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CEQA Memorandum



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MEMORANDUM

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David Morrison
Director

To: Napa Planning Commission	From: David Morrison, PBES Director Brian Bordona, Supervising Planner
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Date: February 11, 2019
Re: CEQA Memorandum for Napa County Water Quality and Tree Protection Zoning Ordinance and Text Amendment

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

The County is considering more than a dozen updates to its Conservation Regulations (Chapter 18.108 of the Napa County Code) in implementation of the Napa County Strategic Plan (2019-2022), and more specifically the plan’s Strategic Actions 12.A, 12.B, & 12.E.

After careful review, the PBES Department has concluded that the County of Napa’s proposed updates to its Conservation Regulations are exempt from environmental review under the California Environmental Quality Act (“CEQA;” Pub. Res. Code, § 21000 et seq) and the CEQA Guidelines (14 CCR, § 15000 et seq). Given that these updates consist of ordinances that assure the maintenance, restoration, or enhancement of natural resources and the environment, their adoption falls within categorical exemptions under the CEQA Guidelines, as well as the general rule exempting activities where it can be seen with certainty the activities in question will not have a significant effect on the environment.

In particular, the ordinance updates are exempt as falling within Class 7 and Class 8 Exemptions, and some of the updates, in addition, fall within Class 4 and Class 5 Exemptions, as codified at Title 14, California Code of Regulations, sections 15304, 15305, 15307 and 15308. Further, no exception to these exemptions would apply.

The available evidence shows the proposed regulations are also exempt under the “Common Sense” Exemption set forth in Title 14, California Code of Regulations, section 15061(b)(3).

II. APPLICABLE EXEMPTIONS AND POTENTIAL EXCEPTIONS, GENERALLY

Requirements of Class 4, Class 5, Class 7, Class 8, and Common Sense Exemptions. The language of the pertinent exemptions are included below:

- **Class 4 Exemption.** This exemption covers “minor public or private alterations in the condition of land, water, and/or vegetation which do not involve removal of healthy, mature, scenic trees

except for forestry or agricultural purposes.” (14 CCR, § 15304.) A non-exclusive list of examples includes certain grading activities, filling activities, alterations that improve habitat for fish or wildlife, and fuel management to reduce fire risks. (*Id.*)

- **Class 5 Exemption.** This exemption covers “minor alterations in land use limitations in areas with an average slope of less than 20%, which do not result in any changes in land use or density.” (14 CCR, § 15305.)
- **Class 7 Exemption.** This exemption covers “actions taken by regulatory agencies as authorized by state law or local ordinance to assure the maintenance, restoration, or enhancement of a natural resource where the regulatory process involves procedures for protection of the environment. Examples include but are not limited to wildlife preservation activities of the State Department of Fish and Game. Construction activities are not included in this exemption.” (14 CCR, § 15307.)
- **Class 8 Exemption.** This exemption covers “actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment. Construction activities and relaxation of standards allowing environmental degradation are not included in this exemption.” (14 CCR, § 15308.)
- **Common Sense Exemption.** The CEQA Guidelines include an exemption based on “the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment.” (14 CCR, § 15061(b)(3); *see Muzzy Ranch Co. v. Solano County Airport Land Use Comm’n* (2007) 41 Cal.4th 372.) Under this exemption, an agency can find a project is exempt from environmental review if “it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.” (14 CCR, § 15061(b)(3).)

The Class 4, Class 5, Class 7 and Class 8 Exemptions are premised on a finding by the California Secretary for Natural Resources that the classes of projects covered by them do not have a significant effect on the environment. The exemptions, however, are not absolute. Although a project might otherwise be eligible for a categorical exemption, these exemptions must be denied if (1) significant cumulative impacts from projects of the same type will result; and (2) there is a reasonable possibility of a significant impact on the environment due to unusual circumstances. (14 CCR, § 15300.2(b)&(c).) In addition, the Class 4 and Class 5 Exemptions cannot apply if the activity in question falls within a particularly sensitive environment, meaning an environment where there exists an “environmental resource of hazardous or critical concern where designated, precisely mapped, and officially adopted pursuant to law by federal, state, or local agencies.” (14 CCR, § 15300.2(a).)

