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LLP

MEMORANDUM

TO: Brian Bordona

CC: Laura Anderson
Annalee Sanborn, AES

FROM: Whit Manley

DATE: December 26, 2015

RE: Walt Ranch BRMP – land designated for preservation

This memorandum addresses the determination of what land should be designated for preservation in the Walt Ranch Biological Resource Management Plan.

Land designated in the BMRP will be permanently preserved by means of a deed restriction or conservation easement. The easement will prohibit future development of this land for vineyards. The easement will therefore ensure that the designated land will be protected from disturbance.

In our view, the land designated for such permanent protection should be determined based on its value as habitat in relation to the impact that the land is designed to address. If the land is to be preserved in order to provide a wildlife corridor, then the location of this land should be determined based on its suitability as a corridor. If the land is aimed at setting aside a particular sensitive community (e.g. oak woodlands), then the land should consist of oak woodlands. The same is true with respect to stream corridors, sensitive plant species, and habitat for sensitive animal species.

Staff has proposed to add an additional requirement, unrelated to the value of the land as habitat. Staff proposes to eliminate from preservation any land that, due to unrelated land-use restrictions, is protected from potential disturbance. Under this view, land with >30% slope would not “count” because this land cannot (in staff’s view) be developed as vineyard. The applicant would therefore have to hunt for suitable habitat with <30% slope. The same would be true for land located within a protected stream corridor; because land within such corridors is protected from disturbance, this land would not “count” towards the project’s mitigation obligations, and those obligations would have to be met elsewhere.

In this fashion, much of the land proposed for preservation in the draft Walt Ranch BRMP would be eliminated from consideration. That acreage would have to be found elsewhere, if it exists.

We disagree with this proposal for both practical and policy reasons. There are at least eight reasons for our disagreement.

First, there may not be any such land, even on the entire +/- 2,300-acre Walt Ranch property. To the extent a plant or animal species relies on damp ground, it may be difficult, or impossible, to find suitable habitat for propagation and preservation outside of stream corridors. It makes little sense to adopt a

screening criterion that eliminates the very land upon which a given plant or animal species depends. To provide a specific example, stream corridors often serve as important wildlife corridors. Those corridors should be designated based on the extent to which they function as corridors. Under staff's proposal, however, the very land that has the highest value would not be included in the BRMP, and the applicant would receive no credit for setting that land aside for permanent preservation. That makes no sense.

Second, if the land that is most suitable to compensate for a given impact happens to be located in a stream set-back area, or on a >30% slope, and that land cannot be considered for inclusion in the BRMP, then what criteria are to be used to find other land for inclusion in the BRMP? Lower habitat value? No habitat value? The use of such criteria would, in our view, be perverse; the County should instead focus on locking up the land that has the *highest* value in relation to the impacts to be addressed.

Third, staff's proposal ignores the difference between current land-use policy and permanent preservation. Right now, the County Code generally prohibits vineyard development on >50% slopes and within varying stream setback areas. (County Code, § 18.108.060.) These policies could change. If they do, then this land could become available for vineyard development. Land locked up in a conservation easement would not. Thus, an easement provides protection regardless of whether County land-use policy changes in the future. Staff's proposal is too dismissive of the value of such permanent preservation.

Fourth, staff's proposal does not accurately reflect current County policy regarding what land is protected, and what land is not. Most notably, staff has proposed that land with >30% slope should not "count" towards the project's mitigation obligations. Yet, County policy allows vineyards on slopes with >30% slope with a use permit. (County Code, § 18.108.060.) Staff's proposal assumes that no land with >30% slope will ever qualify for an ECP. This assumption cannot be squared with the plain language of the code. In fact, the only land that is "off limits" due to steep slopes is land with >50% slope. If staff wishes to propose designating such land as ineligible for preservation, then at least that proposal would be consistent with existing County policy (although, as noted above, County policy could change in the future).

