the County to comply with the *DeHaro* Settlement Agreement, it would be difficult (if not impossible) for the *DeHaro* plaintiffs to prove that the County was willfully disobeying the court’s order.

3. What would be the potential legal consequences and remedies if the initiative is adopted and eventually constrains the County from meeting its RHNA?

If the County fails to meet the RHNA, or violates other provisions of state law related to housing and as cited herein, any person can bring a writ of mandate to enforce the State RHNA requirements. (§ 65751.) Penalties for noncompliance can be severe. For example, a court can suspend the authority of the County to issue building permits (§ 65755(a)(1)); suspend the County’s authority to grant any and all categories of zoning changes, use permits, variances, or both (§ 65755(a)(2)); suspend the County’s authority to grant subdivision map approvals (§ 65755(a)(3)); and mandate the approval of all applications for residential housing where the approval will not impact on the ability of the County to properly adopt and implement the Housing Element, if the applications are in compliance with other law (§ 65755(a)(4).) Also, the County can be enjoined by a court for failure to comply with the cited statutes (§ 65757).

4. The initiative defines the “average” as meaning the “median.” What effect does adding this phrase have on the types of income that are eligible for Category 4 Permits?

Webster’s New Collegiate Dictionary defines the word “average” as follows: “an estimation of or approximation to an arithmetic mean,” or a “single value (as a mean, mode, or median) that summarizes or represents the general significance of a set of unequal values.” (*Webster’s New Collegiate Dictionary* at p. 77 (Merriam Webster 1979).) Webster’s defines median as either “a value in an ordered set of values below and above which there is an equal number of values or which is the arithmetic mean of the two middle values if there is no one middle number,” or “a value of a random variable for which all greater values make the distribution function greater than one half and all lesser values make it less than one half.” (*Webster’s, supra*, at p. 707.) The difference between the “average” and the “median” is significant as the following explanation suggests:

“Mean (or *arithmetic mean*) is a type of **average**. It is computed by adding the values and dividing by the number of values. **Average** is a synonym for *arithmetic mean* - which is the value obtained by dividing the sum of a set of quantities by the number of quantities in the set. An example is $(3 + 4 + 5) \div 3 = 4$. The **average** or **mean** is 4. Two other common forms of **averages** are the **median** and **mode**. The **median** is the middle value of the set when they are ordered by rank - or the point in a series of numbers above and below which is half of the series. An example would be: The **median** income of a four-person family in Connecticut is \$82,517. The **mode** is the most frequent value in a set of data. If you had nine students taking an exam and the scores were: 91, 84, 56, 90, 70, 65, 90, 90, 30 - then the **mode** is 90, the most common score. The **median** (middle) score is 84.” (<http://dictionary.reference.com/help/faq/language/d72.html>)

Applying these definitions here (which we believe a court would accept), use of the term “average” rather than “median” has obvious significance. It will either raise or lower the income of whomever is eligible for affordable housing. For example, 5 people have the following income: \$100,000; \$80,000; \$20,000; \$10,000; and \$10,000. The median income is \$20,000. The average income, which is the total of the incomes divided by 5, is \$44,000.

In addition, the use of the term “average” poses yet another problem. Government Code Section 65584 defines “household income levels” by reference to Health and Safety Code sections 50105, 50079.5 and 50093. (§65584(e)(1)-(4).) Those portions of the Health & Safety Code use the term “median,” and not “average,” in defining various levels of household income. (Health & Safety Code, §§50105(c); 50079.5(c); 50093.) In keeping with these statutory requirements, it should be noted that the pre-2004 GMSE used the term “average” but the 2004 version (as set forth in Resolution No. 04-180) changed “average” to “median” as required by state law. (*See*, Resolution No. 04-180, GMSE § 3, ¶ 5.) As such, the portion of the initiative

that changes the term back to “average” is preempted by state law and may be found invalid by a court.

5. Does the initiative violate the “single subject rule?”

The “single subject rule” is set forth in Article II of the California Constitution. “An initiative measure embracing more than one subject may not be submitted to the electors or have any effect.” (Cal. Const. art. II, § 8(d).) Adopted in 1948, the single-subject rule is a “constitutional safeguard adopted to protect against multifaceted measures of undue scope,” which may otherwise confuse or mislead voters. (*Senate of the State of California v. Jones* (1999) 21 Cal. 4th 1142, 1158.)

“[T]he single-subject provision does not require that each of the provisions of a measure effectively interlock in a functional relationship.” (*Id.*, at p. 1157.) Rather, an initiative measure will not violate the single-subject rule if, despite its varied collateral effects, all of its parts are “reasonably germane” to each other. (See *Amador Valley Joint Union High School District v. State Board of Equalization* (1978) 22 Cal. 3d 208; *Jones, supra*, 21 Cal. 4th at p. 1157.) Therefore, if an initiative measure “fairly disclose[s] a *reasonable and common sense relationship among . . . [its] various components in furtherance of a common purpose,*” then courts will uphold it. (*Jones, supra*, 21 Cal. 4th at p. 1157 [emphasis in original].) “Numerous provisions, *having one general object*, if fairly indicated in the title, may be united in one act. [Likewise,] [p]rovisions governing projects so related and interdependent as to constitute *a single scheme* may be properly included within a single act.” (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal. 3d 208, 230 (emphasis in original).)

