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Hillary Gitelman
Director

MEMORANDUM

To:	Napa County Planning Commission	From:	Hillary Gitelman
Date:	November 4, 2011	Re:	Landmark Preservation Ordinance Update – General Plan Conformity & CEQA – Response to Farm Bureau Letter

This memorandum is intended to provide staff's observations and responses to the letter by Professor Daniel Selmi submitted to the Board of Supervisors by the Napa County Farm Bureau on October 17, 2011. First, it's important to note that Professor Selmi's letter was addressing just one of the ordinances before the Board of Supervisors on October 18, 2011. After a public hearing, the Board of Supervisors requested changes to the ordinance, some of which would address or partially address Professor Selmi's concerns. It should also be noted that the Board of Supervisors requested a legal analysis from County Counsel's office. This memorandum does not provide that legal analysis, but provides common-sense responses from a planning perspective.

1. Professor Selmi's letter asserts that the ordinance allowing for reuse of historic commercial and resort properties is inconsistent with 'fundamental provisions' of the General Plan.

Professor Selmi asserts that because the ordinance recommended by the Planning Commission and considered by the Board of Supervisors (now revised and split into two ordinances) would allow uses that are not specifically allowed by Policy AG/LU-20 and -21 (which define the land use and building intensity of the County's agricultural areas), it conflicts with specific mandatory policies of the General Plan and cannot be approved by finding that the ordinance is "on balance" consistent with the General Plan overall as a whole. Yet Professor Selmi's assertion fails to acknowledge that there are other non-agricultural uses that are clearly permitted in agricultural areas even though they are not spelled-out in these two policies. As indicated by staff's October 11, 2011 memo on general plan conformity, the other uses permitted in agricultural areas include schools and churches (Policy AG/LU-120 through 125), commercial uses within parcels zoned CL or CN (Policy AG/LU-44 and 45), pre-existing legal non-conforming uses (Policy AG/LU-46), recreational facilities (Policy ROS-3), and home occupations (Policy AG/LU-48). Each of these other uses is permitted under the terms of specific general

plan policies, suggesting that Policy CC-28 can be relied upon to permit the reuse of existing historic buildings as proposed, and that Policies AG/LU-20 and -21 are not so fundamental or “mandatory” that they cannot be considered in light of other policies of the General Plan.

Furthermore, AG/LU-20 states that the intent of the Agriculture, Watershed and Open Space designation is “to provide areas where the predominate use is agriculturally oriented...” It does not state that agriculture is the only or exclusive use for AWOS lands, suggesting that some limited non-agricultural uses are acceptable. As to lands designated Agricultural Resource, Policy AG/LU-21 specifically states that “... uses incompatible with agriculture” should be precluded. The ordinances currently proposed are in complete agreement with and actually further this policy because they includes a specific finding that the historic or new commercial uses must be compatible with agriculture. Policy AG/LU-12 provides that “no new non-agricultural use or development of a parcel” located in an agricultural area shall be permitted unless it is needed for the agricultural use of the parcel except as enumerated. The ordinance that would allow historic uses to be re-established could be reasonably construed as not allowing “new uses” and the ordinance that would allow compatible new uses within extant historic buildings could be reasonably construed as not allowing “new development of a parcel.” In both cases, the buildings present on the site and used in the past are being revived or reborn as opposed to newly coming into existence.

Professor Selmi contends that other commercial uses allowed in spite of Policies AG/LU-20 and -21 are acceptable because the General Plan sets forth what limited uses are allowed and where. In this case, Policy CC-28 does much the same thing, indicating that *only* important historic buildings may be reused for their historic use or a compatible new use. In the revised version of the ordinance, this is even more explicit, since both ordinances currently being proposed identify six precise locations and historic resources where owners would be permitted to apply for commercial uses.

Ultimately, if the Board of Supervisors believes that any of the potential General Plan conflicts identified by staff or by Professor Selmi are too severe to maintain “balance,” or that any of the potential conflicts relate to “specific mandatory policies or provisions” of the plan that are not already nuanced by other plan provisions, they will reject the proposal or require a general plan amendment. If the Board of Supervisors agrees that the proposal is “on balance” consistent with the General Plan they may act on that basis.