Fifth, although staff has indicated that this proposal is consistent with existing County practice, this claim appears to be unsupported. We have reviewed carefully the EIRs certified by the County for other vineyard projects (Circle S, Soscol Mountain, Rodgers). The EIRs require conservation easements or deed restrictions of appropriate habitat to compensate for impacts to like habitat. For example, impacts to oak woodlands are compensated by providing conservation easements on other oak woodlands, generally at a ratio of 2:1. The adopted mitigation measures make clear that land placed under easement must have equal or greater value as the habitat to be affected. The EIRs say nothing about a further requirement that the lands must also meet some other unstated criterion, such as the requirement that the land have a slope of <30%. If there are other approved ECPs that reflect this unstated County policy, then please bring them to our attention. We have looked, and we have not found them.

Sixth, although staff has indicated that this proposal is necessary in order to be consistent with policy embedded in the General Plan and its EIR, we see nothing to support this claim. The General Plan itself does not contain a policy that says that. The mitigation measures adopted by the County at the time it approved the General Plan also do not say that.

We have found references in the General Plan and accompanying EIR that refer to slopes and the suitability of land for vineyard development. These references may be the “policies” that are at the heart of staff’s proposal. If so, the proposal misses the mark.

The General Plan text contains the following narrative description of vineyard development in the County:

VINEYARD DEVELOPMENT

Grapes have been grown in Napa County since the first half of the 19th century, although the pace of vineyard development and the acreage of producing vineyards increased most noticeably in the period from the mid 1970s to the present. Today (2006) there are approximately 49,657 acres [] of developed vineyard area spread throughout the County’s valleys and hillsides, representing about 9.8 percent of the County’s total land area. The spread of vineyards and the economic success of the wine industry have directly benefited open space conservation in Napa County by staving off the residential subdivisions that have altered the landscape of so many California communities in the last 30 years.

While there is no doubt there will be additional vineyards in the future, it is difficult to predict the pace and quantity of new acreage that will be developed with any certainty because of the number of factors involved. Some of these factors change over time while others are immutable. Factors include, first of all, whether the land has the characteristics (*terroir*) suitable for growing grapes (e.g., soil, exposure, climate, slope). Another factor is physical accessibility. Other factors are economic (e.g., whether the land can be profitably cultivated, the availability of capital, and the anticipated market for wine grapes), and others are environmental (e.g., topography, water availability) and regulatory (e.g., endangered species, whether a vineyard is allowed on certain lands because of legal restrictions for slope >30 percent).

Figure CON-4 illustrates a projection of future vineyard development potential that was intended to inform analyses in the Environmental Impact Report associated with the 2008 General Plan Update. Based on historical trends, pending applications, available/suitable lands, and professional judgment, this projection of about 10,000 additional acres—an increase of 20 to 25 percent over 25 years—is thought to be somewhat high, although it can serve as a useful outside limit, beyond which the countywide cumulative impacts of vineyard development have not been adequately assessed. As discussed below and as reflected within the policies and action items presented in this Element, vineyard development—even within this projected cumulative limit—requires responsible land stewardship.

(Napa County General Plan (2009), p. CON-19 [footnote omitted].)

Thus, the General Plan text refers to regulatory restrictions that restrict vineyard development, and one cited policy refers to “slope >30 percent.” As noted above, however, the County policy to which this

passage refers – County Code chapter 18.108 – regulates, but does not prohibit, vineyards on >30% slope. The narrative statement in the General Plan is consistent with that regulatory fact. Staff’s proposal therefore misreads this statement.

The General Plan narrative states that approximately 10,000 acres of additional vineyard land could be developed over the 25 years following the County’s adoption of its General Plan in 2009. The General Plan EIR, in turn, made assumptions about how much land would be converted to new vineyards based on General Plan policy. The General Plan EIR looked at four different “scenarios” regarding the acreage of new vineyards that would be established. These scenarios ranged from 7,500 to 15,000 acres, based on varying assumptions about slope and other variables. (See General Plan Draft EIR, Appendix H.) These scenarios were developed in order to provide the County with a range of potential vineyard development outcomes upon which to base its analysis. The scenarios were not designed to restrict, either explicitly or implicitly, where vineyard development could occur. Nor do the scenarios suggest that land that was outside those areas predicted to develop as new vineyards (e.g., those on >30% or >35% slopes) were “off-limits” to vineyard development, and therefore not eligible for inclusion in preservation lands. Staff’s proposal errs by transforming an analytical assumption into binding policy. We have looked, and have found nothing in the General Plan EIR to warrant such a transformation.

