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VIA HAND DELIVERY

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

RECEIVED

OCT 24 2006

SACRAMENTO LOCAL AGENCY
FORMATION COMMISSION

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

Dear Chair Tooker and Honorable Commission Members:

This office has been retained by Reynen & Bardis ("R&B") to address the proposed Open Space and Agricultural Land Preservation Policy ("Preservation Policy"), which is calendared for a public workshop before the Sacramento Local Agency Formation Commission (LAFCo) on Wednesday, November 1, 2006. We look forward to the opportunity to participate in the workshop.

We have had the opportunity to review the proposed Preservation Policy and write to urge LAFCo not to consider adoption of this policy. As we explain in detail below, the Preservation Policy is virtually unprecedented and, as crafted, is likely beyond the power of LAFCo to enact. The Preservation Policy seeks to encroach upon the Constitutional home rule power of cities to regulate land use within their boundaries. It does so without articulating any legal basis to support such action and without any effort to comply with the California Environmental Quality Act ("CEQA"). Moreover, even assuming that LAFCo could adopt such a policy, the proposed Preservation Policy, devoid of any practical funding mechanism or reasonable consideration of practical implementation issues, is simply misguided.

LAND USE REGULATION IS A CITY/COUNTY FUNCTION

Article XI, Section 7, of the California Constitution rests plenary authority over local health, safety and welfare with cities and counties, conferring upon them the "police power" to "make and enforce all local police, sanitary and other ordinances and regulations not in conflict with the general laws." Regulations regarding land use arise through this police power of cities and counties and zoning and pre-zoning for annexation of land are exclusively their province - a widely recognized right confirmed by the California Supreme Court in *Associated Home Builders, Inc. v. City of Livermore* (1976) 18 Cal.3d 582. These powers derive from the "home-rule" provisions in the California Constitution and cannot be abrogated by statute. *Taschner v. City Council of Laguna Beach* (1973) 31 Cal.App.3d 48 [city power]; *Scrutton v. County of Sacramento* (1969) 275

Cal.App.2d 412 [county power]. It is apparent from this Constitutional empowerment that the state legislature is not free to delegate land use authority to other governmental entities. Accordingly, while the legislature has provided that each county will have a LAFCo, the implementing legislation - commonly referred to as the Cortese-Knox-Hertzberg Act ("CKH") - acknowledges this exclusivity and requires that any decision on annexation "be based upon the general plan and rezoning of the city."

It is axiomatic that the decision of how to zone land within its boundaries lies completely within the discretion of the affected city or county. That discretion even applies to a decision by a city regarding whether it wants to expand its boundaries and, if so, what zoning will apply to the annexed land. In light of this Constitutional imperative, it necessarily follows that a LAFCo has no authority to control land uses within the cities and counties. The proposed Preservation Policy, which seeks to mandate mitigation of agricultural land through permanent preservation on a ratio basis, quite plainly runs afoul of the home rule provisions of the Constitution.

The Constitutional imperative that places plenary police powers with cities and counties did not go unrecognized by the legislature when it adopted CKH. To the contrary, the legislature made it clear that LAFCos have no power to impose any conditions on annexation that would directly regulate land use. Accordingly, Government Code §56375, subdivision (a) provides that:

"A commission *shall not impose any conditions* that would directly regulate *land use density or intensity, property development, or subdivision requirements.*"

The proposed Preservation Policy seeks to directly regulate land use density and intensity and property development through its proposed mitigation requirement for development of agricultural land, which would be required during the pre-zoning process. In other words, the Preservation Policy would result in denial of an annexation application that did not require mitigation for lost agricultural land as a component of the pre-zoning process. Such a policy has no basis in law and is clearly proscribed by LAFCo's implementing statutes.

In light of these facts, LAFCo should not pursue a policy that it has no constitutional or statutory right to adopt or enforce.

CEQA COMPLIANCE IS REQUIRED BEFORE LAFCO COULD ADOPT THE PRESERVATION POLICY

Even if LAFCo had the constitutional and statutory right to consider adoption of the Preservation Policy, the current proposal places the cart before the horse - it seeks to consider the policy *before* complying with CEQA. Application of CEQA to policies like the proposed Preservation Policy is not new. This issue has already been considered by the courts and compliance with CEQA has been held applicable. Compliance with CEQA is mandated, here, because the

proposed policies will “influence future LAFCo decisions about development plans and future growth of cities and service areas.” *City of Livermore v. LAFCO* (1986) 184 Cal.App.3d 531, 538.