Agency's finding that a particular proposed project falls within one of the exempt classes necessarily includes an implied finding that the project has no significant effect on the environment and that no exception to the exemption applies. (*Save the Plastic Bag Coal. v. City & Cty. of San Francisco* (2013) 222 Cal. App. 4th 863, 873–74; *Association for Protection of Env't'l Values v. City of Ukiah* (1991) 2 Cal.App.4th 720,

731.) However, where an agency does not make express findings, and relies on implied findings regarding the inapplicability of exceptions, and project opponents file a legal challenge, a court's ability to affirm the agency's decision is constrained with respect to the "unusual circumstances" exception. With implied determinations, a court cannot discern whether (1) the agency determined no unusual circumstances existed, or (2) whether the agency determined unusual circumstances existed, but there was no reasonable possibility of a significant impact due to those circumstances. (*Respect Life South San Francisco v. City of South San Francisco (Planned Parenthood Mar Monte, Inc., Real Party In Interest)* (2017) 15 Cal.App.5th 449.) This makes a difference because the determination of whether unusual circumstances exist is subject to the highly deferential "substantial evidence standard," under which a court will defer to the agency's decision if it is supported by substantial evidence, whereas the determination about whether there exists a reasonable possibility of a significant impact is subject to the non-deferential "fair argument" test, under which a court will find for project opponents if they show there is a fair argument of a reasonable possibility the activity will have a significant environmental impact. (*Id.*) In the absence of direction, a court must analyze the implied finding as if made on the narrowest possible grounds, and can uphold the categorical exemption against the unusual circumstances challenge only if (1) it finds the record contains no substantial evidence that could support a finding of unusual circumstances – a determination courts will likely be reluctant to make due to the broad discretion vested in the local agency to determine this "essentially factual" issue – or (2) it *assumes* the existence of unusual circumstances, but finds the record is devoid of substantial evidence supporting a fair argument of a reasonable possibility that any purported unusual circumstances identified by the challenger will have a significant environmental effect.

Simply, an agency's decision rejecting the existence of an exception to a categorical exemption is much more defensible if the agency makes explicit findings that no unusual circumstances exist and that, regardless, there exists no reasonable possibility the activity in question will have a significant impact. Accordingly, we have set forth below evidence the County can consider in finding the proposed ordinance updates have no significant effect on the environment, and are exempt from CEQA.

Findings are also of significant benefit when an agency seeks to apply the Common Sense Exemption to a project. In essence, the application of this exemption is to be decided based on whether record evidence supports the exemption, and the agency has the burden of demonstrating the exemption applies. (*Muzzy Ranch Co. v. Solano County Airport Land Use Comm'n* (2007) 41 Cal.4th 372, 386, 388.) The agency need not engage in detailed or extensive fact-finding to make this determination, but there must be substantial evidence in the record to support it. (*Id.* at 388, quoting *Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 369.) What must comprise this evidence may vary, and depends on a multitude of factors, including the nature of the project, the directness or indirectness of the contemplated impact, and the ability to forecast the actual effects the project will have on the physical environment. (*Id.*) To this end, we have included findings below that can assist the County in supporting use of the Common Sense Exemption..

III. EVIDENCE SUPPORTING APPLICABILITY OF EXEMPTIONS

Qualification of ordinance updates for Class 4, Class 5, Class 7, Class 8, and Common Sense Exemptions. The prohibition of an activity that creates "environmental problems" constitutes an action

to assure “protection of the environment.” (*Magan v. County of Kings* (2002) 105 Cal.App.4th 468, 476.) Each of the proposed ordinance updates, as explained below, confers the benefit of additional protections for natural resources and the environment, and it can be seen with certainty that there is no possibility the regulations in question may have a significant effect on the environment. A full description of these ordinance updates is included in the February 20, 2019 Planning Commission Agenda Report, and the complete text of the proposed ordinance updates is included in the proposed ordinance included as an attachment to this Agenda Report. These and other materials accompanying the proposed ordinance updates are incorporated herein by reference.

