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**Via E-Mail and U.S. Mail**

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Re: Legality of Proposed New Farm Project in Contra Costa County

Dear Mr. Adams and Ms. Hippard:

You have asked our firm to review the proposed New Farm Project (“Project”) and provide you with our legal opinion as to whether its approval would be legal under relevant state and local planning laws. It is our legal opinion that the proposed New Farm Project is inconsistent with numerous provisions of the General Plan, including provisions adopted by voter initiative. Therefore, it would be unlawful for the County to approve the Project as proposed. Should the County approve the Project in its current form, a petitioner would be able to present a strong argument that the approval violates state and local law.

In addition, because the Project proposes development and extension of urban services beyond the County’s Urban Limit Line, its approval may constitute non-compliance with Measure J’s growth management requirements. As a result, approving this Project may jeopardize the County’s receipt of sales tax revenue pursuant to Measure J.

## SUMMARY OF PROJECT

The proposed New Farm Project would develop 186<sup>1</sup> residences on two parcels of land located entirely outside the County's Urban Limit Line ("ULL"). These two parcels, totaling 771 acres combined, are currently designated Agricultural Lands ("AL") by the County's General Plan and are zoned A-80 Exclusive Agricultural by the County's Zoning Ordinance. They are undeveloped except for a vacant house on the southern parcel and are currently used for cattle grazing.

The Project also proposes to develop a 32-acre cemetery, a church, a training facility for the Fire Protection District, and a new parking lot for the Tassajara Hills Elementary School on these two parcels. Of the 186 proposed residential units, 33 would be "Inclusionary Units" reserved for households with moderate, low and very low incomes.

The Project application indicates that "at least 90% of the Project Site [will] be permanently preserved for agricultural or open space uses through the conveyance of development rights, grants and/or open space conservation easements." However, this percentage assumes that conservation easements will be placed over the entire area of each residential lot outside of the residential building pads. The building pads for the single-family, market-rate homes would be approximately 10,000 square feet each. Each residential lot would be a minimum of one acre.

To develop this Project, the applicant has requested that the County amend the General Plan land use designation for the two parcels. Instead of designating the land for agricultural use, the applicant proposes a newly minted designation: "Rural Mixed Use (M-11)." The applicant has also requested a rezoning to P-1, Planned Unit Development.

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<sup>1</sup> There is some discrepancy in the application as to the total number of units. While the summary of the project proposes 185 units, the more detailed New Farm Project Description indicates that the project would include 186 units. A copy of the New Farm Project Description submitted with the Project application is attached to this letter as Attachment 1.

## RELEVANT LAW

The following describes the relevant local law that applies to the proposed development.

### I. Contra Costa County General Plan

Because the proposed Project would be located within the unincorporated area of the County, the County General Plan applies. The General Plan is the County's "constitution for all future development." *Leshar Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 540. Under state law, the County may not approve a zoning ordinance, tentative map, or land use permit that is inconsistent with its General Plan. See Gov't Code § 65860(a) (zoning ordinances shall be consistent with general plan); Gov't Code § 6647.35 (tentative maps must be consistent with general plan); *Neighborhood Action Group for the Fifth District v. County of Calaveras* (1984) 156 Cal.App.3d 1176, 1184 (conditional use permit must be consistent with general plan). Nor may the County amend its General Plan in a way that creates inconsistencies within the General Plan. Gov't Code § 65300.5.

The General Plan contains numerous provisions relevant to the proposed Project. For example, the Land Use element designates the types of land uses allowed on properties throughout the County. It also provides that properties outside the ULL may not obtain General Plan Amendments that would re-designate them for an urban land use. Contra Costa County General Plan ("GP") at 3-8. The Conservation Element contains policies designed to preserve agricultural lands, open space, wetlands, and parks. GP, Chapter 8. The Open Space Element similarly contains policies designed to preserve scenic resources, outdoor recreation, and historic/cultural resources. GP, Chapter 9.

### II. Contra Costa Transportation Improvement and Growth Management Program (Measures C-1988 and J).

In 1988, Contra Costa County voters approved Measure C-1988.<sup>2</sup> This measure contained a comprehensive program for improving transportation within the County, funding these improvements, and ensuring that new development did not undermine these improvements. Toward these goals, Measure C-1988 included a list of

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<sup>2</sup> The text of Measure C-1988 is included in the Introduction to the County's General Plan, at 1-9 through 1-24.

transportation projects to be funded by a one-half cent retail transaction and use tax. These projects included road improvements, rail extensions, bicycle and pedestrian trails, and transit projects.

A portion of the half-cent tax was also designated to be returned to local jurisdictions for use on local, subregional and/or regional transportation improvement projects. To obtain these local funds, each jurisdiction, including the County, was required to adopt a “Growth Management Program” and incorporate the program into a “Growth Management Element” of its General Plan. Every Growth Management Element must contain certain standards and provisions, per Measure C-1988. Local jurisdictions must apply the standards set out in their Growth Management Elements in reviewing and approving development proposals. Failure to comply with this element makes a local jurisdiction ineligible to receive its share of the half-cent tax.

