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April 18, 2018

Via E-Mail Only

Council President Esmerelda Soria
and Councilmembers
City of Fresno City Council
2600 Fresno Street
Room 2097
Fresno, CA 93721

Re: Proposed Amendment to General Plan Policy RC-9-c

Dear Council President Soria and Honorable Councilmembers:

I represent the League of Women Voters of Fresno. I write to convey the League's concerns about the proposed amendment to General Plan Policy RC-9-c. I am informed that the proposed amendment is on the Council's agenda for this Thursday, April 19. I also write to strenuously object to the City's failure to notify the League of either the Planning Commission's or City Council's action on this item, despite the League's request for such notice and staff's express representation that the League would be notified.

I. The City failed to notify the League of the proposed amendment despite committing to do so.

On April 6, 2017, after an inquiry by my associate Peter Broderick, Mr. Broderick and I received an email from Sophia Pagoulatos of the City's Development and Resource Management Department confirming that the Department was preparing an amendment to General Plan Policy RC-9-c as requested by the Council in Resolution 2017-61. Ms. Pagoulatos wrote, "We will also put you on the noticing list for the plan amendment related to this item." A copy of her email is attached as Exhibit A.

On June 22, 2017, I sent the letter attached as Exhibit B to Jennifer Clark, Director of the Department, and copied Ms. Pagoulatos. The letter conveys the League's concerns about the proposal to amend Policy RC-9-c,

which ensures that farmland conversion is fully mitigated by protecting an equal area of comparable farmland, and indicated the League's strong interest in participating in this process.

Despite the City's commitment to notify the League of further action on the proposed amendment and the League's demonstrated interest in that process, the League received *no notice* of the Planning Commission's action on the amendment and *no notice* of the Council's upcoming consideration of it. The League only learned of the impending Council action from another group on Friday, April 13.

The City's failure to notify the League of the Planning Commission's consideration of this item—despite its clear representation that it would do so—deprived the League of an opportunity to respond to the text of the proposed amendment before the Planning Commission. At the time I sent our prior letter in 2017, staff had not yet developed proposed language for the amendment and thus we had no proposal to which to respond. As you are no doubt aware, the Government Code requires that General Plan amendments be first considered by the Planning Commission for preparation of a recommendation to the Council. Gov't Code §§ 65353-54. Moreover, state law requires a public hearing on the proposed amendment to ensure that the public has a full opportunity to consider and comment on the proposal. Gov't Code § 65353. And another public hearing must be held by the Council. Gov't Code § 65355. The Legislature plainly contemplated that broad public participation would be a critical component of the process of adopting and amending a General Plan.

The City's failure to notify the League also violated the municipal code, which requires that notice be provided to "[a]ny person or group who has filed a written request with the Director for notice regarding the specific application." Fresno Municipal Code § 15-5007(B)(3).

In light of the City's exclusion of a key stakeholder in this process, the League requests that the Council return the proposed amendment to the Planning Commission for further consideration in a truly open process. At the very least, the Council should continue this agenda item to a further meeting to allow the League to more fully develop its comments on the proposal.

II. The proposed amendment to Policy RC-9-c could be interpreted as a repudiation of the City's commitment to fully mitigating the loss of farmland.

Our comments in the attached letter are largely applicable to the proposed amendment. We will not repeat those comments here, but rather incorporate them by this reference.

One clear problem with the proposed amendment identified in our prior letter is that it eliminates the certainty provided by the current version of the Policy. It replaces a clear rule with an ad hoc process. Doing so deprives landowners of the ability to predict what the City will require for significant farmland conversion. And it also exposes to the City to a greater risk of liability from the imposition of mitigation.

A potentially more significant problem, however, is that the proposed amendment could be construed as a wholesale abandonment of the City's commitment in the current Policy to *require* full mitigation for the conversion of farmland. As you know, CEQA requires that significant environmental impacts be mitigated to a less-than-significant level where feasible. CEQA Guidelines §§ 15002(a)(3), 15021(a). If mitigation is not feasible, the legislative body may nonetheless approve a project if it makes findings of overriding considerations that are supported by substantial evidence. *Id.* §§ 15021(d), 15093.

Given its reference to CEQA, the proposed amendment to Policy RC-9-c might be read to allow projects converting significant farmland to be approved without full mitigation of the conversion. Such a reading, however, would represent a *complete repudiation* of the full mitigation principle reflected in the current Policy. The League assumes that this is not the City's intention. Indeed, this interpretation would make the Policy an utter nullity; the Policy then would add nothing to the existing requirements of CEQA. Under ordinary principles of statutory interpretation, statutory language will not be interpreted in a manner that renders it pointless. *See, e.g., Twain Harte Homeowners Ass'n v. Cty. of Tuolumne* (1982) 138 Cal.App.3d 664, 699.

Rather, the amendment should be read, as it would be most naturally, to mean that conversion of significant farmland *must be fully mitigated*, but that it may be so mitigated using any method that would qualify as mitigation under CEQA, *see* CEQA Guidelines § 15370 (defining "mitigation"), and that the City may not, consistent with the Policy, approve

a project that fails to provide such complete mitigation. This reading is supported by the staff report, which suggests that the amendment is intended merely to provide "additional flexibility" in deciding what methods are used to ensure that farmland conversion is mitigated. Staff Report at 5. Similarly, the proposed addendum to the General Plan Master Environmental Impact Report ("MEIR") states that "The purpose of the amendment to the Farmland Preservation Program Policy RC-9-c is to provide more options for farmland preservation." Agenda Ex. D at 1.

