February 12, 2020

SANDAG Executive Committee Members
Attn: Mr. Seth Litchney, Senior Regional Planner
401 B Street, Suite 800
San Diego, CA 92101

RE: February 14, 2020, SANDAG Executive Committee Agenda Item 5
Regional Housing Needs Assessment (RHNA) Proposed Appeals Hearing Procedures

Dear Honorable Executive Committee Members:

The Executive Committee will be considering adopting policies and procedures related to hearing appeals filed under Government Code Section 65584.05 for revisions of the shares of the regional housing need proposed to be allocated under the Regional Housing Needs Assessment (RHNA) methodology adopted for the 6th cycle in its February 14, 2020, meeting. While the proposed appeals hearing procedures are a step in the right direction, they require revisions to ensure that the four appeals that were filed are decided in accordance with constitutional due process. The City of Coronado encourages the Committee to make the following changes to the draft RHNA Appeals Hearing Procedures:

First, and as discussed further below, the voting procedure that should be employed is the tally mechanism of one vote per city; a simple majority, not a weighted vote, should decide the appeals as a necessary procedural safeguard.

Second, the rebuttal time for each appealing city should be moved to after public comment to enable the appellants to respond to such comments.

Third, public hearing date for the appeals must be moved to a date at least 21 days after notice of the hearing is provided to all local governments as required under Government Code section 65584.05. In addition, the appeals hearing should be moved to a date that allows analysis of the newly released Department of Finance projections that show a decrease in population for the region of 6.6%.

To Avoid Constitutional Error, All the RHNA Appeals Must Be Decided Through a Fair Hearing and Impartial Process

RHNA allocations came into being in the Housing Element Act of 1969. Since that time, SANDAG has successfully adopted methodologies for five RHNA cycles that were the result of
regional consensus and allocations resulting from those were never appealed before. What brought about the appeals in this 6th round? The passage of AB 805 in 2017 and its disenfranchisement of the will of the majority through a new weighted voting scheme. Because of the multiple failed motions early in the RHNA process for the 6th cycle, the majority will failed to produce just results. Four appeals followed.

These four appeals require SANDAG to take adjudicatory actions, as opposed to the primarily legislative decisions that the Board has made so far in the RHNA process. As quasi-judicial proceedings, SANDAG must employ procedural and substantive safeguards appropriate to such proceedings.

The Proposed RHNA Appeals Hearing Procedure recognize the fundamental need for due process to be afforded in the appeals. However, the proposed procedures fall short of the constitutionally mandated protections by attempting to apply the “standard” voting policy. The appealing cities are entitled to a fair hearing employing voting procedures that do not create an unacceptable risk of bias nor disenfranchise the citizens of Imperial Beach, Lemon Grove, Solana Beach and Coronado. The Executive Committee has an opportunity to ensure that now. The procedural mechanism of one vote per city should be employed to ensure that the appeals for revisions to the RHNA allocations are decided fairly and without bias.

When SANDAG amended its Bylaws, Article IV, Section 5, in 2018 to make changes to the voting procedures, the impacts had not been manifested. In practice, regardless of the opposition and overwhelming views of the supermajority of jurisdictions, the City of San Diego has played its AB 805 trump card and had its way on any and all issues, in all procedural contexts. This may be permissible in the legislative arena. But it is fundamentally unfair in adjudicatory contexts. Under AB 805 (Government Code section 120102.5(f)), the Board can adopt policies and procedures governing different voting mechanisms for different actions. Article IV, Section 5(a) of the Bylaws recognizes that: “After the tally vote of the Board Members is taken, a weighted vote may be called by the Board Members of any two Member Agencies unless otherwise required by law.” (Emphasis added) Here, the constitution requires that only a tally vote be taken.

To see why AB 805 weighting cannot be applied to adjudicatory decisions without running afoul of constitutional imperatives like impartiality and due process one need only review the RHNA proceedings thus far. An overwhelming number of jurisdictions disagreed with the City of San Diego in every vote involving the adoption of the draft and final methodology for this 6th cycle. In response, the City of San Diego called for a weighted vote. With opposition from 13 or 14 jurisdictions, the City of San Diego was successful in steam rolling its RHNA agenda through, ignoring what makes sense for the region and disregarding what the RHNA statutory objectives require. The overwhelming feedback from a super majority of other cities was squashed. The City of San Diego has shown itself to be actually biased in the RHNA outcomes.