Interestingly, the General Plan’s scenarios all appear to be wildly off the mark. The General Plan EIR anticipated that, overall, about 12,500 acres of new vineyards would be planted between 2005 and 2030. At this point in time, based on a straight-line projection, the County should have approved roughly 5,000 acres. To date, the County has approved 3,587 new acres of vineyards. By any measure, the General Plan EIR significantly overestimated the acreage of new vineyards that would be developed. The County is thus in no danger of somehow underestimating the impacts associated with new vineyard development. In fact, the opposite is true.

Moreover, the Walt Ranch project is entirely consistent with the assumptions embedded in the General Plan and accompanying EIR. Both documents included scenarios in which new vineyards would not be developed on >30% and >35% slopes. Walt Ranch does not propose vineyards on slopes >30%. Even if analytic assumptions in the General Plan EIR were relevant to County policy (they are not), the Walt Ranch project adheres to even the most stringent of these assumptions.

Seventh, although unstated, staff’s proposal may be based on the notion that preservation, in the form of a deed restriction or conservation easement, “counts” only if the land to be protected is under the threat of development. This notion is incorrect. Agencies have discretion to adopt mitigation measures requiring the preservation of agricultural land or habitat at some identified ratio. For CEQA purposes, it is not necessary that the land to be protected must be under the imminent threat of development in order to qualify as mitigation. (See *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 322-324 [upholding city’s exercise of discretion to require 1:1 conservation easements to compensate for loss of agricultural land, and finding that further mitigation at greater ratio was infeasible].) In fact, under CEQA the lead agency has discretion to reject conservation easements as infeasible, where substantial evidence supports that finding. (See *Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018, 1038-1041 [upholding measure requiring preservation at 0.5:1 ratio, and rejecting claim that mitigation had to be provided at 1:1 ratio]; *Friends of the Kings River v. County of Fresno* (2014) 232 Cal.App.4th 105 [upholding finding that conservation easement mitigation was infeasible]; *City of Irvine v. County of Orange* (2015) 238 Cal.App.4th 526

[same].) In this case, we do not suggest that the requirement to provide easements is infeasible. The record does not support, however, imposing restrictions that limit the land eligible to serve as conservation lands, where those restrictions are unrelated to the impacts that the conservation lands are designed to address.

Finally, staff's proposal represents a departure from adopted County policy, as reflected in the General Plan and County Code. This departure is particularly troubling for Walt Ranch. The applicant initiated meetings with the County in 2006, long before the County adopted its General Plan. The General Plan imposes stringent new policies on vineyard development, and we have tried very hard to abide by those policies. This new staff proposal, however, reflects an unwritten and unstated new restriction on mitigation called for by the General Plan. If staff wishes to propose new policies, staff is welcome to do so. Such policies, however, should be adopted following public debate by the Board of Supervisors. If that occurs, we (along with many other stakeholders) will participate in that debate, and the regulated community will all abide by the outcome. Even then, such a policy shift should not apply retroactively to a proposal that has been in the pipeline for nearly a decade.

* * *

We hope the County will give serious consideration to these concerns. We would be happy to participate in those discussions. We also encourage the County to include in those discussions other key stakeholders, such as the Napa Valley Grape Growers, Napa Valley Wine Growers, Napa Valley Vintners, Preserve Napa Valley, and Napa County Farm Bureau.

Although we disagree with staff's proposal in this instance, we also want to make clear that we appreciate staff's hard work on this project, and we remain committed to working with staff so that any differences in policy perspective are minimized. We appreciate the opportunity to provide this perspective.