What follows are general summaries of each of the proposed updates contained in the Water Quality and Tree Protection Ordinance; the full details are incorporated herein by reference, and each of the analyses below extend to the full breadth of the proposed amendments.

- ***Prohibition of new planting and structures on slopes greater than 30 percent.*** Currently, vineyards may be planted, and certain other land clearing and earthmoving activities may be undertaken, on slopes greater than 30 percent if an Exception in the form of a Use Permit is granted. The ordinance updates would eliminate the option to obtain a Use Permit for new plantings and structures on slopes greater than 30 percent, thereby reducing earth-disturbing activities and vegetation removal as well as the risk of erosion and landslides. The ordinance update confers not only a safety benefit, but reduces sediment, preserves habitats, and enhances water quality.
- ***Creation of 200-foot setback from municipal reservoirs.*** The County currently restricts development near municipal reservoirs by prohibiting new sewer lines within 50 feet and septic systems within 200 feet of a reservoir. The ordinance updates would enhance buffer regulations by increasing setbacks for all earth-disturbing activities to 200 feet. In recent years, the quality of drinking water in the County’s reservoirs has become increasingly important, as water quality standards have become stricter and the cost of treatment has increased. Development projects near reservoirs present the risk that sediment, pesticides, and nutrients that promote algae growth will reach reservoirs, adversely affecting water quality and aquatic habitats. To reduce the risks of adverse impacts, a 1990 study “Buffer Strips to Protect Water Supply Reservoirs: a Model and Recommendations” (Nieswand, Hordon, Shelton, Chavooshian, and Blarr; *Journal of the American Water Resources Association*) recommended buffers of between 50 and 300 feet. Increasing setbacks to 200 feet, as proposed, would lessen the likelihood that the pollutants discussed above would reach reservoir waters, thus preserving and enhancing the protections of this natural resource and the environment to a greater extent than they are protected under baseline regulations (i.e., the regulatory frameworks existing at this time).
- ***Clarification of wetland definition, and creation of 50-foot minimum setback from wetlands.*** The County currently uses the federal definition of wetlands, as set forth in the 1987 Army Corps Wetland Delineation Manual, in its CEQA documents, and the proposed ordinance updates would codify this longstanding practice and allow, as an alternative, for adoption of the more expansive California state definition of the term. To avoid indirect impacts to wetlands from

development, the County has typically required a minimum 50-foot setback, though on a case-by-case basis has, at times, increased this setback in excess of 50 feet. Larger setbacks provide additional protection to special status species and mitigate other potentially significant environmental impacts. This practice accords with the buffer recommendations published by the Environmental Law Institute's "Planner's Guide to Wetland Buffers for Local Governments" (2008), which provides that "much of the sediment and nutrient removal may occur within the first 15-30 feet of buffer." The proposed ordinance would codify the County's existing practice of establishing a 50-foot setback, and this provision would not preclude the County from requiring greater setbacks where project-specific conditions so warranted, pursuant to CEQA review, consultation with resource agencies, or other applicable procedures. This proposed update formalizes a longstanding preservation initiative, thereby affording greater protection to wetlands, surrounding habitats, and the species that inhabit them.

