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JOHN G. McCLENDON
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August 14, 2008

Via Email

Members of the Town Council of Yucca Valley
57090 Twentynine Palms Highway
Yucca Valley, CA 92284

Re: *Specific Plan 1-04, Yucca Valley Retail Center Specific Plan*

Honorable Mayor and Members of the Town Council of Yucca Valley:

Item #8 on the *Agenda* posted for tonight's regular public meeting is entitled: "Ordinance Adopting Specific Plan -1-04, The Yucca Valley Retail Center Specific Plan" (the "Ordinance"). On behalf of several Town residents and others, I am submitting this letter to caution that, under established California law, you cannot adopt the Ordinance because, as of July 1, 2008, the Town lacks a legally valid General Plan. I request that this letter, along with all of the separate supporting documentation I am transmitting with it, be included in the record of the Town's proceedings for Agenda item #8.

The Legislature has found "that decisions involving the future growth of the state, most of which are made and will continue to be made at the local level, should be guided by an effective planning process, including the local general plan." (Government Code § 65030.1; emphasis added.) In the context of the California Planning and Zoning Law (Government Code § 65000 *et seq.*), the Legislature requires each city in the State to adopt a comprehensive, long-term general plan for the physical development, configuration, and character of the city and requires that all future land use decisions to be consistent with the general plan. (Government Code §§ 65300 *et seq.*; *Elysian Heights Residents Assn., Inc. v. City of Los Angeles* (1986) 182 Cal.App.3d 21, 27.)

A general plan is required to contain seven mandatory elements: (a) a land use element; (b) a circulation element; (c) a housing element; (d) a conservation element; (e) an open-space element; (f) a noise element; and (g) a safety element. (Government Code § 65302.) If one of the seven mandatory elements is missing, or if a relevant element is inadequate, then a city cannot take any action under the Planning and Zoning Law that is required to be consistent with the general plan. Since "[t]he general plan 'is, in short, a constitution for all further development within the city.' [Citations.]" (*Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 9970, this prerequisite of an adequate general plan has been repeatedly affirmed by the courts. (*Save El Toro Ass'n v. Days* (1977) 74 Cal. App. 3d 64, 74 (1977) [city could not approve any subdivisions because it had not adopted a valid open space

element to its general plan]; *Friends of "B" St. v. City of Hayward, supra*, 106 Cal. App. 3d at 999 [city could not proceed with a public works project because it was missing its noise element; therefore the project could not conform to an officially adopted general plan]; *Camp v. Board of Supervisors* (1981) 123 Cal. App. 3d 334, 349 [county could not approve subdivisions because some of its general plan elements were inadequate under state law]; *Resource Defense Fund v. County of Santa Cruz* (1982) 133 Cal. App. 3d 800, 806 ["Since consistency with the general plan is required, absence of a valid general plan, or valid relevant elements or components thereof, precludes any enactment of zoning ordinances and the like."]; *Neighborhood Action Group v. City of Calaveras* (1984) 156 Cal. App. 3d 1176, 1188 [issuance of a conditional use permit was beyond the county's authority if the noise element of the county's general plan does not conform to the statutory criteria]; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 745 [court invalidated a building permit for proposed cogeneration plant based on general plan inadequacy].)

The Town is in a similar predicament with regard to the adoption of the Ordinance. The Ordinance is for the adoption of Specific Plan 0-01. Government Code section 65454 expressly states: "No specific plan may be adopted or amended unless the proposed plan or amendment is consistent with the general plan." However, as of July 1, 2008, the Town's General Plan no longer has a legally valid Housing Element.