The half-cent tax authorization of Measure C-1988 expired on March 31, 2009. However, in 2004, County voters approved Measure J,<sup>3</sup> which continues the half-cent sales tax for an additional 25-year period. It also creates a new transportation expenditure plan, which includes revised requirements for the required Growth Management Program. In particular, Measure J requires each jurisdiction to “continuously comply with an applicable, voter-approved ULL.” *See* CCTA Ord. 06-04 (clarifying growth management requirements of Measure J)<sup>4</sup>; *see also* Measure J, Transportation Sales Tax Expenditure Plan (“TEP”) at 25. A local jurisdiction may not adjust the boundaries of its ULL by more than 30 acres without voter approval. CCTA Ord. 06-04, Attach. A.

### **III. The 65/35 Contra Costa County Land Preservation Plan (Measures C-1990 and L).**

In 1990, Contra Costa County voters approved Measure C-1990.<sup>5</sup> This measure adopted as part of the County Code the “65/35 Contra Costa County Land Preservation Plan Ordinance” (“65/35 Ordinance”), which required the County to adopt an Urban Limit Line and limit urban development to no more than 35% of the land in the

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<sup>3</sup> A copy of Measure J is attached to this letter as Attachment 2.

<sup>4</sup> A copy of CCTA Ord. 06-04 is attached to this letter as Attachment 3.

<sup>5</sup> The text of Measure C-1990 is included in the Introduction to the County’s General Plan, at 1-26 through 1-30.

County. Measure C-1990 also required that its policies be included in an updated General Plan. In 2006, the voters of Contra Costa County approved Measure L,<sup>6</sup> which extended the term of the 65/35 Ordinance until 2026, adopted a revised ULL, and amended the General Plan to require a 4/5 vote of the Board of Supervisors and voter approval to expand the ULL by more than 30 acres.

## ANALYSIS

### **I. The New Farm Project Is Inconsistent with Numerous Provisions of the General Plan, Including Provisions Required by Measures C-1990 and J.**

#### **A. The New Farm Project Would Develop Urban Land Uses Outside the ULL.**

The New Farm Project proposes an urban development outside the County's ULL, and therefore conflicts with numerous policies in the General Plan. Although the Project applicant asserts that the development is "rural residential" and thus not urban in nature (Letter from Cecily Talbert Barclay to Catherine Kutsuris, Director of Contra Costa County Department of Conservation and Development (June 8, 2009) ("Barclay Letter")), County staff has concluded otherwise: "Contrary to the term 'rural residential' as used in the General Plan, the proposed clustering of residential development would actually be quite urban in nature, because the actual residential density results in approximately 3.9 units to the acre." *See* July 24, 2007 Staff Report from Dennis Barry to Board of Supervisors ("Staff Report") at 2.<sup>7</sup> According to staff, "This would be comparable to density found under the Single Family Residential – Medium Density (SM) designation in the General Plan, which has a density range of 3.0-4.9 units to the net acre, and is deemed an 'urban' land use under the General Plan." *Id.*

While the staff report appears to contain an error in its calculation of this density, a correct calculation indicates that the Project's density may be even higher than 3.9 units per acre. Under the General Plan, densities are generally defined in terms of "housing units per net acre." GP at 3-13. "Net acreage," in turn, includes "all land area used exclusively for residential purposes." *Id.* According to the Application, only 37.2

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<sup>6</sup> A copy of Measure L is attached to this letter as Attachment 4.

<sup>7</sup> A copy of the Staff Report (without attachments) is attached to this letter as Attachment 5.

acres of the Project site will be used exclusively for residential purposes. *See* Application Packet, New Farm Project Description at 15. All of the remainder of the land will be covered by conservation easements, roads, and the proposed non-residential development (i.e., cemetery, fire district raining facility, church, and parking lot). As a result, the density of the proposed Project would be 5 units per net acre (186 units/37.2 acres), comparable to densities found under the Single-Family Residential – High Density (SH) designation. *See* GP at 3-16. This high-density designation is even more “urban” in nature than the medium-density designation.

The General Plan is clear on this point: “properties that are located outside the ULL may not obtain General Plan Amendments that would re-designate them for an urban land use.” GP at 3-8. Yet that is precisely what the New Farm applicant seeks: a General Plan amendment allowing it to develop a dense residential development outside the ULL. In addition to violating this clear General Plan directive, such an amendment would be inconsistent with various goals, policies, and implementation measures of the General Plan, including:

Goal 3-F: To permit urban development only in locations of the County within identified outer boundaries of urban development where public service delivery systems that meet applicable performance standards are provided or committed.

