

SHUTE, MIHALY
& WEINBERGER LLP

396 HAYES STREET, SAN FRANCISCO, CA 94102
T: (415) 552-7272 F: (415) 552-5816
www.smwlaw.com

HEATHER M. MINNER
Attorney
Minner@smwlaw.com

February 28, 2022

Via Electronic Mail Only

Solano County Board of Supervisors
675 Texas Street, Suite 6500
Fairfield, CA 94533
clerk@solanocounty.com

Re: Proposed Zoning Code Amendments for Agricultural Districts

Dear Chair Vasquez and Honorable Members of the Board:

This firm represents the Solano County Orderly Growth Committee in its efforts to preserve open space and working farms throughout the County. In a February 6, 2022 letter to the Board, the Committee noted that proposed Zoning Code amendments for agricultural districts would be too broad and vague, opening the door to non-agricultural businesses that could permanently displace agriculture and cause environmental impacts that must be analyzed under the California Environmental Quality Act ("CEQA"). We are writing to further emphasize that the proposed Zoning Code amendments could result in significant impacts to agricultural resources, among other impacts, and are therefore subject to environmental review under CEQA. The County's claim that the ordinance is exempt from CEQA is false.

I. The "common sense" exemption does not apply.

The February 1 agenda submittal for the proposed amendments states that the ordinance is "exempt from the requirements of CEQA under the 'general rule' exemption." This is not correct. The "general rule," or "common sense," exemption provides that CEQA does not apply only where "[i]t can be seen *with certainty* that there is *no possibility* that the activity in question may have a significant effect on the environment." 14 C.C.R. § 15061(b)(3) (emphasis added). To properly invoke this narrow exemption, an agency must support its finding with facts from the record. *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1130. Moreover, the exemption does *not* apply if there is a "reasonable possibility" that the

project will have a significant environmental impact. *California Farm Bureau Federation v. California Wildlife Conservation Bd.* (2006) 143 Cal.App.4th 173, 194.

The “common sense” exemption does not apply to the proposed Zoning Code amendments because the County cannot show “*with certainty* that there is *no possibility*” that the amendments may have significant environmental impacts. Courts have repeatedly found that where future development is anticipated, the common sense exemption does not apply. *See Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690, 704 (exemption did not apply to approval of a subdivision map because the establishment of new parcels anticipated future residential development); *California Farm Bureau Federation*, 143 Cal.App.4th at 195-96 (exemption did not apply to the conversion of agricultural land into wildlife habitat because the conversion necessitated changes to the land).

Here, there is no doubt that future development may occur as a result of the proposed amendments. Indeed, there is already evidence of anticipated projects in the record. To begin with, the February 1 agenda submittal expressly states that the changes are intended to “accommodate the increasing number of agricultural service and support activities inherent in modern farming practices.” Moreover, at the February 1 Board meeting, both Chair Vasquez and Supervisor Spring referred to existing plans for projects that the County “is looking at.” Both Supervisors expressed a strong preference for approving the new language quickly in order to be able to accommodate incoming “opportunities.” Specifically, Chair Vasquez discussed a pending agreement for the siting of a biomass and biodigester facility. He noted that the facility operator had already been told that under the current Zoning Code, the facility is not permitted. Thus, the amendments would facilitate development already anticipated by the County, and that is one of the County’s reasons for approving these amendments. The County cannot at the same time claim that there is no possibility of significant environmental impacts in an effort to dodge CEQA review.

II. The proposed ordinance could have significant environmental impacts.

It is clear that the zoning ordinance could have significant environmental impacts, particularly on the already scarce and irreplaceable agricultural lands in Solano County. The proposed language is too vague and permissive to meaningfully limit development and guard against resulting environmental impacts. Far from being mere “technical adjustments” as the agenda submittal claims, proposed amendments would allow for an expansive increase in the number and intensity of allowed uses, each of which will have environmental consequences.

For example, the proposed definitions for both “agritourism” and “agritourism facility” would permit an alarming number of new uses on agricultural land. The ordinance deletes a long list of activities that were previously excluded from the definition of “agritourism,” such as musical entertainment, racetracks, public golf courses, fairgrounds, and gun clubs. All of these uses could now be allowed as agritourism because they are “commercial activities conducted at a working farm or ranch . . . for the enjoyment of visitors.” The definitions also now specifically allow for lodging and accommodations facilities. A company that owns a ranch or farm could construct any number of buildings or facilities on the same property for these new enterprises.