In *City of Livermore*, the Alameda County LAFCo adopted a negative declaration under CEQA as a predicate to adoption of new guidelines regarding spheres of influence, which involved the question of whether growth will occur in unincorporated areas and whether agricultural land will be preserved or developed. The City of Livermore challenged the negative declaration, arguing that an EIR was required before LAFCo could adopt such guidelines. The Court of Appeal affirmed the trial court decision to require an EIR, holding that such guidelines would clearly impact development and agricultural land preservation.

Thus, even if LAFCo could consider adoption of the Preservation Policy, which it cannot, it could only do so by first complying with CEQA. As *City of Livermore* teaches us, such compliance will require LAFCo to prepare and circulate an EIR to study the environmental impacts of any such proposed policy. Accordingly, if LAFCo desires to continue to pursue the Preservation Policy, it should first prepare and circulate an EIR.

LAFCOS CANNOT IMPOSE LAND USE CONDITIONS AT ANNEXATION

LAFCos are a creature of the legislature and, accordingly, have only the powers that are expressly granted by statute or that are necessarily implied in order to exercise the powers granted. *Tillie Lewis Foods v. City of Pittsburg* (1975) 52 Cal.App.3d 983, 999. Thus, although some LAFCo decisions may implicate land use issues, a LAFCo has no power to impose conditions that would directly regulate: land use (Gov’t Code §56886); land use density or intensity (Gov’t Code §56375(a)); property development (Gov’t Code §56375(a)); or subdivision requirements ((Gov’t Code §56375(a), 56886). In this regard, Government Code Section 56886 contains a list of conditions of approval that a LAFCo could impose at annexation. Conspicuously absent from this list is any power to impose conditions that would require mitigation for loss of agricultural land.

THE PRESERVATION POLICY SEEKS TO CONTROL USE OF ALL AGRICULTURAL LAND

The staff report acknowledges LAFCo’s role in encouraging protection of *prime* agricultural and open space land. The proposed Preservation Policy, however, seeks to impose mitigation requirements for loss of *all* agricultural land, not just *prime* agricultural land. The staff report does not disclose any precedent for such far-reaching mitigation requirements. Government Code §56375, subdivision (a)(2) makes it clear that a LAFCo cannot reject an annexation application for land within an urban service area designated for growth by the annexing city, unless the land is *prime* agricultural land. Even for such *prime* agricultural land, the statute merely allows for a LAFCo to consider the loss of *prime* agricultural land when addressing an annexation application within an urban service area designated for growth. In the absence of such *prime* agricultural land, LAFCo has no power to reject an annexation within an urban service area that has been designated for urban growth on the basis of lost agricultural land. The proposed mitigation measures, however, would

compel mitigation even if *non-prime* agricultural land is affected. Thus, while the Preservation Policy and staff report, at times, suggests that it is designed to preserve *prime* agricultural land, the proposed provisions that would require mitigation for reduction in *non-prime* agricultural land clearly run contrary to the enabling statute.

THE PROPOSED PRESERVATION POLICY IS UNPRECEDENTED, FISCALLY IMPRACTICAL AND RAISES PRACTICAL IMPLEMENTATION ISSUES

Interestingly, the supporting materials appended to the staff report confirm that the vast majority of LAFCoS do not have specific mitigation requirements for preservation of agricultural land. As staff's matrices confirm, most LAFCoS wisely follow the controlling statutory scheme of CKH and have not attempted to implement competing, redundant mitigation schemes. The result of these prudent policies leaves the issue of land use - urban or agriculture - to the cities and counties where it rightly, and constitutionally, belongs.

According to the staff matrices, Yolo County LAFCo is the only LAFCo with a ratio-driven mitigation requirement, and it only applies to *prime* agricultural land. Moreover, even in Yolo County, the requirement to mitigate occurs, not at pre-zoning, but later in the development process - prior to final map, grading or building permit issuance. Additionally, the Yolo program has not been tested in the courts and its constitutionality and legality is questionable. Yet, the proposed Preservation Policy seeks to impose mitigation measures that push the constitutional and legal envelope even further - applying mitigation ratios to *non-prime* agricultural land and requiring them at the time of pre-zoning.