- ***Protection of new stream classification, and 35-foot setback from such streams.*** Current regulations protect "blue line streams," as identified in United State Geological Survey maps; watercourses with well-defined channels meeting certain parameters; and watercourses listed in Resolution No. 94-19. The proposed ordinance update would protect an additional category of streams, specifically "intermittent or ephemeral" watercourses consisting of a natural channel with bed and banks containing flowing water or showing evidence of having contained flowing water. Where such streams are found, the ordinance update would impose a minimum 35-foot setback. This regulatory framework echoes the state classification and protection approaches, and adding this additional regulation and protecting an additional category of streams would enhance the County's framework for watercourse protection. Furthermore, this provision would not preclude the County from requiring greater setbacks where project-specific conditions so warranted, pursuant to CEQA review, consultation with resource agencies, or other applicable procedures. Therefore, if adopted, this regulation would enhance the protection of a natural resource and the surrounding environment (e.g., habitats, water quality).
- ***Clarification of tree canopy definition, and extension of tree canopy setback rule to all unincorporated land.*** The County Code currently defines "vegetation canopy cover," which includes tree canopy cover, to mean the crown area of a stand of trees (i.e., upper-story vegetation) in a natural stand of vegetation, and the County determines canopy coverage through review of aerial photography. Within municipal watersheds, the County requires that a minimum of 60 percent of tree canopy cover be maintained as part of any use involved earth-disturbing activity. The ordinance update would maintain the existing definition of canopy coverage, but would (1) increase the tree canopy retention requirement to a minimum 70 percent, and (2) expand its scope of application to include all unincorporated areas of the County, and not just municipal watersheds. Outside of municipal watersheds, the 70 percent retention requirement would be based on canopy cover depicted in the 2016 National Agricultural Imagery Program (NAIP) maintained by the United States Department of Agriculture Farm Service Agency's Aerial Photography Field Office. The effect of this change would be to preserve more woodland, riparian, and other habitats. In this manner, the ordinance update would enhance the protection of natural resources and the environment.

- Extension of 40-percent shrubland canopy preservation ordinance to all unincorporated areas.*** The County Code now requires that a minimum of a 40 percent of shrub, brush, and associated vegetation without tree canopy be maintained within municipal watersheds. The proposed ordinance would extend this retention requirement from municipal watersheds to all unincorporated land within the County that contain shrubland and chaparral, with clarifications of how both habitats are defined. In protecting additional habitat, the ordinance update would enhance the protection of natural resources and the environment. To the extent other habitats are impacted by any earthmoving activity, they would be subject to the County’s existing conservation regulations, general plan policies and associated environmental review processes under CEQA, resource agency consultation processes required by the Federal and California Endangered Species Acts, the Clean Water Act, and other regulatory frameworks, and nothing in the ordinance updates would reduce the efficacy of those processes. Moreover, mitigation for the loss of shrub or any other canopy would not be permitted where doing so would frustrate biological and water quality protections..
- Increase in required tree mitigation ratio, from 2:1 to 3:1.*** The County’s General Plan contains policies that provide for the replacement of lost oak woodlands or preservation of like habitat at a 2:1 ratio when retention of existing vegetation is found to be infeasible. The ordinance update would increase this ratio to 3:1 for all “vegetation canopy cover,” with habitats having higher biological value being prioritized for preservation, and on-site mitigation being preferred over off-site mitigation. This ordinance update also prioritizes the preservation of vegetation within potentially developable lands with slopes of thirty percent or less and outside of stream and wetlands setbacks (though the replacement of vegetation canopy cover may occur within setbacks where determined biological and watershed protections), but also provides that mitigation could take place on slopes greater than 30 percent, but not on slopes 50 percent or greater. Moreover, mitigation for the loss of tree canopy would not be permitted where doing so would frustrate biological and water quality protections. Off-site mitigation would have to be within the same watershed, and the habitat would have to be of the same or better quality as determined by the planning director. Any preserved vegetation canopy cover, meanwhile, would be enforced with a perpetual conservation easement. Under this proposed framework, a greater amount of trees, including but not limited to oaks, would be replaced and/or preserved, enhancing the protection of natural resources and the environment.
- Effective date of ordinance updates.*** If adopted, the new ordinances would apply only to existing, incomplete applications and new applications for development, as determined on the ordinances’ effective date. The date of effectiveness does not affect the calculus of environmental effects.
- Exceptions in the form of a use permit and exemptions from ordinance updates, including for fuel management, forest health, reconstruction after fires, and vineyard development encompassing less than five acres and on slopes less than 15 percent.*** Exemptions from the County’s conservation regulations would be exempt from CEQA because they (1) do not constitute the

relaxation of existing environmental rules; (2) function as codifications and clarifications of existing practices and ordinance interpretations; (3) function as clarifications of carve-outs from the newly proposed, stricter rules proposed under the ordinance update; and/or (4) consist of minor alterations in land use and land use limitations that would not significantly impact the environment. For instance:

- Exceptions to conservation regulations in the form of a discretionary use permit currently apply to certain structural, agricultural, and road development projects that meet certain conditions, including that the project in question does not adversely affect certain habitats identified in the County's "environmental sensitivity maps." Other provisions in Chapter 18.108 of the County code also use this terminology (e.g., restrictions on erosion hazard areas). The proposed amendments would update the exception findings to reflect the County's modern system for identifying environmentally sensitive habitats, and would refer to such resources "as special-status species, sensitive biotic communities or habitats of limited distribution in the county's Baseline Data Report (2005 as amended) or Environmental Resources Mapping System." The Baseline Data Report and Environmental Resources Mapping System have, for the past 13 years, been the systems by which the County catalogs and assesses environmental conditions, and is a "living" document that has proven to be more accurate than past approaches. By tethering environmental restrictions and exemptions to a database that more accurately reflects the location of sensitive habitats and other resources, the law as amended would better protect natural resources and the environment. The proposed amendments would also update the requirement for projects to be designed to not exceed the soil tolerance factor approved by the U.S. Department of Agriculture's soil conservation service. The new exception would require that sediment and erosion control measures related to structural/road development projects and agricultural projects maintain pre-development sediment erosion conditions, or improve them. This requirement is more stringent insofar as property owners would have to ensure post-project conditions do not worsen vis-à-vis pre-project conditions, and ensure a property owner could not obtain potentially relaxed standards based on soil tolerance factors set forth by the soil conservation service. The existing zoning requirement has also been superseded by General Plan Policy CON-48. The proposed amendments would eliminate the option to obtain an exception to exceed the 30 percent slope limitation, while retaining the use permit option for other exception requests.
- The updates clarify the scope of exemptions for firebreaks and fire protection and prevention strategies, providing that firebreaks and the implementation of fire management strategies are permitted for structures. This addition reflects current fire protection practices, which recognize that it is not always necessary to cut a firebreak to prevent the spread of wildfires, and the exemption is narrowly drawn to apply only to legally constructed structures.
- The updates propose a new exemption for the rebuilding of existing legally constructed structures when the area of disturbance associated with the rebuild does not exceed 125 percent of the original footprint. Recontouring, grading, earthmoving, or re-engineering

would be allowed, but only as necessary to correct existing erosion or water quality problems, regardless of the slope percent of the original footprint. This amendment is exempt for a number of reasons. First, a rebuild only could occur where a structure was destroyed by a fire or other natural disaster, meaning the development footprint did not contain environmental resources. In such circumstances, it is likely the surrounding area also would have been destroyed by fire damage, meaning it is unlikely construction work would damage any nearby resources. Second, the scope of reconstruction is extremely narrow, and restricts the property owner to rebuilding the structure in substantially the same configuration as previously existed. There would, also, be no meaningful changes to density or land use. Meanwhile, grading under this exemption is severely restricted, and is allowed only to the extent necessary to remedy any existing erosion or water quality issues, which would result in better post-project conditions. In this manner, this exemption would ensure no environmental resources were impacted and, in many cases, would result in the greater protection of natural resources and the environment.

