DANIEL P. SELMI, ESQ.
ATTORNEY AT LAW
919 ALBANY STREET
LOS ANGELES, CA 90015
TELEPHONE: (213) 736-1098
EMAIL: DSELMI@AOL.COM

October 17, 2011

Mr. Bill Dodd, Chairman
and Members of the Board of Supervisors
County of Napa
County Administration Building
1195 Third Street
Napa, CA 94559

Re: Proposed Landmark Preservation Ordinance
Board Agenda Oct. 18, 2011

Dear Mr. Chairman and Board Members:

I represent the Napa County Farm Bureau ("the Bureau") and am appearing on its behalf in the matter of the proposed Landmark Preservation Ordinance. Your Board has calendared that matter for hearing on October 18, 2011.

As you know, the Bureau has a long history of working to protect Napa County's world-famous agricultural resources. The Bureau has carefully examined the Landmark Preservation Ordinance and strongly urges you to reject the so-called "second ordinance" (referred to below as the "Proposed Ordinance") that is proposed for adoption on October 18.[1] As explained in detail below, the Bureau opposes this ordinance for four reasons:

---

[1] This ordinance is entitled:

AN ORDINANCE OF THE BOARD OF SUPERVISORS OF THE COUNTY OF NAPA, STATE OF CALIFORNIA, AMENDING CHAPTER 15.52 (LANDMARK PRESERVATION) AS IT RELATES TO THE DESIGNATION AND DISPOSITION OF COMMERCIAL AND RESORT HISTORIC RESOURCES IN NAPA COUNTY AND MAKING RELATED AMENDMENTS TO CHAPTER 18.124 (USE PERMITS) AND CHAPTER 18.132 (LEGAL NONCONFORMITIES) AND ADDING A NEW SECTION 18.104.430 ENTITLED NAPA COUNTY LANDMARKS ADAPTIVE REUSE—FINDINGS.

1. The Proposed Ordinance is legally defective, as it is inconsistent with fundamental provisions of the Napa County General Plan. As such, adoption of the Proposed Ordinance would violate Government Code Section 65860, which requires a county's zoning ordinances to be consistent with its general plan.

2. The Proposed Ordinance violates the provisions of Napa County's Measure P. The effect of the Proposed Ordinance is to effectively re-designate agricultural lands and thereby circumvent the voting provisions of that law.

3. The County cannot legally adopt the Proposed Ordinance without preparing a new environmental impact report under the California Environmental Quality Act, Public Resources Code Section 21000 et seq. California law does not allow the County to rely on the impact report previously prepared for adoption of the County's General Plan Update.

4. Aside from its legal deficiencies, the Proposed Ordinance is fundamentally flawed from a policy perspective. In particular, under the guise of historic preservation, the ordinance would authorize the resurrection of long-lapsed land uses previously carried out on properties but without considering whether those uses are appropriate today. It would do so even without a complete knowledge of the properties that the Proposed Ordinance would affect. And it would authorize entirely new uses on properties--uses completely divorced from the traditional uses on the land--without considering their effects from a planning perspective.

In short, the proposal opens a kind of "Pandora's box" of uses on an unknown number of sites that could jeopardize the fundamental agricultural preservation policies long followed in the County. There is simply no reason to take such action.

/
/
/
/
/
/

I. THE PROPOSED ORDINANCE WOULD VIOLATE CALIFORNIA PLANNING LAW.

A. The Proposed Ordinance is Flatly Inconsistent with the Allowable Uses and Building Intensity for Agricultural Land Set Forth in the General Plan.

As the California Supreme Court has emphasized, the general plan is the "constitution" or "charter" for future development in local jurisdictions. Lesher Communications, Inc. v. City of Walnut Creek, 52 Cal. 3d 531, 540 (1990). Development must be consistent with the general plan. Neighborhood Action Group v. County of Calaveras, 156 Cal. App. 3d 1176, 1183 (1984). In particular, the County must ensure that zoning ordinances, such as the one now proposed, must be consistent with the General Plan. Gov't Code § 65860. This law, known as the "consistency doctrine," is "the linchpin of California's land use and development laws" and "the principle which infuse[s] the concept of planned growth with the force of law." Napa Citizens for Honest Government v. Napa County Board of Supervisors, 91 Cal. App. 4th 342, 355 (2001) (citations omitted).

