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January 31, 2007

Christopher Tooker, Chair and
Honorable Commission Members
Sacramento Local Agency Formation Commission
1112 I Street, Suite 100
Sacramento, CA 95814

Re: LAFCo Policy Discussion Paper:
Open Space and Agricultural Land Preservation Policy (LAFC 12-03)

Dear Chair Tooker and Honorable Commission Members:

As you know, this office represents Reynen and Bardis ("R& B") with respect to LAFCo's consideration of a proposed open space and agricultural land preservation policy ("Preservation Policy"). In a previous letter dated October 24, 2006, we detailed for you our client's concerns and explained that such a policy: would improperly encroach upon the constitutional home rule power of cities to regulate land use within their boundaries; was being proposed without any effort to comply with the California Environmental Quality Act ("CEQA"); and, in the absence of a practical funding mechanism or reasonable consideration of its practical implications, was simply misguided.

Subsequent to our letter, we were provided with a copy of the January 8, 2007 Memorandum prepared by your counsel, Nancy Miller, regarding the practical and legal issues associated with adoption of a Preservation Policy. Fundamentally, counsel concurred with our view that appropriate CEQA review is required. Moreover, counsel appears to have agreed that a mandatory mitigation policy would run afoul of the constitutional home rule power of cities. Having acknowledged these issues, counsel suggests that an appropriate Preservation Policy, that is only advisory in nature, could be adopted and would be consistent with LAFCo's statutory authority.

We write at this time to express our concerns with respect to counsel's suggested approach. In this regard, we note that, at the outset of her memorandum, counsel referenced suggested changes to the Preservation Policy that could address concerns that had been raised by us and other parties. To date, we have not been provided with these changes. An opportunity to do so could shed light on some of the issues raised. Nevertheless, we continue to maintain that a ratio-based Preservation Policy would clearly implicate the constitutional home rule power of cities and counties, and remains an unfunded and misguided effort.

LAFCO ADOPTION OF A RATIO-BASED PRESERVATION POLICY IS CONSTITUTIONALLY AND STATUTORILY PROSCRIBED.

Fundamentally, there appears to be no dispute that regulation of land use is a constitutional imperative of local government. Accordingly, Government Code Section 56375 stresses that a LAFCo

has no power to "... impose any conditions that would directly regulate land use density or intensity, property development, or subdivision requirements." Although it has been suggested that a LAFCo-enacted, ratio-based, Preservation Policy is not inconsistent with this constitutional and statutory imperative because it does not directly regulate land use, the argument overlooks the clear statutory directive proscribing three potentially different forms or direct regulation: (1) land use density or intensity; (2) property development; or (3) subdivision requirements. Overlooked in counsel's analysis is the rather simple truth that a Preservation Policy that proscribes annexations of property that do not include ratio-based mitigation quite clearly directly regulates development of the property. Under such a policy, the regulated land cannot be developed without the proposed mitigation in place. Conversely, so-called mitigation land is now precluded from urbanization. Such a regulation, just like a zoning density limitation or a subdivision requirement, directly regulates property development. Indeed, we suspect that the cities and counties in this state would be surprised to learn that the right to control property development through such mitigation measures was not within their purview.

Counsel also suggests that an advisory mitigation measure would not constitute an improper usurpation of local land use authority. While we have yet to see counsel's suggested advisory language, we find the concept perplexing. The Preservation Policy will hardly be "advisory" if it cautions that annexation will likely be denied without ratio-based mitigation. On the other hand, if the policy merely advises that ratio-based mitigation will be "well received," there is little reason to expend limited staff time and fiscal resources toward development of such a policy. This is especially true when one recognizes that the CEQA review utilized during the annexation process will include consideration of land uses - including open space, agricultural uses and mitigation.