- The updates, as proposed, would not apply to “earth-moving activities associated with an agricultural project of five acres or less on slopes of less than 15 percent,” but provides that projects must still comply with the conservation regulations in effect prior to any adoption of the updates. This ordinance update constitutes an exemption of a discrete use from newly proposed, stricter rules, and does not create exemptions from existing conservation regulations. In other words, the proposed exemption merely creates a safe harbor from new restrictions, and does not relax any existing environmental protections. It is important to note, too, that small earth-moving projects are similar to certain new vineyards that the County has already exempted from environmental review in its CEQA guidelines, which indicate such small projects fall within a Class 4 Exemption. (*See Napa County’s Local Procedures for Implementing the California Environmental Quality Act*, last revised February 2015, App. B, pp. 2-3 [exempting new vineyards of less than 5.5 acres and with an average slope of 15 percent or less, and meeting certain drainage, groundwater demand, and location requirements].)

For the foregoing reasons, these exemptions would not have any adverse effect on the existing environment.

- ***Non-substantive clarifications.*** Various of the proposed updates consist of clarifications of definitions and other provisions; updates to the County’s nomenclature to reflect modern practices and databases; and changes in administrative supervision responsibilities. Providing clarity about the County’s conservation regulations, and updating provisions to reflect modern law and regulatory practices, has the effect of benefiting the environment, and there is no possibility that these updates would have a significant effect on the environment. The proposed updates include, without limitation:
 - The proposal to require a perpetual protective easement as a means of protecting retention areas in municipal watersheds, instead of a “memorandum of understanding or similar document.” The term “perpetual protective easement” is defined as an easement preserving and conserving certain natural resources, and that it must be dedicated to the

- County or granted to other qualified parties, and recorded, in a form acceptable to county counsel. This instrument is more specific and protective than the more general phrasing “memorandum of understanding or similar document,” which contains no parameters, and does not necessarily require a perpetual duration.
- The proposal to allow for revegetation within stream setbacks pursuant to an NPDES program, whereas existing law allows for revegetation only pursuant to an erosion control plan. NPDES programs are extremely strict and subject to state and federal authorities, and their inclusion in the County’s ordinance strengthens its environmental protections.
 - The proposal to measure stream setbacks from the top of the stream bank or ordinary high water mark and, for streams listed in Resolution 94-19, from the vegetation outboard dripline. Permitting such flexibility would allow the County to determine where stream waters actually have the potential for erosive effects on adjacent soils, and measure setbacks from this threshold. This refinement allows the County to be more precise in establishing setbacks on a case-by-case basis, without sacrificing environmental protections.
 - The proposal allowing the planning director to require an applicant to install, in addition to construction fencing, “other means of demarcation acceptable to the director” to protect stream setback areas and other sensitive areas. Allowing for greater flexibility will allow the County to tailor stream protections on a case-by-case basis, and maximize environmental protection.
 - The proposal to authorize the planning department, rather than the department of public works, as the administrative body tasked with enforcement of Chapter 18.108; this substitution reflects longstanding practice and allows the County to draw on the expertise in resource protection that planning staff have acquired in past years.
 - The proposal to extend the class of persons authorized to prepare erosion control plans to now include a Construction General Permit Qualifies SWPPP or a Qualified SWPPP Developer, while removing from this class the property owner or owner’s designee.
 - Clarification concerning the definition of “special-status species,” to formalize the County’s longstanding practice of incorporating lists of species maintained under the federal Endangered Species Act, the California Endangered Species Act, and other federal, state, and local regulations.
 - Clarification that exempted single-family residences and residences must have been legally constructed, formalizing the County’s longstanding interpretation of section 18.108.050(A).
 - Clarification concerning the definition of “watershed” to formalize the County’s longstanding practice of defining the term to mean a region draining into a river, river system, or other body of water.

- Clarifications that “winter shut-down” provisions, per practice, apply to activities on slopes set forth in 18.108.070(L).

The County’s natural streams and wetlands play a critical role in protecting County water resources by reducing erosion, alleviating flooding, and improving water quality. Similarly, the County’s trees and shrublands play a key role in sustaining healthy watersheds and water quality by reducing soil erosion, slowing runoff, capturing rainfall, improving the water holding capacity of soil, increasing nutrient retention, and mitigating flooding. Trees, other vegetation, streams, and wetlands also provide for important habitat for fish and wildlife, including many special status species. Each of the updates discussed above therefore have the effect of preserving additional critical habitat and habitat connectivity; retaining additional riparian areas and fisheries; protecting domestic water supplies to a better extent; and improving water quality.