Goal 3-G: To discourage development on vacant rural lands outside of planned urban areas which is not related to agriculture, mineral extraction, wind energy or other appropriate rural uses . . . .

Implementation Measure 3-q: Maintain and enforce the ULL in accordance with the terms of this Land Use Element and Measure C-1990. . . .

Policy 8-30: In order to reduce adverse impacts on agricultural and environmental values, and to reduce urban costs to taxpayers, the County shall not designate land located outside the ULL for an urban land use.

Policy 8-31: Urban development in the future shall take place within the Urban Limit Line and areas designated by this plan for urban growth.

Because the proposed Project conflicts with these General Plan policies, the County cannot approve it.

In a letter to the County, the Project applicant has suggested that “conforming amendments to the General Plan would [need] to be made” to ensure that

the Project is consistent with the General Plan. Barclay Letter at 2. However, many of the General Plan policies listed above were incorporated into the General Plan to implement Measure C-1990, and thus cannot be amended without voter approval. Elections Code § 9125.<sup>8</sup> As a result, the Board of Supervisors alone cannot make all the conforming amendments that would be necessary to make the Project consistent with the General Plan.

Similarly, Measure J requires the County to limit urban development to land within the County's ULL. The County's failure to comply with this requirement would make it ineligible to receive its portion of the half-cent sales tax authorized by Measure J. *See* Measure J § 7 & TEP at 25. Like the policies adopted pursuant to Measure C-1990, this requirement cannot be amended without voter approval.

**B. The New Farm Project Would Subdivide Undeveloped, Important Farmland for Urban Use.**

The proposed New Farm Project would also require the creation of a major subdivision on land that is currently designated for agricultural use. These subdivisions are expressly discouraged by General Plan Implementation Measure 8-x. GP at 8-26 (“Discourage applications for major subdivisions of agricultural lands. . . .”).

Moreover, permitting the proposed subdivision of the New Farm parcels would also conflict with the County's broader policies of supporting and maintaining agriculture in the County. According to the General Plan, subdividing agricultural lands into “ranchettes” owned by non-farming families drives up property values in the area and “in turn drives out the original farmers.” GP at 8-20. The New Farm Project would likely have the same domino effect: by converting these agricultural lands to urban uses, the Project will drive up surrounding property values and thus increase development pressure on nearby agricultural lands. As a result, the proposed New Farm Project would conflict with the following goals and policies:

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<sup>8</sup> In addition, Measure C-1990 adopted the 65/35 Ordinance as part of the County Code. *See* County Code Chapter 82-1. This ordinance also “prohibit[s] the County from designating any land located outside the [ULL] for an urban land use.” *Id.* at 82-1.010. Because it was adopted by initiative, this Ordinance cannot be amended without voter approval. Elections Code § 9125. Thus, any approval of urban development outside the ULL—such as the proposed Project—would also violate the County's own ordinance.

Goal 8-G: To encourage and enhance agriculture, and to maintain and promote a healthy and competitive agricultural economy.

Goal 8-H: To conserve prime productive agricultural land outside the Urban Limit Line exclusively for agriculture.

Policy 8-29: Large contiguous areas of the County should be encouraged to remain in agricultural production, as long as economically viable.

Policy 3-14: Protect prime productive agricultural land from inappropriate subdivisions.

Policy 8-32: Agriculture shall be protected to assure a balance in land use. The policies of Measure C-1990 shall be enforced.

To solve this problem, the General Plan states: “Adequate minimum parcel sizes in agricultural zones must be maintained in order to protect the existing farm operations and to discourage urban landowners from building homes in the area.” *Id.* The one-acre lots proposed in the New Farm application are patently inconsistent with an adequate minimum parcel size for agricultural use.

The applicant suggests that the proposed Project is consistent with the General Plan because it does not propose to develop any more units than would be allowed if the applicant developed one dwelling unit for every five acres of the property, the maximum allowable density under the property’s current “Agricultural Lands” (“AL”) designation. Barclay Letter at 5. There are several flaws, however, in this argument.

First, the applicant is not entitled to develop one unit on every five acres of the property. The minimum parcel size under the current zoning is 80 acres. This zoning is designed to achieve the General Plan goals of preserving agricultural resources. Moreover, “one dwelling unit per 5 acres” is only the maximum allowable density allowed in lands designated AL. There is no guarantee in the General Plan that every parcel designated AL could be subdivided into such small parcels. In fact, as discussed above, many goals and policies of the General Plan discourage such subdivision. Thus, the proposed Project, which calls for a subdivision of the property into more than 180 parcels, would be inconsistent with the General Plan goals and policies discouraging major subdivisions of agricultural land, described above.