Other proposed amendments would also permit new and expanded uses on agricultural lands. For example, “breweries” and “distilleries” would now be allowed as an “agricultural processing facility.” In addition, “farm equipment sales stores” and “farm and ranch supply stores” could now constitute primary uses that entirely occupy agricultural lands because proposed amendments remove the requirement that such stores be “incidental to the principal agricultural use.” Further amendments would make it possible for greenhouses to pave over vast swaths of prime farmland by considering a “greenhouse” as an “accessory building” allowed by right.

If adopted, these amendments could result in significant environmental impacts that must be evaluated under CEQA. Obviously, the conversion of prime farmland to other uses is a significant impact to agricultural resources. Even minor conversions of prime farmland land constitute a significant impact requiring mitigation. CEQA Guidelines, Appendix G, II(a); *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 733. Allowing greenhouses would also be a significant agricultural impact, given their potential to pave over prime farmland. See *Protect Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109.

The new uses may also have significant visual impacts given the introduction of new structures and facilities within scenic agricultural vistas. They may also result in significant odor impacts (consider the construction and operation of breweries and distilleries). The introduction of new “processing” and “agritourism” activities will also likely impact water supply, hydrology and water quality, air quality, and traffic. Furthermore, the cumulative impact of new facilities and events could be disastrous. These are only some of the potential environmental impacts that are likely to result from the proposed Zoning Code amendments.

Given the new and expanded uses that would be allowed by the Zoning Code amendments, and their potentially significant environmental impacts, the County cannot rely on the general rule/common sense exemption to avoid CEQA review. *See Muzzy Ranch Co. v. Solano County Airport Land Use Commission* (2007) 41 Cal.4th 372, 386-87 (agency did not meet its burden where it failed to cite any evidence for the common sense exemption and “legitimate questions” about “possible environmental impacts” were raised).

III. CEQA review is required at this stage.

The County cannot delay CEQA review claiming environmental impacts will be analyzed when specific projects are proposed. Courts have repeatedly found that agencies may not sidestep CEQA simply because “further decisions must be made.” *See Union of Medical Marijuana Patients, Inc.*, 7 Cal.5th at 1200-01 (zoning code amendments subject to CEQA regardless of future conditional permits); *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 794 (general plan amendment subject to CEQA). Instead, environmental review of changes to land use regulations must encompass the potential impacts from projects authorized by the changes. *Bozung v. LAFCO* (1975) 13 Cal.3d 263, 283 (LAFCO must analyze potential impacts of future development resulting from its approval of annexation).

Environmental review of the County’s proposed zoning code amendments is particularly necessary here, where some of the new uses would be allowed by right. In other words, there may not be an opportunity for CEQA review of future projects because CEQA does not apply to ministerial approvals. Pub. Res. Code §21080(a). The public will thus not have a later opportunity to raise environmental concerns and the County will miss its opportunity to impose mitigation requirements.

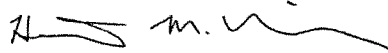
IV. Conclusion

Given the potential for significant environmental impacts, the County must conduct environmental review of the proposed Zoning Code amendments or risk CEQA litigation. Fortunately, the Board has the opportunity to properly consider comments raised by the public.

Solano County Board of Supervisors
February 28, 2022
Page 5

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP

A handwritten signature in black ink, appearing to read "H. M. Minner", with a stylized flourish at the end.

Heather M. Minner

CC: Bernadette Curry, County Counsel
Bob Berman, Chair, Solano County Orderly Growth Committee
Duane Kromm, Solano County Orderly Growth Committee

1475958.4

SHUTE, MIHALY
& WEINBERGER LLP



OFFICE OF THE COUNTY COUNSEL
SOLANO COUNTY GOVERNMENT CENTER
675 TEXAS STREET, SUITE 6600
FAIRFIELD, CA 94533

TO: Board of Supervisors
FROM: James Laughlin, Deputy County Counsel
DATE: March 8, 2022
RE: Zoning Text Amendment No. ZT-21-03

By letter dated February 28, 2022, the Orderly Growth Committee, through its attorneys Shute, Mihaly & Weinberger, has submitted comments contending that the proposed zoning text amendment could have significant environmental impacts. We substantially disagree with the Committee's contention, for the reasons explained in this memorandum.

