Memorandum
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TO: President Nate Miley
Supervisor Keith Carson
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FROM: Brian E. Washington, Chief Assistant County Counsel
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SUBJECT: PROPOSED MEASURE D AMENDMENTS TO ALLOW INCREASED FLOOR AREA FOR CERTAIN EQUINE FACILITIES

BACKGROUND AND QUESTION PRESENTED:

The Board of Supervisors is considering adoption of amendments to the East County Area Plan (ECAP) and the Castro Valley General Plan (CVGP) to increase the amount of allowable floor area above the floor area ratio (FAR) limitations set forth in these plans. The proposed amendments would allow an increase in floor area only for equine facilities with no more than one wall and an earthen floor, and only if such facilities are necessary to maintain a horse breeding and training use.

The proposed amendments would change portions of the ECAP and the CVGP that were amended and confirmed by the Save Agriculture and Open Space Initiative (Measure D), which was approved by the electorate in November 2000. In general, State law and Measure D prohibit changes to its provisions unless also approved by a vote of the electorate. However, Measure D allows the Board of Supervisors to make certain "technical or nonsubstantive" modifications that are consistent with the purposes of Measure D.

The purpose of this memorandum is to analyze whether the proposed amendments may be approved by the Board as a technical amendment consistent with Measure D.

SHORT ANSWER:

Given the discretion that California law gives the Board of Supervisors in interpreting the county's general plan, the Board could find that the proposed amendments are technical in nature because they address the needs of the horse breeding and training industry for additional facilities that are not required for other types of commercial agriculture. We believe that a court would give some deference to this interpretation, and to a Board determination that the amendments are generally consistent with the purposes and content of Measure D because the amendments are crafted to preserve and enhance horse breeding and training, a recognized form of commercial agriculture. Since Measure D's "technical and nonsubstantive" amendment provision is narrow, the interpretation offered by the Sierra Club and other

proponents of the Measure is plausible. Given the deference that California law provides for your Board's interpretations of the general plan, if the Board determined that the amendment did not comply with Measure D, a reviewing court would likely not overturn that conclusion.

DISCUSSION AND ANALYSIS:

The Sierra Club in a comment letter to the Planning Commission argues that the proposed amendments violate Measure D and State law unless they are adopted by the voters. They cite to California Elections Code Section 9125, which provides as follows: "No ordinance proposed by initiative petition and adopted . . . by the voters shall be . . . amended except by a vote of the people, unless provision is otherwise made in the original ordinance."

Section 23 of Measure D provides certain exceptions that do allow for the Board to approve amendments. Specifically relevant to the proposed amendments, Section 23 provides that the Board may "make technical or nonsubstantive modifications . . . for purposes of reorganization, clarification or formal consistency within a Plan." As noted and discussed in the Initial Study for the proposed amendments, the objective of the proposed amendments is to be consistent with the intent of Measure D, and to provide internal consistency of both the ECAP and the CVGP.

The Sierra Club argues that the amendments cannot be considered a "technical" amendment because the proposed amendments allow additional development in conflict with a explicit development limitation in Measure D. They maintain that the only technical amendments that should be permitted without a vote are those that correct things such as renumbering and changes to land use diagrams.

We believe that the Sierra club is taking too narrow a view of what a "technical" amendment may include. In interpreting the language of an initiative such as Measure D, courts apply the same principles as they do to interpret statutes. (See *People v. Rizzo* (2000) 22 Cal.th 681, 685.) The first step in such an interpretation is to look at the "plain meaning" of the initiative language. Next, courts will construe the initiative language "in the context of the statute as a whole and the overall statutory scheme." (*Id.*)

The plain meaning of "technical" here does not and cannot mean "nonsubstantive" because Section 23 allows the Board to approve a "technical" OR "nonsubstantive" amendment. The amendment does not need to be both technical AND nonsubstantive to be permissible, as suggested by the Sierra Club. In addition, the dictionary definition of "technical" includes the following: "Peculiar to or characteristic of a particular art, science, profession, trade, etc."[1] Under this definition, the amendments here can be considered "technical" because they are specifically crafted to address an issue particular to commercial horse breeding and training.