Second, even if one puts aside all of the other policies, goals, and implementation measures of the General Plan and focuses solely on the current maximum allowable density for lands designated AL, the proposed Project is still inconsistent with the General Plan. The maximum residential density allowed under the Agricultural Lands designation is one unit per 5 acres. A subdivision of the 771 acres of the New Farm site into five-acre lots would allow only 154 units,<sup>9</sup> not the 186 proposed as part of the New Farm Project. Taking into consideration the acreage required for the non-residential uses proposed by the Project, including a church, a fire district training station, a cemetery, an equestrian center, and a school parking lot, the remaining acreage would accommodate only 145 five-acre lots.<sup>10</sup> Thus, the applicant is incorrect that the proposed Project is simply a clustered version of what would otherwise be allowed under the maximum densities of the current General Plan designation.

Nor will the New Farm Project advance the General Plan's goals for preserving agriculture by placing land in and around the residential subdivision under conservation easement. Contrary to the suggestion in the application, conservation easements do not require the holder to maintain the land in active agricultural production. *See* Civ. Code § 815.1. Much of the area proposed for agricultural conservation is made up of the yards surrounding single-family homes. These mini-orchards on plots of less than one acre are unlikely to be commercially viable. If they are not maintained as orchards, they will simply revert to what they are: yards for the single-family homes they surround.

**C. The New Farm Project Would Require Extension of Services Outside of the ULL.**

According to the Staff Report, the proposed New Farm Project would require the extension of urban services (e.g. water and sewer services) outside of the ULL. *See* Staff Report at 3. Extending these services to the Project site, outside the ULL, would conflict with General Plan Policy 3-10, which provides: "The extension of urban services into agricultural areas outside the Urban Limit Line, especially growth-inducing infrastructure, shall be generally discouraged." It would also be inconsistent with Implementation Measure 3-v: "To the extent legally permitted, advise LAFCO to (a) respect and support the County's 65/35 Preservation Standard, Urban Limit Line and

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<sup>9</sup> 771 acres/5 acres = 154 5-acre lots.

<sup>10</sup> (771 acres – 46 acres)/5 acres= 145 5-acre lots.

growth management standards when considering requests for incorporation or annexations of the land to cities or service districts . . . .” These policies implement Measure C-1990, and thus cannot be amended without voter approval. Given these inconsistencies, the County cannot approve the Project as proposed.

**D. The New Farm Project Would Create Conflicts Between Urban and Agricultural Uses.**

Numerous goals, policies and implementation measures of the General Plan require the County minimize conflicts between urban and agricultural land uses. For example:

Policy 3-11: Urban uses shall be expanded only within an Urban Limit Line where conflicts with the agricultural economy will be minimal.

Policy 3-12: Preservation and buffering of agricultural land should be encouraged as it is critical to maintaining a healthy and competitive agricultural economy and assuring a balance of land uses.

Implementation Measure 3-b: During project review, require that proposed uses on the edges of land use designations be evaluated to ensure compatibility with adjacent planned uses.

Implementation Measure 3-f: The County shall conduct a study of minimum parcel sizes in agricultural districts needed to implement General Plan policies and adopt such parcel sizes.

Goal 8-I: To minimize conflicts between agricultural and urban uses.

Policy 8-34: Urban developments shall be required to establish effective buffers between them and land planned for agricultural uses.

Implementation Measure 8-ah: Require adequate setbacks for any non-agricultural structures located within or adjacent to cultivated agriculture.

Implementation Measure 8-aj: Where unmitigable conflicts exist between agricultural and residential uses generally give priority to maintaining the agricultural use.

Seth Adams  
Melissa Hippard  
May 28, 2010  
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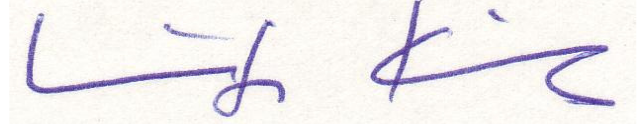
Contrary to these General Plan provisions, the New Farm Project would surround single-family homes with agricultural uses. The potential for conflict is obvious: trucks and tractors required to maintain the proposed orchards will create noise impacts on the families living in the residences. Pesticides and herbicides may be applied outside the windows of residents. Thus, the proposed Project is inconsistent with these General Plan goals, policies, and implementation measures, as well.

### CONCLUSION

For the reasons set forth above, it is our legal opinion that the proposed New Farm Project is inconsistent with the County's General Plan, and its approval may jeopardize the County's receipt of sales tax revenue pursuant to Measure J.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP



Winter King

#### Attachments:

- 1) New Farm Project Description
- 2) Measure J: Contra Costa's Transportation Sales Tax Expenditure Plan
- 3) CCTA Ord. 06-04
- 4) Voter Information Pamphlet for Measures L & M (2006)
- 5) Staff Report from Dennis M. Barry, AICP, Community Development Director, to Board of Supervisors (July 24, 2007) (without attachments)