IV. NO EXCEPTIONS TO EXEMPTIONS WOULD APPLY

The ordinance updates would not have any significant, adverse effects on the environment, and none of the CEQA Guidelines’ exceptions apply. The Class 4, Class 5, Class 7, Class 8 have exceptions, and do not apply, where (1) significant cumulative impacts from projects of the same type will result; or (2) there is a reasonable possibility of a significant impact on the environment due to unusual circumstances. (14 CCR, § 15300.2(b)&(c).) In addition, Class 4 and Class 5 exemptions cannot apply where the activity in question is ordinarily insignificant, but would be located in a particularly sensitive environment and thus have the potential for a significant impact. (14 CCR, § 15300.2(a).)

With respect to cumulative impacts, the ordinance updates are Countywide regulations that govern all unincorporated lands. There are no similar regulations being proposed in the County, including within its five incorporated municipalities, that would cumulate with the proposed project. With respect to possible significant environmental impacts due to unusual circumstances, substantial evidence exists to support a finding that no unusual circumstances exist, and such a finding would be given deference if challenged. Consider:

- ***Enhanced conservation regulations in rural, semi-rural, and otherwise non-urban environments are not “unusual circumstances.”*** As discussed in the County’s Board Agenda Letter for Item 9C, dated January 29, 2019, the County has a long record of adopting and enforcing conservation regulations in unincorporated lands, and the ordinance updates are enhancements of an existing regulatory framework. Because rural, semi-rural, and other unincorporated lands encompass, in general, a greater quantity and variety of natural resources and habitats than do urban and semi-urban settings, it is not unusual to enhance environmental regulations to reflect improvements in scientific understandings and preservation interests in the community. The proposed ordinance updates here, while more restrictive than existing requirements, are not unusual in their scope and, again, reflect enhancements and refinements of existing regulations and practices. Courts account for context in determining whether a circumstance is unusual, and have found in similar situations that proposals are not unique when the existing environment is replete with projects of a similar nature. (*See San Francisco Beautiful v. City & County of San Francisco* (2014) 226 Cal.4th 1012, 1025 [addition of telecommunications infrastructure to environment already saturated with

similar infrastructure was not unusual]; *Wollmer v. City of Berkeley* (2011) 183 Cal.App.4th 1329, 1351 [project traffic at already crowded intersections in urban environment not unusual]; *San Lorenzo Valley Community Advocates for Responsible Educ. v. San Lorenzo Valley Unified Sch. Dist.* (2006) 139 Cal.App.4th 1356 [traffic, parking, and access problems are not unusual circumstances in context of school consolidations].) As such, the County's proposed enhancement of rules that protect water resources, habitats, special status species, and other natural and environmental resources is not unusual, given the large amounts of agricultural and open space lands in the County's unincorporated area and its longstanding history of protecting resources and the environment in such areas.