As discussed in the Initial Study prepared for the amendment, modern, efficient, professional horse training can require more than 40,000 square feet of agricultural buildings

[1] Dictionary.com

and structures. Measure D's FAR limits would only permit 43,560 sf of agricultural facilities on a 100 acre parcel. However, although the minimum parcel size under Measure D is 100 acres, the prevailing lot size in the rural areas of the County is closer to 50 acres, a characteristic that predated the adoption of Measure D. On a 75 acre parcel, agricultural facilities would be limited to less than 33,000 sf, and even less for a 50 acre parcel. Thus, Measure D's FAR limitations are impacting the "technical" requirements of the horse breeding and training industry in the County, and these technical amendments are necessary to address this issue.[2]

In addition to being "technical" or "nonsubstantive", in order for these amendments to be approved by the Board, they must also be "consistent with the purposes and substantive content" of Measure D. As stated in Section 1 of Measure D, its purposes are "<u>to preserve and enhance agriculture and agricultural lands</u>, and to protect the natural qualities, the wildlife habitats, the watersheds and the beautiful open space of Alameda County from excessive, badly located and harmful development."

The proposed amendments would be consistent with the purposes of Measure D because they would preserve and enhance horse breeding and training, a recognized form of commercial agriculture. Horse breeding and training may have always been a form of commercial agriculture, but there have been developments since the passage of Measure D that clarified and confirmed this interpretation. The California Department of Conservation issued a policy clarification providing that for purposes of the Williamson Act, "a facility dedicated to the commercial breeding and training of horses, including training for racing, may constitute an 'agricultural use' of the land." This policy was formally adopted into the County Williamson Act program, which was approved by the Board in October 2011. (See County Williamson Act Uniform Rule 1, Section I.C.2.) Thus, the proposed amendments are consistent with one of the primary purposes of Measure D.

The Sierra Club also argues that the proposed amendments are inconsistent with the "substantive content" of Measure D because they contradict an explicit provision prohibiting the increase of FAR. However, the proposed amendments do not increase FAR generally, but rather allows a specific, limited type of additional development that will only be permitted if it is shown that it is necessary to maintain the horse breeding and training use. In addition, as noted above, courts will look at the initiative language "in the context of the statute as a whole and the overall statutory scheme." (*Rizzo*, 22 Cal.4th at 658.) Here, the "overall statutory scheme" is not just the language of Measure D, but the County General Plan, and specifically ECAP and the CVGP, which were amended by Measure D.

Under California Planning Law, every City and County must adopt "a general plan for the physical development of the county or city." (Gov. Code § 65300.) General Plan policies typically reflect a range of completing interests, but the County's land use decisions must be consistent with the policies expressed in the plan. (*Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 815.) However, the courts are highly deferential when reviewing an agency's interpretation of its own general plan. "Because policies in a general plan reflect a

[2] As noted in the Negative Declaration, the general plan contains an analogous exception to the FAR requirement for another specific agricultural-related use – nurseries. Neg. Declaration, p.3.

range of competing interests, the governmental agency must be allowed to weigh and balance the plan's policies when applying them, and it has broad discretion to construe its policies in light of the plan's purposes." (*Id.* at 816.)

In *Lagoon Valley*, the court found that Vacaville's approval of a development project was consistent with the City's general plan, although it permitted residential development at a density greater than envisioned under the general plan. The court noted that "the question is not whether the proposed development matches the square footage envisioned for the various uses in planning documents, but whether the project is compatible with, and does not frustrate, the general plan's goals and policies." (*Id.* at 822.)

Similarly, a court reviewing the decision of the Board here should ask whether the amendments are generally compatible with Measure D and the ECAP and CVGP and whether they frustrate their goals and policies. As noted above, the amendments help preserve and enhance a form of commercial agriculture, which is a primary purpose of Measure D. Other purposes of Measure D include protecting the natural qualities and open spaces of the County. The proposed amendments are arguably inconsistent with these purposes as they would allow some limited, additional development. However, overall we believe that the Board could reasonably conclude that they are generally compatible and, on balance, do not frustrate the County general plan goals and policies. And, a reviewing court should defer to the Board's conclusion on this question.

For all of these reasons, we believe that the Board can approve the proposed amendments, and that a vote of the electorate is not necessary.