2. Professor Selmi’s letter asserts that the proposed ordinance “effectively re-designates” agricultural lands, circumventing and violating provisions of Measure P.

Mr. Selmi quotes Measure P (General Plan “provisions governing intent and maximum building intensity... and minimum parcel size may not be changed... except

by a vote of the people”), but fails to explain how the proposed ordinance would be in conflict other than to suggest that by “radically altering the uses and building intensity allowed” in agricultural areas, the ordinance “would effectively re-designate any of these lands that have historic resources.”

In fact, the currently proposed ordinances would not re-designate land that is designated for agriculture in the General Plan and would not alter any of the provisions of Policy AG/LU-20 or 21. Nor would they “radically alter” the uses and intensity allowed in agricultural areas. Instead, the proposed ordinances would allow a limited number of qualified historic buildings – *buildings that were constructed and used for commercial purposes in the past*—to be rehabilitated and reused for commercial purposes again. This is not a re-designation, and is not in conflict with Measure P, thus the findings in Measure P discussed by Mr. Selmi are irrelevant.

The *DeVita* case is cited by Mr. Selmi in an attempt to argue that the Board should put the proposed ordinance before the voters, yet the very paragraph cited (9 Cal.4th at 792-93) makes clear that the court anticipated that the County Board of Supervisors could and would continue to conduct its business, placing an item on the ballot only if it would amend a part of the general plan enacted by the voters.

3. Professor Selmi’s letter asserts that the proposed ordinance requires a new environmental impact report (EIR), that the County’s general plan EIR did not consider the proposal, and that environmental review cannot be conducted until the County understands exactly which buildings will be eligible for the program, and what the site-specific impacts of their reuse would be.

Mr. Selmi’s CEQA arguments over simplify the staff’s approach in an attempt to cast doubt on its legitimacy. However Section 15168 of the State CEQA Guidelines (Program EIR) makes it clear that lead agencies may prepare program EIRs for projects such as the County’s General Plan Update which are “intended to govern the conduct of a continuing program” (Section 15168(a)(3)) and that such EIRs may be used for later activities when they fall within the scope of the project and the EIR’s analysis (Section 15168(c)). In this case, the General Plan clearly anticipated the proposed project, because it included Policy CC-28 and the related implementation action.

The General Plan EIR also anticipated the project, analyzing the concept as part of Alternative C (Draft EIR p. 4-12-20) and the preferred project (Final EIR p. 2.0-3). The components of Alternative C, including historic reuse of buildings, were analyzed throughout the EIR in each resource section (e.g., agriculture, biology, land use, traffic, fisheries, air quality, etc) and the impacts and mitigation measures identified in the EIR were identified as described in the August 15, 2011 Initial Study checklist prepared for the project described as the “Landmark Preservation Ordinance Update.” Thus the

General Plan EIR appropriately assessed the cumulative impacts of forecasted development under the General Plan – *assuming the reuse of historic buildings for their historic use or a compatible new use* -- to the year 2030.

By arguing that the County must identify each and every site where the proposed ordinance would allow commercial uses and the new use that would be proposed, Mr. Selmi is asking the Board to speculate as to the outcome of historical research by property owners and future deliberations by the Planning Commission. Yet CEQA Guidelines Section 15145 states that a lead agency need not speculate as to potential impacts. It is important to remember that the proposed ordinance simply provides a vehicle for property owners to apply for historic reuse or a new commercial use. It does not entitle, permit or authorize any particular use as a matter of right. Upon submittal of a use permit application, project-specific impacts will be comprehensively evaluated under CEQA and mitigation measures from the General Plan EIR will be applied as appropriate.

While the identification of specific historic resources and sites in the revised ordinance(s) might suggest that a more detailed, site-specific analysis could be conducted now, it is simply not possible to speculate as to all of the historic uses of each property, or as to the precise uses and site configurations that will be proposed, if at all, in the future. If Mr. Selmi's assertions were correct, no local or State agency would be able to adopt standards and incentives for preservation projects without first conducting an exhaustive survey of all possible (present and future) historic resources, and without first knowing all future uses of such resources, and the site improvements (e.g. driveways, waste treatment systems, etc.) that might someday be considered in conjunction with their reuse.