As the Board is aware, the land use and building intensity provisions of the Napa County General Plan are precise, establishing specific uses and intensities that are allowed in agricultural areas. Most importantly, Policy AG/LU-20 sets forth standards that "shall apply to lands designated as Agriculture, Watershed and Open Space on the Land Use Map of this General Plan." The specified uses are extremely limited: "Agriculture, processing of agricultural products, and single-family dwellings." Similarly, the "Maximum Building Intensity" allowed on these lands is narrow and particularized: "One dwelling per parcel (except as specified in the Housing Element). Nonresidential building intensity is non-applicable."

Policy AG/LU-21 closely tracks Policy AG/LU-20. Policy AG/LU 21 prescribes uses for lands designated as "Agricultural Resource," again limiting them to "Agriculture, processing of agricultural products, single-family dwellings." And, as is the case for Policy AG/LU 20, "Maximum Building Intensity" is similarly circumscribed: "One dwelling per parcel (except as specified in the Housing Element.) Nonresidential building intensity is non-applicable, but where practical, buildings will be located off prime soils."

Unquestionably, the Proposed Ordinance would conflict with these two fundamental policies. For "Agriculture, Watershed and Open Space" lands and "Agricultural Resource" lands, the Proposed Ordinance would authorize uses that

exceed the limited set of uses authorized by the general plan. Under the Proposed Ordinance, buildings could be used "for their historic use or for uses permitted in the Commercial Limited or Commercial Neighborhood zoning districts upon grant of a use permit pursuant to Section 18.124.010…" Proposed Ordinance, Section 1, § 15.52.040 subd. E (emphasis added). These types of commercial uses are not uses listed in Policies AG/LU-20 or 21. At the same time, by authorizing commercial uses, the Proposed Ordinance would violate the policy that "[n]onresidential building intensity is not applicable." As such, the Proposed Ordinance directly conflicts with the County General Plan and would violate Government Code Section 65860.

Other policies in the General Plan establish a principle that operates in tandem with Policies AG/LU 20 and 21: the County will avoid the intrusion of urban uses into agricultural areas. Thus:

(1). Policy AG/LU 3: "The County's planning concepts and zoning standards shall be designed to minimize conflicts arising from encroachment of urban uses into agricultural areas. Land in proximity to existing urbanized areas currently in mixed agricultural and rural residential uses will be treated as buffer areas and further parcelization of these areas will be discouraged."

(2). Policy AG/LU 4: "The County will reserve agricultural lands for agricultural use including lands used for grazing and watershed/open space, except for those lands which are shown on the Land Use Map as planned for urban development."

The Proposed Ordinance unquestionably conflicts with these policies. It would allow urban, commercial uses in agricultural areas. The Proposed Ordinance itself reaches the opposite conclusion, but its reasoning is entirely unconvincing. One of its findings states:

> D. The adaptive reuse does not constitute urbanization because it (1) either re-establishes an historic use of the property, or establishes an alternative use that does not require inappropriate alterations or extensive additions to the historic building, and (2) the resulting use will not be more intense than the historic use.

Proposed Ordinance, Section 2 §18.104.430 subd. D. That conclusion, however is simply illogical. The fact that a historic use is re-established, or that a new use is allowed, says nothing about whether that new or historic use is urban.

Finally, Policy AG/LU 12 declares: "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 provided in Policies AG/LU-2, AG/LU-5, AG/LU-26, AG/LU-44, AG/LU-45, and ROS-1." Because none of the enumerated exceptions apply, the proposed ordinance violates this policy as well.

B. The Planning Department's "Conformity" Memorandum Fails to Justify the Proposed Ordinance.

The Napa County Conservation, Development and Planning Department recently released a memorandum, entitled "Landmark Preservation Ordinance Update—General Plan Conformity" dated October 11, 2011 (hereafter "Memorandum"). This document addresses the question of the Proposed Ordinance's consistency with the Napa County General Plan. In doing so, the Memorandum expressly recognizes the potential conflicts with the General Plan outlined above in this letter. Citing many of the Plan policies identified above, the Memorandum admits that it is "possible to identify individual general plan goals, policies, and action items that could be inconsistent with the proposed action…" Id. at 4.

Despite these inconsistencies, the Memorandum concludes that the Board has the authority to find that the Proposed Ordinance is "on balance" consistent with the General Plan, and thus to adopt it. Id. However, that conclusion is legally incorrect, and we respectfully submit that a court would so find.

1. The Board Cannot Employ a "Balancing" Technique As a Means of Disregarding Fundamental Policies in the County's General Plan.

The Board lacks legal authority to disregard clear, fundamental policies in its General Plan by using the "on balance" interpretive technique suggested by the Memorandum, i.e. by (1) citing to other policies in the General Plan and then (2) concluding that an ordinance is "on balance" consistent with the Plan's policies. The consistency statute, Government Code Section 65860, is specific: the zoning ordinance must ensure that "the various land uses authorized by the ordinance are compatible with the objectives, policies, general land uses, and programs specified in the plan." (Emphasis added). The statute does not afford the County the option

of choosing to follow some set of "preferred" policies over others. Yet this is precisely the technique that the Memorandum advocates.