Even assuming that LAFCo had the legal authority to require such land mitigation, the proposed Preservation Policy provides no mechanism to *fund* the mitigation. Certainly, no landowner would be willing to pay for mitigation of lost agricultural land in advance of project approval and annexation. Yet, the proposed Preservation Policy seeks to require that mitigation be in place at the time of pre-zoning - which occurs in advance of annexation and project approval. A landowner will not likely know what type of development it seeks at this early stage. Whatever mitigation might be imposed for loss of agricultural land should not be required until the actual impact occurs.

Moreover, pre-zonings often occur with the participation of only some or, in the case of city initiated pre-zonings, none, of the affected property owners. It is practically infeasible to impose mitigation requirements on landowners that are not participating in the pre-zoning process and improper to shift the burden for this mitigation to other landowners that are participating. Legally, there must be a nexus between the proposed development and the impact. *Nollan v. California Coastal Commission* (1987) 483 U.S. 825; *Dolan v. City of Tigard* (1994) 512 U.S. 374. In order to properly assess this nexus, any mitigation requirement should be imposed on a case-by-case basis at the time of project implementation.

If, in fact, LAFCo intends to adopt a Preservation Policy in the face of clear constitutional and statutory proscription, it should, at the very least, contain provisions to ensure an appropriate funding mechanism and reasonable implementation timelines. The proposed Preservation Policy is a recipe for failure without some measures to ensure that the demanded mitigation can be provided and funded consistent with a reasonable and realistic implementation timeline.

LAND USE MITIGATION IS PROPERLY CONTROLLED BY CEQA

The legal and practical hurdles that countenance against adopting a Preservation Policy do not, however, preclude appropriate mitigation of impacts to loss of agricultural land associated with development. To the contrary, they leave these land use issues to the cities and counties where they constitutionally reside. Moreover, such impacts to agriculture are properly handled through the CEQA process and appropriate mitigation can be imposed through that regime. In this regard, the CEQA Guideline Checklist (Guidelines Appendix G) requires that the CEQA Initial Study include information regarding loss of agricultural land and its significance. If the loss is significant, mitigation can be required. As a responsible agency, LAFCo will have input into the CEQA process. This current procedure is certainly preferable to the rigid alternative of the proposed ratio-driven mitigation contained in the Preservation Policy.

In its staff report, LAFCo staff has recognized its potentially conflicting roles of providing for housing for persons of all incomes, while at the same time preserving and protecting open space and prime agricultural land. This is the very type of conflict that is best addressed through the give and take of the local approval process, including CEQA, taking into account all factors without applying rigid mitigation ratios in advance.

THE PROPOSED POLICIES CONFLICT WITH LAFCO POLICY

The staff report confirms that "mitigation requirements" contemplated in the Preservation Policy are in conflict with other LAFCo policy statements regarding annexation approvals, which acknowledge that cities and counties should have discretion regarding mitigation. In this regard, the staff report notes that "it is very difficult to develop a single regional or a countywide mitigation fee or ratio program for the protection of open space and prime agricultural lands." Yet, that is precisely what the proposed mitigation requirements contained in the Preservation Policy would do, even in the face of staff's suggestion that such a rigid approach "may be difficult, and even imprudent."

CONCLUSION

Ultimately, it becomes apparent that the Preservation Policy is not an appropriate mechanism for dealing with impacts of urban development on agricultural land. Rather, these issues must be handled at the local city and county levels, where they constitutionally belong. In the interim, LAFCo should retain its current appropriate role of providing guidance through the CEQA process. Legally, the Preservation Policy is constitutionally and statutorily proscribed. Practically, it cannot be fairly implemented and funded as proposed. Accordingly, prudence dictates that your Board

Christopher Tooker
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direct staff to cease efforts to adopt the Preservation Policy and concentrate future efforts through the CEQA process.

We look forward to the opportunity to discuss these issues further with the members of the Commission. Please feel free to contact us should you have questions or concerns.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Gregory D. Thatch".

GREGORY D. THATCH

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cc: Mike Winn, Reynen & Bardis