We also disagree with counsel's suggestion that LAFCo's authority to impose conditions on annexation includes the power to impose land mitigation conditions. The authority of LAFCo to impose conditions on annexation is not expansive. In fact, as noted previously, any such conditions cannot directly regulate land use or property development. Moreover, if LAFCo intends to impose conditions, Government Code section 56886 contains an exclusive list of conditions that LAFCo can require upon annexation. As we pointed out previously, nowhere in Section 56886 is there any suggestion or reference to the fact that LAFCo could require mitigation for lost agricultural land as a condition of approval of an annexation request. Given the specificity contained in many of the sub-sections of Section 56886, it stands to reason that, if ratio-based mitigation conditions were contemplated, then the statute would have included them. Of course, it appears most likely that the Legislature had no intention to permit such conditions, which would constitute improper regulation of property development.

Ultimately, even recognizing that LAFCo retains the power to impose conditions on annexation proposals, any such conditions must be consistent with constitutional and statutory limitations. The limitations on this authority contained in Section 56886 properly recognize that land use regulation is not a LAFCo power and that, accordingly, conditions imposed cannot result in direct regulation of property development.

ADOPTION OF THE PRESERVATION POLICY WOULD BE FISCALLY AND PRACTICALLY IMPRUDENT

Notwithstanding the debate over whether LAFCo has the constitutional or statutory power to impose agricultural mitigation conditions, substantial policy considerations suggest that development of such a policy is imprudent.

We have not argued, as counsel surmises, that LAFCo's authority extends only to *prime* agricultural land. We do maintain, however, that Government Code Section 56375, subdivision (a)(2) clearly prohibits LAFCo from rejecting an annexation application for land within an urban service area designated for urban growth by the annexing city, unless the land is *prime* agricultural land. While we acknowledge that this limitation applies only for designated urban service areas proposed by an annexing city, the point is that proposed development in an annexing city would, logically, be located in such urban service areas. Thus, it is clear that LAFCo has no power to reject annexations in land to be developed by the annexing city, unless the annexed land is *prime* agricultural land.

Perhaps in recognition of this fact, Yolo County and Santa Clara County, two agencies that currently have or are considering such similar mitigation standards, both only apply (or propose to apply) those standards to *prime* agricultural land. Neither jurisdiction attempted to apply their policies, either existing or proposed, beyond prime agricultural land.

Accordingly, and as we have pointed out, LAFCo's proposed policies, which contemplate application of mitigation ratios to all open space and agricultural land, go well beyond the policies of other jurisdictions that have considered the issue. Accordingly, we stand by our previously stated position that the proposed preservation policy is unprecedented. Indeed, the vast majority of LAFCo's in the state continue to consider these matters on a case-by-case basis, just as your Commission does.

In addition, we wish to reiterate a point overlooked by counsel - the Preservation Policy includes no funding mechanism. The Preservation Policy would require Open Space and Agricultural land mitigation in advance of any project approval and annexation. As identified in our prior letter, even if an agricultural mitigation requirement were to be adopted, it should only be required when an actual impact occurs. Certainly, the annexing City will not desire to use public funds to obtain such advance mitigation. Typically, mitigation for lost agricultural land is a condition placed upon a development project and required after, not before, specific project approval. The purpose of the mitigation is to offset development. Until the development is a reality, and a project is moving forward, mitigation is unnecessary.

Moreover, there has to be a nexus between any proposed development and its impact. Accordingly, we maintain that the current policy of addressing mitigation in the CEQA process on a case-by-case basis at the time of project implementation is much more practical than the proposed Preservation Policy. The Commission should remember staff's admonition that "it is very difficult to develop a single regional or countywide mitigation fee or ratio program for the protection of open

space and prime agricultural lands." We certainly agree that such a rigid approach "may be difficult, and even imprudent," if not illegal.

CONCLUSION

The Preservation Policy is both constitutionally and statutorily proscribed, and it cannot be practically and fairly implemented as proposed. While we welcome the opportunity to participate in further discussions with respect to such a policy, we question whether that is an appropriate use of limited LAFCo time and resources. We maintain that the most prudent approach would be for the commission to direct its staff to cease efforts toward adoption of the Preservation Policy and to concentrate its future efforts through the CEQA process on a case-by-case basis consistent with California law and current practice.

Very truly yours,

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cc: Mike Winn, Reynan & Bardis
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