California case law is unequivocal on this point. As the Court of Appeal emphasized in Families Unafraid to Uphold Rural El Dorado County v. Bd. of Supervisors, 62 Cal. App. 4th 1332 (1998), a project cannot be found consistent with a general plan if it conflicts with a plan policy that is fundamental, mandatory, and clear, regardless of whether the project is consistent with other general plan policies. The court stated:

> County looks to the policies in the Draft General Plan with which Cinnabar is consistent; these are expressed in the Board's finding of consistency with that plan…and are confirmed by the principle that the LDR land use designation is generally appropriate in rural regions. The general consistencies expressed in this finding and principle, however, cannot overcome the specific, mandatory and fundamental inconsistencies with the LDR land use policies noted above.

Id. at 1342 (emphasis added). Similarly, in Napa Citizens, the court declared that the issue is "whether the project is compatible with, and does not frustrate, the general plan's goals and policies." 91 Cal. App. 4th at 378; accord Endangered Habitats League v. County of Orange, 131 Cal. App. 4th 777, 789 (2005) ("Consistency requires more than incantation, and a county cannot articulate a policy in its general plan and then approve a conflicting project.")

Significantly, the Memorandum itself expressly recognizes this fundamental legal principle. It admits:

> [A] project may not conflict with specific mandatory policies or provisions in a general plan. Inconsistency with a single mandatory policy requires denial of a project, even if it is consistent with numerous other provisions.

Id. at 3 (citing Endangered Habitat League). Unfortunately, the Memorandum then adopts a recommendation fundamentally at odds with the principle.

The Board's decision to follow this recommendation would leave the County vulnerable to legal challenge. In the words of the Napa County decision, the "frustration" of General Plan policies that the Proposed Ordinance would cause is manifest. The provisions of the Proposed Ordinance would contradict the

heart of the agricultural preservation policies set forth in the Plan. Once again, even the Memorandum explicitly recognizes that core conflict: "Policies AG/LU-20 and AG/LU-21, which define the AR and AWOS districts, do not identify commercial uses among the 'General Uses' that are allowed…" Memorandum at 5.

That conclusion, which is correct, ends any debate over whether the Board could find that the Proposed Ordinance is consistent with the Napa County General Plan. It cannot, for the County must follow the policies in its Plan.

2. <u>The Plan's Limited Authorization for Commercial Uses in Agricultural Areas Cannot Be Inflated to Authorize The Proposed Ordinance</u>.

The Memorandum also offers a second argument in support of its claim that the Board may adopt the Proposed Ordinance. It states that General Plan Policies AG/LU-44, 45, and 46 "permit very limited commercial uses under very specific circumstances…" <u>Id</u>. at 5. The Memorandum implies that the existence of these commercial uses in the General Plan can somehow justify the large-scale commercial uses that the Proposed Ordinance would allow in agriculturally designated land.

The Memorandum is correct that, under carefully defined, very narrow circumstances, the Plan does allow certain existing commercial establishments to continue. But that is precisely the key point: the Plan has already specifically set forth <u>what</u> limited commercial uses are allowed, and <u>where</u> are they are allowed. Those provisions set exact limits on commercial uses permitted in agricultural areas; other such uses are not allowed. The Plan does not authorize further exceptions, yet the Proposed Ordinance would create them.

In other words, after citing those limited commercial uses in the current plan, the Memorandum then proceeds to draw exactly the wrong conclusion from them. The County cannot "bootstrap" the Plan's narrow exceptions for commercial uses into a broader authorization for a variety of commercial uses on agricultural lands. Instead, the very specificity and narrowness of these exceptions proves that the broader array of uses in the Proposed Ordinance would be inconsistent with the General Plan.

3. Policy CC-28 Must Be Read Consistently with the Other Parts of the General Plan and Cannot Authorize Broad Commercial Uses in Agricultural Areas.

Finally, we come to the principal authority relied on in the Memorandum: Policy CC-28. This policy reads in full:

> As an additional incentive for historic preservation, owners of existing buildings within agricultural areas of the County that are either designated as Napa County Landmarks or listed in the California Register of Historic Resources or the National Register of Historic Places may apply for permission to reuse these buildings for their historic use or a compatible new use regardless of the land uses that would otherwise be permitted in the area so long as the use is compatible with agriculture, provided that the historic building is rehabilitated and maintained in conformance with the U.S. Secretary of the Interior's Standards for Preservation Projects.
>
> This policy recognizes that, due to the small number of existing historic buildings in the County and the requirement that their historic reuse be compatible with agriculture, such limited development will not be detrimental to the Agriculture, Watershed or Open Space policies of the General Plan. Therefore such development is consistent with all of the goals and policies of the General Plan.