In *Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171, the California Supreme Court held that not every proposed zoning amendment was a "project" requiring environmental review under CEQA. Instead, CEQA review was required only if the proposed amendment "is the sort that is capable of causing direct or reasonably foreseeable indirect effects on the environment." In that case, the city's prior zoning ordinance did not allow medical marijuana dispensaries within the city, while the zoning amendment permitted the establishment of such business subject to regulations. The Supreme Court held that the zoning amendment was a "project" for purposes of CEQA because it altered the city's land use regulations "to permit the establishment of a sizable number of retail businesses of an entirely new type."

Unlike the zoning amendment discussed in the *Union of Medical Marijuana Patients* case, the County's proposed zoning amendments do not permit the establishment of entirely new types of business or land uses. Instead, the primary focus of the County's proposed amendments is to conform the County's zoning regulations to the County's existing land use regulatory practices and state law, and to correct several vague, confusing, or inconsistent provisions within the existing zoning regulations. Various specific points raised by the Committee, and our responses to them, are as follows:

Agritourism and Agritourism facility: The Committee contends the proposed revisions to these definitions “would permit an alarming number of new uses on agricultural land,” including lodging and accommodations facilities. The Committee’s contention overlooks the fact that the Suisun Valley Strategic Plan recommended, and the County’s current zoning regulations allow, agricultural homestays, bed and breakfast inns, hotels, resort hotels, and vacation house rentals in the Suisun Valley agricultural zoning districts. While the existing definitions of “agritourism” and “agritourism facility” do not explicitly reference lodging and accommodation land uses, such uses are implicitly included within those terms by both the Strategic Plan and the current zoning regulations. Moreover, the existing definition of “agritourism” is vague and requires interpretation by the Zoning Administrator, but the Zoning Administrator’s interpretation in any particular case is not subject to public input or CEQA review because any use that the Zoning Administrator decides satisfies the existing definition of “agritourism” is allowed by right in all of the Suisun Valley agricultural zoning districts. The existing definition is as follows:

Agritourism: The provision of facilities, amusement activities, commercial services, guides, or instructional content to encourage visitors to any agricultural, horticultural or agribusiness operation, either temporarily or on a permanent basis, for the purpose of enjoyment, education, or active involvement in the activities of the farm or operation other than as a contractor or employee of the operation. Agritourism includes agriculturally related indoor and outdoor amusement and recreation activities such as farm tours, hayrides, sleigh rides, corn mazes, picnic and party facilities and other similar uses as determined by the zoning administrator. Agritourism does not include commercial amusement and entertainment uses, such as dance halls, electronic game arcades, studios, theatrical productions, musical entertainment, bowling alleys, billiard and pool establishment, commercial sports such as arenas, rings, racetracks, public golf courses, miniature golf course, amusement parks, membership sports and recreation clubs, game parlors, gun clubs, circus and carnival operations, water parks, amusement parks, fairgrounds, expositions, amphitheater or theater entertainment facilities for the performance of concerts or other entertainment events.

The proposed amendment would eliminate “agritourism” as a catch-all land use allowed by right within the Suisun Valley agricultural zoning districts, redefine any facility at which otherwise undefined agritourism land uses are conducted as an “agritourism facility,” and require a discretionary use permit for such land uses, which requires public notice and hearing and CEQA review. Unlike the *Union of Medical Marijuana Patients* case, the County’s proposed amendments to the definitions and permitting

requirements for “agritourism” and “agritourism facility” does not allow the establishment of any new types of business not already allowed by the current zoning regulations, but instead clarifies these two definitions and increases the permitting requirements, and associated opportunity for public input as well as CEQA review, for agritourism facilities.

Breweries and distilleries: The Legislature amended Civil Code section 3482.6 in 1993 to add “the production and bottling of beer” to that section’s definition of “agricultural processing activity, operation, facility, or appurtenance thereof.” Consistent with this state law definition of agricultural processing, the County has permitted several breweries – including the Solano Brewing Company, Ruhstaller, and Bally Keal Vineyard – as agricultural land uses in agricultural zoning districts. Distilleries are not identified as an agricultural processing activity in this Civil Code section, but several wineries produce and/or use distilled spirits as part of their wine making process.