- ***The enhanced conservation regulations would not displace uses in a manner that significantly impacts the environment.*** Imposing stricter conservation regulations on unincorporated land is not likely to displace development to other areas for a number of reasons:
 - Evidence shows that, with respect to projects entitled during the past four years, the average amount of tree canopy protected was 83.0 percent, while the average amount of shrub and grassland that was protected was 67.5 percent. (See January 29, 2019 Board Agenda Letter for Item 9C, Attachment G.) Thus, while the ordinance updates impose stricter minimum standards, these regulations have historically been exceeded by individual projects in practice.
 - The great majority of development projects anticipated in the County of Napa, in terms of geographic space, consists of agricultural projects, and more specifically vineyards. To this end, the General Plan Conservation Element projects that 10,000 acres of vineyards are likely to be established through year 2030. (GP-CE, pp. CON-19 and -20.) The location of a vineyard, in terms of its viability, is dictated by climate, sun exposure, weather conditions, hydrology and drainage, soil conditions, slope gradient, and other environmental factors. The fact that a vineyard can be established on a parcel unencumbered by environmental regulations does not mean a property owner will establish it. To the extent the climate in local jurisdictions is favorable to vineyard and other agricultural production, such as in the Cities of Calistoga, St. Helena, Yountville, and Napa, it would be speculative to conclude stricter regulations in unincorporated lands would shift agricultural uses to urban centers, especially when urbanized areas are more likely to contain incompatible adjacent uses. In fact, evidence shows displacement would not occur because of land availability and market considerations. The great majority of territory within local municipalities is occupied by existing vineyards and urban uses and, to the extent open space remains available for further development, it is either subject to the conservation regulations of other jurisdictions or highly sought after. Further, under section 18.104.250 of the County's code, many wineries in Napa County, and newly expanded wineries, have to ensure that 75 percent of grapes they use to make wine are grown in unincorporated areas of Napa County. This "eligibility" regulation makes it more likely vintners will negotiate tougher environmental regulations in Napa County as they seek to preserve the marketability of their grapes and take advantage of the international demand for Napa County wines. Therefore, to the extent land that is suitable

for vineyard production is available in other jurisdictions, the high demand for Napa Valley wine already predicts that such lands will be developed for vineyards regardless.

- Similarly, the evidence shows it would be incorrect to conclude that tightened conservation regulations within Napa County would result in the displacement of uses to other counties. For instance:
 - In terms of acreage, vineyard development in Sonoma County has leveled off, with a growth rate of less than one percent between 2005 and 2014 (*see* Sonoma County Agricultural Commissioner, *Sonoma County Crop Report*), which is attributable to the fact that most land in Sonoma County that could easily have been developed for grapes has already been developed, and that Sonoma County has adopted increasingly stringent regulations applicable to new vineyard development (e.g., the county’s Vineyard Erosion and Sediment Control Ordinance). Concerns over water availability also have suppressed vineyard development.
 - As in Napa County, vineyard location in nearby counties is a function of climate and other factors. The demand for suitable land in these counties is extremely high and, to the extent any properties remain available, their development would occur regardless of whether stricter conservation regulations in Napa County were adopted.
 - Under section 18.104.250 of the County’s code, many wineries in Napa County, and newly expanded wineries, have to ensure that 75 percent of grapes they use to make wine are grown in Napa County. This “eligibility” regulation makes it more likely vintners will negotiate tougher environmental regulations in Napa County as they seek to preserve the marketability of their grapes and take advantage of the international demand for Napa County wines.

For the foregoing reasons, vineyards in Napa County are not “fungible,” and restricting or precluding on their development in the County would not result in any measurable increase in vineyards being established outside the County.

- The proposed restrictions are not zone-specific, but apply to development activity in all zones. Therefore, the County’s zoning framework in itself would not spur any displacement of uses.

In addition, the Class 4 and Class 5 exemptions would apply to the proposed updates, including without limitation to: setback rules designed to create buffers between development and particularly sensitive areas; the prohibition of development on steep slopes that are particularly vulnerable to erosion; new retention regulations designed to protect sensitive environmental areas; mitigation provisions requiring the preservation or replacement of tree canopy at a 3:1 ratio (and where replacement could not occur in sensitive habitats); proposed regulatory exemptions that apply only to the extent sensitive environmental areas are avoided; the exemption allowing reconstruction after a fire, as discussed above; definition clarifications; and the proposed non-substantive clarifications. None of the foregoing updates, by their very design, would significantly impact particularly sensitive environments. (*See* 14 CCR, § 15300.2(a).)

V. FACTS SUPPORTING USE OF THE COMMON SENSE EXEMPTION

In support of the Common Sense Exemption's applicability, and to address concerns by various stakeholders in the community, we have considered impacts of the ordinance updates on agricultural and forest lands. Again, the Common Sense Exemption applies if "it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment." (14 CCR, § 15061(b)(3).)