According to the Memorandum, Policy CC-28 supports adoption of the Proposed Ordinance. Memorandum, at 5.

For several reasons, however, this policy cannot justify the adoption of the Proposed Ordinance. To begin with, the policy does not say that any commercial use is allowable in agricultural areas. The emphasis is on "compatible" new uses. And in this respect, the other parts of the General Plan provide guidance on when such uses would be "compatible." In particular, Policies AG/LU 44-46, discussed above, carefully lay out authority for non-agricultural uses in agricultural areas.

State law requires that the general plan must "comprise an integrated, internally consistent and compatible statement of policies." Gov't Code §65300.5. Pursuant to this law, any new uses authorized by Policy CC-28 would have to be of the type and nature found in Policies AG/LU 44-46. The Proposed Ordinance,

however, far exceeds those types of limited commercial uses. Under the Memorandum's argument, the vague authorization in Policy CC-28 authorizes the Board to adopt a broad set of commercial uses in agricultural areas, uses that far exceed the specific uses that the plan itself sets forth. The language of Policy CC-28, considered in the context of the entire General Plan, cannot nearly carry that weight.

Furthermore, if Policy CC-28 was read as broadly as the Memorandum suggests, that policy would flatly conflict with other policies in the Plan. Among others, it would contradict Policies AG/LU 20 and 21, which specify only three uses on "Agricultural Resource" and "Agriculture, Watershed and Open Space" Lands: agriculture, processing of agricultural products, and single-family dwellings. Under the suggested broad reading of Policy CC-28, the County's General Plan would be rendered internally inconsistent in violation of state law.

Nor could the County cure that internal inconsistency by giving one policy in the Plan—in this case, Policy CC-28—precedence over other policies in the Plan (e.g., Policies AG/LU 20 and 21). The Court of Appeal rejected such a practice in Sierra Club v. County of Kern, 126 Cal. App. 3d 698, 708 (1981). It found invalid such a "precedence" clause that would have given policies in the land use element precedence over conflicting policies in the open space element.

In short, the Memorandum relies almost entirely on Policy CC-28 to justify the Proposed Ordinance. To reach that goal, it inflates the effect of CC-28 so that it supersedes other, specific parts of the Plan. That interpretation would conflict with state law.

II. THE PROPOSED ORDINANCE WOULD VIOLATE MEASURE P.

A. Unless the Board Makes Certain Enumerated Findings, Measure P Requires a Vote of the People to Change Most Uses on Agricultural Land.

As the Board is well aware, at the 2008 general election the voters of Napa County approved Measure P. This measure readopted and extended Measure J, the landmark agricultural protection initiative passed in 1990 and upheld by the California Supreme Court in DeVita v. Napa County, 9 Cal. 4th 763 (1995). The passage of the Proposed Ordinance would violate Measure P.

The core of Measure P is, of course, the strong and extensive protection given to agricultural land uses in the Plan. Section 1, Subsection I of the Measure contains a finding by the people of Napa County that:

> For the past forty years---since the County first established an "Agricultural Preserve" zoning designation—land use policy in Napa County has been guided by two complementary principles: that agricultural lands should be protected and that development should occur in urban areas. The people of Napa County find and declare that the fortieth anniversary of the Agricultural Preserve presents an appropriate occasion to reaffirm and strengthen these principles by extending and updating Measure J.

Measure P, Section 1 Subsection I (emphasis added).

The Measure then sets forth explicit provisions implementing those principles. Again, the overarching requirement is plain:

> The General Plan provisions attached hereto as Exhibit A governing intent and maximum building intensity may not be changed except by vote of the people, and … the provisions governing minimum parcel size may not be changed to reduce minimum parcel size except by vote of the people.

Id. Section 1 Subsection G(1). See also Id. Subsection B ("Measure J amended the Napa County General Plan to ensure that designated agricultural, watershed, and open space lands could not be redesignated and made available for more intensive development without a vote of the people.")

Implementing this intent, Measure P enacts a series of "Limitations on General Plan Amendments Relating to 'Agricultural, Watershed and Open Space' and 'Agricultural Resource' Lands." Id. Section 2 Subsection B. Until 2058, "provisions governing the intent and maximum building intensity" for these lands "shall not be amended unless such amendment is approved by vote of the people." Id. Section 2 subsection B(a).