As a rule, courts are reluctant to invalidate initiatives under the single subject rule unless the proposed law seeks to encompass two or more obviously disparate subjects. (See, e.g., *Chemical Specialties Manufacturers Assn. Inc. v. Deukmejian* (1991) 227 Cal. App. 3d 663, 671 (invalidating initiative that sought to do many disparate things, including reducing toxic pollution, protecting seniors from fraud and deceit in the issuance of insurance policies, preserving the integrity of the election process, and fighting apartheid); but see, also, *San Mateo County Coastal Landowners Assn. v. County of San Mateo* (1995) 38 Cal. App. 4th 523, 554 (rejecting characterization of initiative by appellants as embracing two distinct subjects (change in coastal land use policies and offshore drilling) and holding that these two provisions of the initiative were reasonably germane to one another as they all deal with the planning and regulation of development in the coastal zone).) Generally, “any reasonable doubts” about whether an initiative violates the single subject rule are resolved “in favor of the exercise of the right or initiative.” (*San Mateo County Coastal Landowners, supra*, 38 Cal. App. 4th at p. 554.)

In this case, it is arguable that the initiative violates the single subject rule because it attempts to do five separate things, as enumerated above. (See, Initiative, § 1(C).) Also, there are parts of the initiative internally that address different subjects, such as maximum building height (an aesthetic component) (Initiative, §5, at p. 24), and affordable housing (see, Initiative, generally.)

However, it is also arguable that all of these things are reasonably germane to each other because they all deal with planning and regulation of development and housing. (*See, generally, San Mateo County Coastal Landowners, supra*, 38 Cal. App. 4th at p. 554.)

6. Does the initiative result in an internally inconsistent General Plan, and if so, can the initiative withstand a challenge?

Any initiative amendment to a general plan “must conform to all the formal requirements imposed on general plan amendments enacted by the legislative body. The amendment itself may not be internally inconsistent, or cause the general plan as a whole to become internally inconsistent (Gov. Code, § 65300.5), or to become insufficiently comprehensive (*id.*, § 65300), or to lack any of the statutory specifications for the mandatory elements of the general plan set forth in Government Code section 65302.” (*DeVita, supra*, 9 Cal. 4th at p. 796 n. 12.)

Section 1(C)(5) of the initiative requires that the voters approve all residential growth limits and affordable housing requirements. This stands in stark contrast to another part of the initiative that, in keeping with state law, requires that the Housing Element be in compliance with and “address[] all applicable requirements of state law.” (Initiative, § 3(B)(I)(B), at p. 4.) These two requirements are arguably in direct conflict with one another. Further, pursuant to the *DeHaro* Settlement Agreement, the Housing Element and the GMSE are based upon each other, and the initiative – which proposes changes to an outdated version of the GMSE – could in fact result in an internally inconsistent General Plan.

7. Does the Board have the authority to reject the initiative at the outset, before putting it on the ballot?

There is a strong line of authority holding that the Board of Supervisors may not withhold the initiative from the ballot. However, there is some authority to the contrary.

The general rule is that the Board of Supervisors action to place the initiative on the ballot is ministerial and the initiative must be placed on the ballot even though the Board may conclude that all or a portion of the initiative is invalid. (*See, e.g., Save Stanislaus Area Farm Economy v. Board of Supervisors of the County of Stanislaus* (1993) 13 Cal. App. 4th 141, 148-149; *Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal. App. 4th 1013, 1021.) Even advice of counsel that an initiative is likely invalid is not a sufficient reason to withhold it from the ballot. (*See Citizens Against A New Jail v. Board of Supervisors of Santa Cruz County* (1976) 63 Cal.App.3d 559, 561.)

The often stated policy of the courts is to allow the election to take place and deal with the legal issues later. (*Costa v. Superior Court* (2006) 37 Cal. 4th 986, 1005.) However, there are exceptions to the general rule. The *Costa* case distinguished between pre-election challenges based upon the constitutional invalidity of the proposed measure as opposed to challenges based upon arguments that there were defects in the circulation of the initiative or its presentation to the voters, or that it is not legislative in character, or that the single subject rule is violated. In the case of constitutional infirmities, the courts will look more favorably upon a pre election challenge. (*Id.*) This initiative presents challenges that might be considered both procedural and

substantive (indeed, even some that are constitutional in nature, which go to the question of whether the initiative is valid at all). In such a case, when there are constitutional or substantive challenges, a matter can be decided pre-election where there is a “clear” constitutional violation. (*Cf.*, *Save Stanislaus, supra*, 13 Cal. App. 4th at pp. 150-151 [discussing standard of review for removing initiative from ballot].) What constitutes a “clear” constitutional violation is somewhat unclear. Presumably something very blatant, such as discriminatory racial policy, would amount to a clear violation, as would an initiative that directs a legislative body to do something other than that which is properly within the scope of a legislative enactment. (See, e.g., *Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal. App. 4th 1013, 1023 (initiative barring anti-discrimination legislation against persons with AIDS kept off ballot when it was clearly unconstitutional and violated equal protection clauses, among other things); *AFL v. Eu* (1982) 36 Cal. 3d 687, 691, 696-697 and n. 11 (holding that pre-election review was proper where initiative which directed the Legislature to convene to propose a balanced budget amendment did not propose a statute, and as such was beyond the limits of the initiative power).)

The outcome of litigation is always uncertain absent some obviously blatant constitutional violation or violation of the statutory processes for the presentation of an initiative measure. Absent such, the litigation may turn on the severity and clarity of the specific facts presented by the particular initiative. Here, we have noted a number of potentially fatal flaws with this particular initiative based on what courts have concluded in other factual situations. Whether a court would find that one or a combination of these flaws would be sufficiently strong as to warrant removal from the ballot would require further review.

IV. Responses to Questions

We will be present at the Board of Supervisors meeting scheduled for February 5, 2008 to respond to your questions regarding our legal analysis of the initiative.