Unlike the other seven mandatory General Plan elements, a housing element must be reviewed "as frequently as appropriate" and revised "not less than every five years, to reflect the results of this periodic review." (Government Code § 65588(a) & (b).) The Town began 2008 with a valid Housing Element. (See HCD's *2007 Report to the Legislature on the Status of Housing Elements in California* required by Health and Safety Code section 50459(c).) However, State law required the Town to prepare and adopt a final, valid "fourth revision" Housing Element to its General Plan by July 1, 2008. (See HCD Deputy Director Criswell's July 6, 2005, letter to SCAG Executive Director Pisano affirming AB 2158's extension of Government Code § 65588(e)(1) deadline by two years to July 1, 2008.) HCD's most recent *Housing Element Compliance Report* lists Yucca Valley's Housing Element as "DUE," and the footnote explains that "Due means a housing element has not yet been submitted for the current planning period. Therefore, the housing element is out of compliance." (See *Housing Element Compliance Report* dated August 5, 2008; emphasis added.) In a conversation with an HCD staff person (Paul McDougall) this afternoon, he confirmed that HCD has not even received a draft version of the Town's "fourth revision" Housing Element that was due months ago. Moreover, he confirmed that the Town has not received an extension of time to prepare and submit its Housing Element, nor can it obtain one, since such extensions are expressly prohibited by Government Code section 65361(b).

The failure of the Town's General Plan to include a valid Housing Element has a direct and immediate bearing on the project for which the Ordinance is being adopted: the development of a Wal-Mart supercenter. In July, 2007, SCAG released its *Final Regional Housing Need Allocation Plan* for the planning period January 1, 2006 through June 30, 2014. (*Plan* is attached hereto.) The *Plan* allocates to the Town the "RHNA" requirement that its Housing Element provide for the development of 2,510 new residential dwelling units, including 560 units for "very low-income households" (e.g., 50% of area median income) and 399 units for "low-income households" (e.g., 80% of area median income).

Moreover, according to earlier testimony provided a Wal-Mart spokesman (John Mendez), the proposed supercenter will generate 150 new jobs. In a front-page article in the *Hi-Desert Star*, a Wal-Mart spokeswoman (Cheryl Rahming) was quoted as actually touting the merits of the supercenter's "low-wage jobs that allow a worker to still receive food stamps and WIC (Women, Infants and Children) aid.)" (See attached May 21, 2008, *Hi-Desert Star*.) I previously provided you with a copy of the latest and most definitive empirical study of the impacts of supercenters on local labor. That study (Neumark, *et al.*) found that for every new job that a supercenter created at a lower wage, it caused the loss of 1.4 jobs at a higher wage. Applying Wal-Mart's one numbers to the Neumark study's conclusions, the Town and vicinity will exchange 210 higher-paying jobs for 150 lower-paying ones.

Thus, the Town finds currently without a valid Housing Element that accommodates the 959 very low- and low-income units it must accommodate under its RHNA allocation, plus an additional 210 such units that will be needed to accommodate the families of the 210 workers that will be displaced by the supercenter, plus an additional 150 such units to house the supercenter's low-wage workers who "still receive food stamps and [welfare benefits]."

The Planning and Zoning Law is clear: adoption of the Specific Plan requires as a prerequisite that the Town have a valid General Plan. Adoption of the Ordinance with one is an *ultra vires*¹ act:

"Since consistency with the general plan is required, absence of a valid general plan, or valid relevant elements of components thereof, precludes enactment of zoning ordinances, and the like.'...(Thus) the scope of authority of the agency to enact a general plan and zoning ordinances and to apply them is governed by the requirements of state law. A permit action taken without compliance with the

¹ An *ultra vires* act is one that is "beyond the scope of power allowed or granted ... by law," (*Black's Law Dictionary* 1525 (7th Ed. 1999)) and as such is *void ab initio*. (See *Hansen v. California Bank* (1936) 17 Cal.App.2d 80, 100.)

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hierarchy of land use laws is ultra vires as to any defect implicated by the use sought by the permit.” (*Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176, 1184.)

I would urge you refrain from considering the adoption of the Ordinance until the Town has a General Plan in which all seven of its mandatory elements comply with State law.

Very truly yours,

LEIBOLD McCLENDON & MANN, P.C.

A handwritten signature in black ink, appearing to read "John G. McClendon". The signature is written in a cursive style with a large, stylized initial "J".

By: John G. McClendon

Attachments are included in email transmitting this letter