Measure P authorizes only narrow exceptions to this sweeping set of limitations. Lands can be re-designated without a vote only if (1) the Board makes enumerated, specific findings, or (2) the land is annexed or designated for solid waste transformation or disposal facilities. Id. subsection B(c)-(f).

B. <u>The Proposed Ordinance Cannot Substitute Its Findings for Those in Measure P and then Authorize the Re-Designation of Agricultural Lands</u>.

By radically altering the uses and building intensity allowed on "Agriculture, Watershed and Open Space" and "Agricultural Resource" lands, the Proposed Ordinance would effectively re-designate any of these lands that have historic resources. Indeed, this re-designation is the Ordinance's very purpose. Critically, however, the re-designation would occur without either a vote of the people or the Board findings required by Measure P.

The Board cannot--just two years after the passage of Measure P--approve an ordinance that circumvents its provisions. Approval of the Proposed Ordinance would violate Measure P.

The Board Agenda Letter for this matter argues that the Proposed Ordinance would not violate Measure P because it "would…allow existing buildings to be reused…only if their reuse is affirmatively found to be compatible with agriculture." Board Agenda Letter from Hillary Gitelman, Director, at p. 7. The Agenda Letter here is referring to those provisions of the Proposed Ordinance that would require certain findings before approval of a use permit for the properties in question. Proposed Ordinance, Section 2, §18.104.430. One finding is that the proposed use "is compatible with agriculture."

Napa County's voters, however, have <u>already established</u> the conditions under which the Board may re-designate property without a vote of the people. Measure P sets them forth in detail, and they include a series of specific findings that the Board must make to re-designate property without a vote. Those findings differ substantially in their content from the findings required by the Proposed Ordinance. For example, in addition to compatibility, the Board must find that (1) "[t]he land is immediately adjacent to areas developed in a manner comparable to the proposed use," and (2) "[t]he land proposed for redesignation has not been used for agricultural purposes in the past 2 years and is unusable for agriculture due to its topography, drainage, flooding, adverse soil conditions or other physical reasons…" Measure P, Section 2 Subsection B, §3.F.9 subd. (d) (ii) and (iv).

The Board lacks authority to substitute the findings in the Proposed Measure for those findings in Measure P, as the Agenda Letter suggests. In particular, it cannot re-designate agricultural land by substituting a finding under

the Proposed Ordinance that reused property must be "compatible with agriculture" for the specific findings required by Measure P. To do so would violate Measure P.

C. The Proposed Ordinance is Plainly Intended to Circumvent the Procedures and Limitations Set forth in Measure P.

The Proposed Ordinance is obviously intended to circumvent Measure P's procedures for conversion of agricultural land in Napa County. That Measure installs two specific methods for changing land uses on such lands—precise Board findings or bringing the matter to a vote of the people. That procedure has worked very well for over twenty years. Indeed, in the DeVita case, the California Supreme Court emphasized in particular the reasonableness of the voting provision in Measure J (the same provision re-enacted by Measure P). The court declared:

> The planning agency will continue to be able to review and propose revisions to the plan pursuant to Government Code section 65103, subdivision (a), and the board of supervisors will continue to amend the general plan in ways that do not conflict with the provisions of Measure J. If a future board determines that a part of the general plan enacted by voter initiative must be amended for the sake of general plan currency, then the board can propose such an amendment to the electorate, as Measure J provides. We should not presume…that the electorate will fail to do the legally proper thing.

9 Cal. 4th at 792-93 (emphasis added).

Instead of using Measure P's procedures to adopt the changed land uses, the Proposed Ordinance attempts to circumvent the Measure. The Ordinance would effectively change the land uses by authorizing commercial uses on certain agricultural lands. The legal mechanism that it would use to implement those changes is the grant of a conditional use permit, not a vote of the people or the Board's adoption of Measure P findings.

The Board is entrusted with implementing Measure P, and it has done so effectively in the past. It should not—two years after the Measure's adoption at the ballot box--depart from that practice by employing a method plainly intended to avoid the Measure's voting provision.

III. ENACTING THE PROPOSED ORDINANCE WOULD VIOLATE THE CALIFORNIA ENVIRONMENTAL QUALITY ACT.

A. The County Cannot Rely on the General Plan EIR to Approve the Proposed Ordinance.

The California Environmental Quality Act ("CEQA") requires the County to prepare an environmental impact report ("EIR") on any project that may have a significant effect on the environment. Cal. Pub. Res. Code §21151. Here, instead of preparing a new EIR, the County's Initial Study proposes to use the program EIR prepared for the 2008 General Plan Update. The County's Initial Study declares that "the proposed project is within the scope of the 2008 General Plan Update." Initial Study Checklist, at 5. The Initial Study then promises that the County will undertake "site specific environmental review under CEQA" when use permits are issued under the Proposed Ordinance. Id. at 4. In other words, the County proposes to examine the environmental impacts of its decision at a later time on an individual, case-by-case basis.