While such bias may be acceptable in the legislative decisions to adopt the methodology, it is intolerable in proceedings that are quasi-judicial in nature. Unlike legislative actions, when an administrative agency makes adjudicative decisions, like on these appeals, due process of law
requires a fair tribunal. A fair tribunal is one in which the decision maker is free of bias for or against a party, including its investment in a pre-judged outcome. The voting outcomes on RHNA issues after AB 805's passage show a situation in which experience teaches that the probability of actual bias on the part of the decision maker when a weighted vote is employed is too high to be constitutionally tolerable. AB 805 cannot be employed in the adjudicatory context of a RHNA appeal because the particular combination of circumstances present would create an unacceptable risk of bias.

The Executive Committee can avoid such an unconstitutional outcome by adopting a policy to utilize a tally vote when deciding RHNA appeals. Such a policy is proper under Government Code section 120102.5(f) and Article IV, Section 5(a) of the Bylaws. It also avoids a circumstance where AB 805 could be challenged in its entirety as unconstitutional. There is no fiscal or administrative burden in applying the tally voting mechanism only. The risk of erroneous deprivation of rights is high through employing the procedure of a weighted vote. In addition, the probable value of employing the procedural safeguard of a tally vote is high. To a certain extent, each member is interested in the outcome of the appeal. An appeal policy of one city, one vote minimizes the risk of error because, but no one member is forcing its agenda and disenfranchising on the rest. Therefore, the procedural safeguard of one vote per city (a tally vote only) should be applied in deciding the RHNA allocation appeals.

Respectfully Submitted,

[Signature]

Blair King, City Manager
City of Coronado

cc: Hasan Ikhrata, Executive Director, SANDAG
    Colleen Clementson, Director of Regional Planning, SANDAG
    City Council members of the City of Coronado
February 13, 2020

San Diego Association of Governments (SANDAG)
Executive Committee
401 B Street, Suite 800
San Diego, CA 92101

RE: Regional Housing Needs Assessment: Proposed Appeals Hearing Procedures
Proposed SANDAG Board Meeting February 28, 2020 Agenda Item No. 5

Dear Chairperson and Members of the Executive Committee and Board of Directors:

On February 11, 2020, the City of Lemon Grove (City) was provided with the proposed Agenda for the February 14, 2020 meeting of the San Diego Association of Governments (SANDAG) Executive Committee. The Executive Committee Agenda enclosed a proposed Agenda for a February 28, 2020 meeting of the SANDAG Board of Directors (Board), as well as Proposed Appeals Hearing Procedures for the Regional Housing Needs Assessment (RHNA) appeals, which – according to the Agenda – are set to be heard by the SANDAG Board on February 28, 2020.

The City hereby objects to the proposed February 28, 2020 date for the hearing on the RHNA Appeals before the SANDAG Board as well as the proposed RHNA Appeals Hearing Procedures attached to the proposed February 28, 2020 SANDAG Board Agenda.

I. THE APPEAL HEARING MUST BE CONTINUED.

Government Code section 65584.05(d) provides:

No later than 30 days after the close of the comment period, and after providing all local governments within the region or delegate subregion, as applicable, at least 21 days prior notice, the council of governments or delegate subregion shall conduct one public hearing to consider all appeals filed pursuant to subdivision (b) and all comments received pursuant to subdivision (c).
On January 6, 2020, in accordance with Government Code section 65584.05(c) SANDAG provided local governments with notice of all Draft Housing Allocation Appeals filed in the region by sending an email to the jurisdictions containing the notification and links to the appeals. Pursuant to that Section, local governments and SANDAG have 45-days – until February 20, 2020 – to comment on those appeals. Thus, pursuant to Section 65584.05(d), SANDAG has 30-days from February 20, 2020 – until March 20, 2020 – to hold the appeal hearings. In addition, pursuant to Section 65584.05(i), that hearing date may be continued up to 30-days. Pursuant to the reasons set forth below, the February 28, 2020 appeal hearing date set forth in the proposed February 28, 2020 SANDAG Board Agenda is premature and must be continued.

SANDAG has at no time provided the requisite 21-days’ notice of hearing to local public entities as expressly provided for in Section 65584.05(d). While SANDAG’s online archive indicates that public notice was posted on SANDAG’s website on January 31, 2020, (https://www.sandag.org/index.asp?fuseaction=notices.home) at no time was it sent to the local public entities as required by law. Nor was the Notice posted on SANDAG’s “Regional Housing Needs Assessment 6th Housing Element Cycle 2021-2029” webpage, that tracks the RHNA process. (see, https://www.sandag.org/index.asp?projectid=189&fuseaction=projects.detail.)

In addition, the February 6, 2020 letter from Ray Major, Chief Economist and Chief Analytics Officer for SANDAG to the SANDAG Board, indicates that the “Department of Finance (DOF) released new population projections in January 2020” which “indicates a 6.6% decrease in our total regional population when compared to the previous DOF 2017...projected population forecast.” He went on to say that SANDAG staff “has reached out to the DOF to understand the technical assumptions and methodology used in the new 2020 projections” and “is seeking guidance from Housing and Community Development Department on how the new population projections may or may not affect the current RNHA process.” SANDAG disclosed the February 6, 2020 letter, but did not include the documentation cited by Mr. Major therein.