For example, without knowing the mix of uses and the parking configuration proposed for the Pope Valley Store, it would be impossible to analyze traffic impact of reuse any more specifically than the cumulative impacts (i.e. contributions to traffic volumes and congestion) already considered in the General Plan EIR. An attempt to speculate on potential future reuses would be costly, time consuming and potentially of little value depending on the configuration of the ultimate application request. An EIR need not attempt to predict future environmental consequences when future development is unspecified and uncertain. (*Environmental Protection Info. Ctr. v. Department of Forestry & Fire Protection* (2008) 44 C4th 459, 502.)

As indicated in State CEQA Guidelines Section 15162 and in the memo and checklist (initial study) prepared for this project dated August 15, 2011, once an EIR has been prepared, no subsequent EIR is required unless there are substantial changes to the project, substantial changes in circumstances, or new information of substantial importance. The General Plan has been amended several times since the General Plan Update was adopted in June 2009. However those amendments reduced the size of

“urbanized areas” on the land use map and updated the County’s Housing Element, they did not change Policy CC-28 or its implementation, or modify the General Plan in such a way as to increase the number or severity of relevant impacts identified in the program EIR for the General Plan Update. (The Housing Element program-EIR identified significant and unavoidable impacts related to traffic and cultural resources that were already identified in the General Plan EIR, and identified only one “new” unavoidable impact related to visual resources in the Moskowitz Corner area, which is irrelevant to the current proposal.) Similarly, the County is not aware of any changes in circumstances or new information that would render conclusions of the program-level EIR for the General Plan Update inadequate or out of date. In fact, the current economic recession has assured that the County unincorporated area looks the same now as it did in June 2008, and very few new developments have been either proposed or approved.

In this instance, the County has done a responsible and reasonable job, preparing an initial study to explain anticipated impacts of the proposal in general terms for the public and decision makers, and also explaining the proposal’s relationship to the General Plan program-level EIR. Appropriately, the initial study focuses on cumulative impacts and indicates that site-specific review of individual projects proposed pursuant to the ordinance will be required once the details of each proposal are identified and declines to speculate as to what those might be.

4. **From a policy perspective, Professor Selmi’s letter objects to the ordinance because the precise number and location of qualifying buildings is unknown, because historic uses could be re-instituted “without considering whether those uses are appropriate today,” and because new commercial uses would be authorized.**

In response to concerns like those expressed by Professor Selmi, the Board of Supervisors has requested modifications to the ordinance originally proposed so that it would apply to a finite number of specifically identified historic resources. A basic premise is that there are a very limited number of truly significant historical commercial properties in the County worthy of preservation, even if that means allowing them to be reused for commercial purposes. After all, these buildings date from a period or periods when Napa County was more rural than it is today, and their active commercial use did not result in “urbanization” of their surroundings. Re-instituting commercial use pursuant to the proposed ordinances would require site-specific environmental review (including an assessment as to whether growth inducement or agricultural impacts would result), and could only be approved if County decision-makers found the proposal to be compatible with agriculture. Also, as part of the standard use permit findings, the Planning Commission (and the Board on appeal) would need to affirmatively find that the project does not adversely affect the public health, safety and welfare of the county. This finding gives the decision-makers broad discretion and would easily encompass considering whether the proposed use is appropriate today,

It is not “arbitrary” as Professor Selmi suggests to provide a program that allows legitimate historic buildings to be reused for commercial purposes if the preservation of historic buildings is a community value like the preservation of agricultural lands. This type of program was anticipated when the General Plan Update was adopted in 2008, and has been used in other communities as well. For example, Ventura County permits applicants to seek establishment of boarding houses and bed-and-breakfasts in Open Space and Agricultural Exclusive zones within designated historic structures (Ventura County Non-Coastal Zoning Ordinance Section 8107-40).