The County's approach violates CEQA. It is long-settled in California that environmental review must be completed "at the earliest possible stage" in the review process. See, e.g., Bozung v. Local Agency Formation Comm., 13 Cal. 3d 263, 282 (1975). An agency may not delay complete environmental review to a later approval point. See Save Tara v. City of West Hollywood, 45 Cal. 4th 116, 134 (2008); County of Amador v. City of Plymouth, 149 Cal. App. 4th 1089, 1106.

For example, in Stanislaus Natural Heritage Project v. County of Stanislaus, 48 Cal. App. 4th 182 (1996), an agency tried to postpone detailed environmental review of a destination resort by using a program EIR and deferring a specific analysis to the time of later governmental approvals. The court emphatically rejected that attempt. Id. at 199-200, 206.

Here, the Planning Department is proposing to authorize commercial uses on specific agricultural lands, and the uses authorized are set forth in the Proposed Ordinance. The County has more than enough information to analyze their environmental impacts. Furthermore, it can identify the location for those uses simply by completing the information-gathering effort that CEQA requires.

The program EIR for the General Plan update cannot substitute for that effort. It does not identify the specific lands on which the commercial uses will be

allowed, and it contains no specific analysis of the impacts of those uses in agricultural areas. CEQA demands that the County carry out that task now in a new EIR.

B. The Project Description is Impermissibly Vague.

An accurate description of a project subject to CEQA is the cornerstone of an adequate environmental analysis. See, e.g., San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus, 27 Cal. App. 4th 713, 730 ("[a]n accurate, stable and finite project description is the sine qua non of an informative and legally sufficient EIR" (quoting County of Inyo v. City of Los Angeles, 71 Cal. App. 3d 185, 193 (1977).) In particular, "an accurate project description is necessary for an intelligent evaluation of the potential environmental effects of a proposed activity." San Joaquin Raptor, 27 Cal. App. 4th at 730 (quoting McQueen v. Board of Directors, 202 Cal. App. 3d 1136, 1143 (1988).

A project is the "whole of an action, which has a potential for resulting in either a direct physical change" or "a reasonably foreseeable indirect change in the environment." 14 Cal. Code Regs. § 15378(a). The Guidelines implementing CEQA also caution that "project" means the "activity which is being approved." 14 Cal. Code Regs. § 15378(c).

Here, the County's Initial Study found that "the program-level EIR prepared for the 2008 General Plan Update adequately describes the project for the purposes of CEQA." Initial Study Checklist, at 5. That EIR, however, does no such thing, and the Initial Study never points to such a description. The EIR for the 2008 General Plan update describes the project there as follows: "The project is adoption and implementation of an updated General Plan for the County with a planning horizon of 2030." General Plan Update EIR § 3.4. That description cannot apply here, for the County is adopting a specific zoning ordinance governing specific land.

Equally important, the County has not done the work to adequately describe the project. The Initial Study states that the Proposed Ordinance "would allow historic commercial/resort buildings that are designated as landmarks to be rehabilitated and adaptively reused for their history use or for uses allowed in the Commercial Limited (CL) and Commercial Neighborhood (CN) zoning districts…" Initial Study Checklist, at 4. In other words, the County is changing the zoning designation for specific properties.

But the project description does not identify the specific properties to which the Proposed Ordinance applies. Indeed, the County admits that it is unsure about which properties that the zoning designation would cover. See also Board Agenda Letter, Historical Preservation Ordinances (2) (10/18/2011), at 3 ("An important premise of the update [of procedures and standards] is that Napa County has many historic buildings that are worthy of recognition and preservation.")

An adequate project description is a prerequisite to compliance with CEQA. The Initial Study cannot simply declare that "the project would apply to all properties within unincorporated Napa County that meet the criteria for landmark designation…" Initial Study Checklist, at 3. Nor can it rely on a "focused survey" concluding that "approximately ten properties currently exist that would be eligible." Id. at 4 (emphasis added). And it cannot avoid the inquiry, as its attempts to do, by claiming that "[t]o prepare an updated, comprehensive survey would be a time-consuming and potentially costly endeavor." Board Agenda Letter, supra, at 4.