The February 28, 2020 hearing date does not provide sufficient time for SANDAG to evaluate the impact of those updated calculations on the underlying methodology and the draft allocation and fails to provide appellants with adequate notice of how those calculations will impact their appeals, thereby prejudicing the appellants’ ability to prepare for and participate in, a fair appeal hearing.

Similarly, as the comments on the four pending appeals are due February 20, 2020, eight days before the scheduled hearing, the February 28, 2020 hearing date does not provide the Board, SANDAG staff, or appellants with adequate notice, or time, to review all of the comments submitted in relation to the pending appeals thereby prejudicing appellants’ ability to adequately prepare for the hearing.
For all the reasons stated above, the City of Lemon Grove requests that the appeal hearing be continued, at least until March 20, 2020, so adequate notice can be provided, the comments can be fully evaluated and the impact of the updated DOF calculations can be assessed. Failure to continue the hearings will prejudice the City in this proceeding, and violate the due process rights of the City, and the residents and citizens it represents.

II. THE PROCEDURES FOR THE APPEAL HEARING VIOLATE THE RIGHTS OF APPELLANTS AND THEIR RESIDENTS.

Proposed SANDAG Board Agenda, for February 28, 2020, Item No. 5, Attachment 1, sets forth the proposed “SANDAG RHNA Appeals Hearing Procedures” (Procedures) for this quasi-adjudicatory process.

A. The Procedures Do Not Provide An Opportunity For Appellants To Be Heard.

Paragraphs 1 through 4 of the Procedures list the procedures for presentation of evidence for each appeal hearing. Paragraph 5 provides that those procedures will be followed for each appeal. Paragraph 6 then provides for public comment after all appeals have concluded. The City objects to the timing of the appellants’ rebuttal articulated in Paragraph 3. As set forth, appellants are only provided with a 5-minute opportunity to present rebuttal testimony following presentations by SANDAG staff. Appellants are not provided with an opportunity to respond to public comments, as pursuant to Paragraph 7, following public comment “[t]he Chair will close the public hearing on the RHNA Appeals.”

In a quasi-adjudicatory process such as this one, due process requires the opportunity to be heard. The procedures, as drafted, deny appellants that right by preventing them from responding to public comments pertaining to their appeals. The procedures should therefore be modified to ensure that the appellants have a chance to address any public comments pertaining to their appeals.

B. A Weighted Vote Would Deny the Appellants the Right to Impartial Adjudication.

Paragraph 9 of the Procedures provides that “[t]he Board will be asked to conduct a separate vote for each appeal pursuant to SANDAG standard voting procedures.” [emphasis added] SANDAG’s Bylaws, Article IV, Section 5 (a) provides as follows regarding the SANDAG Board voting procedures:

There are 19 Member Agencies on the Board and a majority of the Member Agencies constitutes a quorum for the transaction of
business. In order to take final action on any item, except the final vote(s) electing the Chair and Vice Chair of the Board, which shall require use of the weighted vote procedure as described below in subsection b, a majority vote of the Board Members present on the basis of one vote per agency (tally vote) is required. After the tally vote of the Board Members is taken, a weighted vote may be called by the Board Members of any two Member Agencies unless otherwise required by law. ... [emphasis added.]

The City does not object to the tally vote process, which allocates a single vote to each SANDAG Board member, thereby equally distributing the vote among all nineteen members and increasing the fairness of the decision despite the inherent bias of all SANDAG Board members due to the impact of the Draft RHNA Allocation on their respective jurisdictions.

In contrast, the City strenuously objects to the SANDAG Board using the weighted vote to decide the appeals. Pursuant to Article IV, Section 5 (a) of SANDAG’s Bylaws, the law requires that a weighted vote not be used in RHNA because it will illegally interfere with the due process rights of appellants and their citizens, thereby disenfranchising the voters who rely on their representatives who act on their behalf.

SANDAG’s 2020 Weighted Vote Formula provides for a total of 100 weighted votes. Out of those 100 weighted votes, Board member City of San Diego has an adjusted weighted vote of 42 and Board member County of San Diego has an adjusted weighted vote of 15, as compared to the smaller local government entity Board members, such as the City, which have an adjusted weighted vote of 1 each.

The right to an impartial decision maker is an essential element of due process. The SANDAG Board is the decision maker in this RHNA Appeal process. As discussed above, many of the Board members are biased as they are directly impacted by the issues raised in one, or more, of the appeals. Unlike the tally vote – which provides for even distribution of the decision-making power among the members of the SANDAG Board – the weighted vote allows those entities with a significantly larger weighted vote to control the final determination, thereby impermissibly compromising the fairness of the appeal process.