Prior to 2008, the County regulated wineries as simply a type of agricultural processing facility. Due to the increasing development of wineries within the County and recognizing the need to develop special rules for this particular type of land use, the County enacted winery-specific land use regulations as part of Ordinance No. 1692 in May 2008. The County could take the same approach with breweries and/or distilleries, but such new brewery-specific or distillery-specific land use regulations are not being proposed as part of the currently proposed zoning amendments. Instead, the current amendment proposes only to explicitly recognize breweries and distilleries within the County’s zoning definition of “agricultural processing facility,” consistent with existing County practice and state law.

Farm Equipment Sales and Farm and Ranch Supply Stores: As part of the 2012 comprehensive update to the County’s zoning code, new language was added requiring these types of land uses to be “incidental to the principal agricultural use on the property.” While the term “incidental” refers to a separate land use that is secondary or subordinate to the principal or primary use of the property, the method of determining which use on a particular property is primary and which is secondary can vary depending on the circumstances. When the Suisun Valley agricultural zoning districts were established in 2011, “incidental” was used to describe uses intended to provide a secondary non-agricultural income source to operators of working farms and ranches. Accordingly, when multiple income-producing land uses are being conducted on a single property, using the relative amount of income derived from each land use is an acceptable method for determining which land use is secondary or incidental to the other.

This “new” 2012 requirement that the commercial sales land use be incidental to the agricultural land use on a parcel potentially renders any such existing commercial sales operation legal nonconforming, and thus unable to adapt or expand to meet

changing opportunities and market conditions, unless the net revenues derived from the commercial sales operation are less than the income derived from the farming or ranching operations on the property. This was not the County's intent in 2012 and has not been the County's practice either before or after 2012. The proposed amendment is intended to conform the County's zoning regulations to the County's land use regulatory practices, and it will not allow "entirely new types" of businesses.

Greenhouses: In 2005, the Legislature amended section 51201(b) of the Williamson Act to add greenhouses to the definition of agricultural use, as follows:

"Agricultural use" means use of land, including but not limited to greenhouses, for the purpose of producing an agricultural commodity for commercial purposes.

The Senate Rules Committee analysis of the bill (AB 365) describes the reason that this amendment was deemed necessary, as follows:

The popularity of cut flowers and other specialty crops has led to the expansion of greenhouse operations, which has been controversial in some coastal counties. Critics say greenhouses are industrial buildings that encroach on open space; growers see greenhouses as just another way to raise crops. County have not said that greenhouses are not eligible for Williamson Act contracts, but the cut flower industry worries about future pressures.

As explained in the bill analysis, the Legislature amended 51201(b) to preempt local governments from prohibiting greenhouses on land subject to Williamson Act contracts.

By explicitly recognizing that crop production within greenhouses is an agricultural use for purposes of the Williamson Act, the Legislature has identified greenhouses as buildings or structures accessory to agriculture, or in the terminology of the County zoning regulations, agricultural accessory buildings.

Consistent with both the letter and intent of AB 365, the County's long-standing land use regulatory practice has been to allow greenhouses as agricultural accessory buildings; examples of this practice include Hines Nursery and Gotham Greens.

Under the County's current zoning regulations, most agricultural accessory buildings are allowed by right, although there are some exceptions to this general rule, such as dairy barns and related structures, which require a discretionary use permit.

The County's zoning amendment proposes to explicitly recognize greenhouses as agricultural accessory buildings, consistent with state law, and to continue to allow such buildings and structures by right, consistent with the County's past practices. The amendment does not propose to impose new land use regulations or permitting requirements on such buildings, although the Board could direct staff to develop such requirements for the Board's consideration. Again, unlike the *Union of Medical Marijuana Patients* case, the County's proposed amendment relating to greenhouses does not allow the establishment of any new types of business or buildings not already allowed by the current zoning regulations.

Agritourism Facilities in the Exclusive Agriculture zoning districts: The proposed zoning amendment provided to the Board for its February 1 meeting included a provision that would newly authorize certain agritourism land uses in the A-40 and A-20 zoning districts. Although we do not fully agree with the legal analysis provided by the Committee's attorneys for a variety of reasons, including the fact that there is no pending or anticipated proposal for such a project anywhere within the A-40 or A-20 districts and thus it would be entirely premature and speculative to attempt to meaningfully evaluate to potential environmental impacts of an unknown number of undescribed projects at unknown locations, we do not want the clearly non-CEQA portions of the proposed zoning text amendment to be clouded or encumbered by the Committee's threats of CEQA litigation. For that reason, we have advised Planning staff to delete the proposed amendment that would authorize certain new agritourism land uses in the A-40 and A-20 zoning districts.