The County's obligation under CEQA is to precisely identify the affected properties in its project description. Without such identification, it cannot conclude that the project will not have a significant effect on the environment of those properties, as it proposes to do.

C. The County Omitted the Required Analysis of Important Environmental Impacts.

The County's General Plan EIR failed to analyze the potential impacts of the Proposed Ordinance. The document contains no specific analysis of commercial uses on even the ten properties that were identified. Obviously, these uses may cause impacts on traffic, noise, biology, air quality, and public services, among others. But the EIR--a program document analyzing the entire General Plan--ignores these potential impacts. See, e.g., Environmental Planning & Information Council v. County of El Dorado, 131 Cal. App. 3d 350, 357 (1982) (EIR for general plan amendment was inadequate where it did not make the clear effect of the plan amendment on the physical environment).

Furthermore, the County must consider the cumulative effect of the changes that the Proposed Ordinance would authorize. See 14 Cal. Code Regs. § 15065(a)(3) (agency must analyze impacts from all "past projects…current projects..and probable future projects.") The changes also may be growth-inducing, an impact which also must be analyzed. Introducing commercial uses

into rural areas could induce further development into the area. For example, the new commercial uses--uses heretofore unknown at the site--would likely require infrastructure improvements. These improvements, in turn, can incentivize additional development. And the new uses could attract additional employees to the area, with their attendant impacts on housing, schools, etc.

Under the Napa Citizens case and the other pertinent CEQA case law, these impacts must be analyzed now. Napa Citizens, supra. The County cannot defer that analysis, as it proposes to do. If it approves the Proposed Ordinance without the required analysis, it will violate CEQA and fail to proceed in the manner required by law.

IV. THE PROPOSED ORDINANCE IS FUNDAMENTALLY FLAWED IN NUMEROUS ASPECTS.

As described above, approval of the Proposed Ordinance would violate State Law. But the legal violations are symptomatic of the underlying problem: As currently drafted, the Proposed Ordinance is a fundamentally flawed in a variety of respects. The Bureau respectfully suggests that, for the following reasons, the Board should reject it in its present form.

A. The Proposed Ordinance is Vague and Open-Ended.

First, the proposal is vague and open-ended. The Planning Department is unsure about which lands would qualify for the special treatment that the Proposed Ordinance would give in the name of historic preservation. Instead, it asks the Board to approve the proposal and then determine later which lands it covers on a case-by-case basis. That process is analytically backwards.

B. The Proposed Ordinance Would Arbitrarily Resurrect Old, Long- Abandoned Land Uses.

Second, the proposal resurrects any long-abandoned land use, no matter what its characteristics (except bordellos and gambling halls), simply because that use took place in a building covered by the ordinance. Many abandoned uses were perhaps acceptable in their time, but they may well be unsuitable today. Nor does the fact that the uses took place in the past at given locations logically lead to the conclusion that those locations are suitable for those same uses today. The Proposed Ordinance, however, is premised on just that illogical premise.

The "resurrection of use" premise that underlies the Proposed Ordinance is particularly unsuitable for Napa County. The County and its voters have spent years enacting a carefully structured system for considering situations where non-agricultural uses are suggested for agricultural areas. The institutional caution in allowing such uses, embodied in Measure P and before that in Measure J, exists for an important reason: it is well-established that allowing non-agricultural uses in agricultural areas can have significant, adverse impacts on surrounding agricultural uses.

To avoid such impacts, Measure P narrowly prescribes situations in which the Board of Supervisors may allow those non-agricultural uses. If the proposed non-agricultural use does not fall into one of those narrow categories, the use must be put to a vote of the people.

The Proposed Ordinance overrides this cautious approach. But there is simply no compelling reason to do so—particularly just two years after the County's voters overwhelming endorsed Measure P.

C. The Proposal Would Arbitrarily Insert New, Unplanned Land Uses on Lands Where Old Uses Were Abandoned.

Third, the proposal broadly authorizes new uses in these old buildings, uses that never before were allowed on the properties. The effect is clear: if approved, the Proposed Ordinance will allow the random insertion of urban uses in agricultural areas via the issuance of conditional use permits. The locations where these uses may occur will not be identified through a comprehensive planning effort that identifies properties where commercial uses might be suitable in agricultural areas. Instead, the locations will be ad hoc, depending on (1) the existence of a historic building on a piece of land, and (2) the fact that another use—not the new use now allowed—happened to occur in a building on that land at some point in the past.

This process is the antithesis of good planning. Instead of deciding land uses based on present conditions, the Proposed Ordinance would simply authorize the new use on what is essentially an arbitrary basis: whether a historic building exists on the site. Given the County's profound and long-standing concern with agricultural preservation, it would be entirely inappropriate for it to employ this process to approve commercial land uses in agricultural areas.