III. THE PROCEDURES FOR APPEAL HEARING FINDINGS DO NOT COMPLY WITH GOVERNMENT CODE § 65584.05(e)(1).

Government Code section 65584.05(e)(1) requires that the final determination on an appeal “be based upon the information and methodology described in Section 65584.04 and whether the revision is necessary to further the objectives listed in subdivision (d) of Section 65584.” (Gov. Code, § 65584.05(e)(1).)
Paragraph 9 of the Procedures fails to specify that the SANDAG Board’s determination must comply with those statutory requirements in order for the appeal determination to comply with the law, thereby creating a presumption of invalidity as to any decision the Board may reach.

IV. CONCLUSION.

The City respectfully requests that the February 28, 2020 date for the hearing on the RHNA Appeals before the SANDAG Board be continued, and the Appeal Procedures be modified, as requested above. The City objects to the current schedule, and procedures, as they unlawfully impair the rights of the City, and its residents and citizens.

Respectfully submitted,

Lydia Romero
City Manager

cc: Hasan Ikhrata, Executive Director of SANDAG (Hasan.Ikhrata@sandag.org)
Executive Committee: Steve Vaus (Chair), Catherine Blakespear (Vice Chair), Georgette Gomez, Jim Desmond, Bill Wells and Mary Salas c/o Tessa Lero (Tessa.Lero@sandag.org)
Seth Litchney, Senior Regional Planner, SANDAG (Seth.Litchney@sandag.org)
John Kirk, General Counsel, SANDAG (John.Kirk@sandag.org)
Samantha Foulke, Associate Legal Counsel, SANDAG (Samantha.Foulke@sandag.org)
City Council of the City of Lemon Grove
February 13, 2020

San Diego Association of Governments (SANDAG)
401 B Street, Suite 800
San Diego, CA 92101

SUBJECT: POLICIES FOR HEARING APPEALS FOR REVISIONS OF REGIONAL HOUSING NEEDS ASSESSMENT (RHNA) ALLOCATIONS

Dear Members of the Executive Committee:

On February 14, 2020, the Executive Committee will be considering adopting policies and procedures related to hearing appeals filed by four cities under Government Code Section 65584.05 for a revision of the shares of the regional housing need proposed to be allocated under the Regional Housing Needs Assessment (RHNA) methodology adopted for the 6th cycle. The City of Solana Beach urges that the following changes be made to the draft RHNA Appeals Hearing Procedures:

1. Each cities’ rebuttal time should be moved to occur after public comment;

2. The date of the appeals hearing should be moved to a date at least twenty-one (21) days after notice of the hearing is provided to all local governments consistent with state law;

3. The appeals hearing should be moved to a future date that allows analysis of the newly released Department of Finance projections that show a decrease in population for the region of 6.6%; and

4. The procedural safeguard of a straight majority vote (a tally vote only with no weighted option) should be adopted in deciding the RHNA appeals.

With respect to voting procedures, Article IV, Section 5(a) of SANDAG’s Bylaws provides that: “After the tally vote of the Board Members is taken, a weighted vote may be called by the Board Members of any two Member Agencies unless otherwise required by law.” (Emphasis added.) Accordingly, where the law requires otherwise, a tally vote only is to be taken.

In the context of deciding the RHNA appeals, which are quasi-judicial proceedings, due process requires that the weighted vote not be employed. All appellants are entitled to a fair hearing with voting procedures that do not create an unacceptable risk of bias nor disenfranchise any jurisdiction’s citizens.
Under Government Code Section 120102.5(f) and its bylaws, policies and procedures governing different voting mechanisms for different contexts can be adopted. The RHNA appeals present a situation in which experience teaches that the probability of bias is too high to be constitutionally tolerable. Due process therefore requires a straight majority vote in deciding the RHNA appeals to minimize the risk of error in such an adjudicatory setting.

Should you have any questions, please feel free to contact the City’s Community Development Director, Joseph Lim, at (858) 720-2434 or by e-mail at jlim@cosb.org.

Respectfully Submitted,

Jewel Edson, Mayor
City of Solana Beach

David A. Zito, Councilmember
City of Solana Beach

Judy Hegenauer, Deputy Mayor
City of Solana Beach

Kristi Becker, Councilmember
City of Solana Beach

Kelly Harless, Councilmember
City of Solana Beach

cc: Hasan Ikharta, Executive Director, SANDAG
Coleen Clementson, Director of Regional Planning, SANDAG
Seth Litchney, Senior Regional Planner, SANDAG
Gregory Wade, City Manager, City of Solana Beach