D. <u>The Proposed Ordinance Circumvents the General Plan Process and Conflicts with the Fundamental Policies Enacted Through that Process</u>.

Related to the last point, the Proposed Ordinance would operate outside of the General Plan as means of avoiding the voting provisions in Measure P. As discussed above, this method is illegal. But it is also bad planning, for it would inevitably mean that the policies of the General Plan are marginalized, and thereby weakened.

The Proposed Ordinance is inconsistent with the central policy that pervades the entire Napa County General Plan: that urban uses should be confined to urban areas and not allowed in agricultural areas. Measure P could not be clearer on this point. It sets forth a finding that "The Land Use Element of the County's General Plan contains policies…that protect agricultural, watershed and open space lands <u>from the adverse effects of urban uses</u>…" Measure P, Section 1, subsection F (emphasis added). And if that finding were not sufficiently explicit, the Measure summarizes:

> For the past forty years—since the County first established an "Agricultural Preserve" zoning designation—land use policy in Napa County has been guided by two complementary principles: that agricultural lands should be protected <u>and that development should occur in urban areas</u>. The people of Napa County find and declare that the fortieth anniversary of the Agricultural Preserve presents an appropriate occasion to reaffirm and strengthen these principles….

Measure P, Section 1, subsection I (emphasis added).

The new commercial uses that the Proposed Ordinance would allow in agricultural areas are urban, and they are precisely the types of uses that the County's fundamental policies proscribe. These commercial uses include—just to name a few—hardware stores, liquor stores, markets, gas stations, a variety of service businesses, a variety of general business offices, and schools.

Because the authorization of these new uses so plainly conflicts with the confinement of urban uses, the central policy in the General Plan, the Planning Director's Memorandum is forced to argue that the Board should "balance" these conflicting policies in enacting the Proposed Ordinance. But "balance" is not the verb that correctly describes what the Ordinance would effectuate; instead, the

verb "override" is more accurate. If the Board adopts the Proposed Ordinance, it should make no mistake about the outcome: such action will, by its nature, weaken the central agricultural preservation policy in the Plan.

E. The Cited Examples from Other Jurisdictions Are Unpersuasive.

Finally, the Planning Department cites examples from two other jurisdictions, Santa Clara and Ventura Counties, as supporting the policy basis for Proposed Ordinance. However, these examples are not merely unpersuasive; they demonstrate why the policy should not be adopted.

The Ventura County law is narrower than the Proposed Ordinance. As to Santa Clara County, of the jurisdictions surveyed by the Planning Department, this is the only replying jurisdiction that authorizes new uses in historic buildings. See Board Agenda Letter, Napa County Planning Commission (9/7/2011) at 7 ("Of the Counties responding to the query, only Ventura and Santa Clara Counties have ordinances that permit historic buildings to be reused for their historic use (Ventura) or for a limited number of other uses (Santa Clara).") But that fact should only serve to give the Board pause, for the agricultural conditions in Santa Clara County are without question very different from those in Napa County.

Most importantly, the vast majority of the agriculture in the Santa Clara Valley, which contains some of the best agricultural soil in the country, has now been lost to urban development.[2] By contrast, Napa County has vigorously acted to prevent urban intrusions in agricultural areas and thus, unlike Santa Clara County, has preserved its agricultural land.

In short, the example of Santa Clara County should remind the Board why Measure P exists and what can happen without vigilance to preserve agriculture. Experimenting with the Proposed Ordinance--and, given its lack of adoption in other jurisdictions, the Proposed Ordinance can rightly be labeled an experiment—is entirely inappropriate in Napa County.

/
/
/

---

[2] See http://www.nps.gov/nr/travel/santaclara/economic.htm (noting that "[p]rior to World War II the economy of Santa Clara County was tied to agriculture" but "[t]oday those orchards are gone.")

CONCLUSION

In summary, the Napa County Farm Bureau urges the Board to reject the Proposed Ordinance as presently constituted. In doing so, however, the Bureau wants to emphasize that by no means does it oppose well-planned efforts to preserve historic structures and to encourage their economic use. The County can and should continue its efforts to address this issue. But any solution must carefully reflect the County's previous efforts at agricultural preservation and the policies supporting that effort now embedded in the General Plan. The Bureau will support efforts that adhere to the Plan, and it is certainly willing to participate in further steps to craft a workable ordinance.

Very truly yours,

/s/

Daniel P. Selmi, Esq.

cc: Robert Westmeyer, Esq.
County Counsel

Hilary Gitelman
Planning Director