Accordingly, if the Council in fact intends to make the Policy merely duplicative of the requirements of CEQA, it must say so clearly. Needless to say, the League would strenuously object to such a reversal of course from the recently adopted General Plan. Given that we have brought this interpretive issue to the Council's attention, the City will not be able to claim in later litigation that the amendment was in fact intended merely to require future projects to comply with CEQA.

However, if the Council does intend to repudiate the existing mitigation policy, doing so would result in the General Plan having more severe environmental impacts than were contemplated in the MEIR. As the staff report notes, "Policy RC-9-c was included in the Fresno General Plan and cross-referenced in the MEIR in order to mitigate the loss of farmland to the extent possible." Staff Report at 5. Yet the addendum concludes that "the proposed Plan Amendment, Rezone and Text Amendment will not substantially increase the severity of the impacts that were addressed in the Master EIR and PEIR." Agenda Ex. D at 3. That can be true only if the proposed amendment to Policy RC-9-c does not substantially alter the effect of the existing Policy.

CEQA forbids deleting or modifying previously adopted mitigation measures like the Policy "without a showing that it is infeasible." *Napa Citizens for Honest Government*, 91 Cal.App.4th at 359; *see also Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, 1167 ("mitigation measures cannot be defeated by ignoring them"); *Katzeff v. California Dept. of Forestry and Fire Protection* (2010) 181 Cal.App.4th 601, 611 (mitigation measures are not "nullified by the passage of time"). Additionally, if an agency modifies mitigation, it must conduct additional environmental review to evaluate the environmental impacts of changing its mitigation. *Lincoln Place Tenants Assn. v. City of Los Angeles* (2005) 130 Cal.App.4th 1491, 1509; 1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (2d ed. 2015) § 14.35, pp. 14-44 to 14-45 ("reasons for deleting the mitigation

measure . . . must be addressed in a supplemental EIR or other CEQA document such as an addendum").

Given that the addendum here provides no such analysis with respect to the proposed amendment to Policy RC-9-c, one can only conclude that that amendment does not have the effect of altering the mitigation commitment in the current Policy. The alternative interpretation would render the amendment invalid under CEQA.

* * *

These comments are necessarily abridged given the City's failure to properly notify the League of the City's proposed action. Given that failure, the City should, at the least, continue this agenda item to a future meeting to allow the League adequate time to evaluate and comment on the proposal.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP

Matthew D. Zinn

cc: Mary Savala
Dan O'Connell
Lee Brand, Mayor of the City of Fresno
Yvonne Spence, City of Fresno City Clerk

992323.1

EXHIBIT

A

From: Sophia Pagoulatos <Sophia.Pagoulatos@fresno.gov>
Sent: Thursday, April 06, 2017 2:56 PM
To: Peter J. Broderick; Matthew D. Zinn
Subject: Resolution 2017-61 Re: Fresno Farmland Mitigation

Hello:

Pursuant to your inquiry about Fresno City Council resolution 2017-61, this is to confirm that yes, the resolution was an initiation of a plan amendment. Any plan amendment would need to be considered by the Planning Commission and City Council at public hearings, and final action would be taken by the City Council.

You may check the following link to access public hearing notices on the City's website:

https://www.fresno.gov/cityclerk/notices-publications/

We will also put you on the noticing list for the plan amendment related to this item.

Best regards,

Sophia Pagoulatos
Planning Manager
City of Fresno
Development and Resource Management Department
(559) 621-8062

EXHIBIT B

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MATTHEW D. ZINN
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June 22, 2017

Via U.S. Mail

Jennifer Clark
Director
Development and Resource
Management Department
City of Fresno
2600 Fresno Street
Fresno, California 93721

Re: Resolution to Amend General Plan Policy RC-9-c (Farmland Mitigation)

Dear Ms. Clark:

I am writing on behalf of the League of Women Voters of Fresno to comment on a potential amendment to General Plan Policy RC-9-c which I believe the Development and Resource Management Department is currently developing. As you know, on March 2, 2016, the Fresno City Council adopted Resolution 2017-61 to initiate a General Plan amendment "to remove the specific requirement for permanent easements from [General Plan] Policy RC-9-c." That policy requires the City to implement a Farmland Preservation Program requiring mitigation for the loss of farmland. Specifically, the program requires development projects converting Prime Farmland, Unique Farmland, or Farmland of Statewide Importance to urban uses outside City limits to permanently protect an equal amount of similar farmland with a conservation easement.

The League was actively involved in the long and only recently completed comprehensive update to the Fresno General Plan and supported the addition of Policy RC-9-c. The League therefore strongly

opposes elimination of the Farmland Preservation Program. The City would be best served by *strengthening* Policy RC-9-c, not by removing it. This letter is intended to raise several issues that you and your staff may want to consider as you develop a response to Resolution 2017-61 and prepare any draft amendments and associated staff reports.

Removing the permanent agricultural conservation easement requirement would seriously undermine the City's ability to preserve farmland effectively, which is a critical matter of local, regional, and statewide concern. The California State Legislature has emphasized the importance of preserving agricultural land in California, and has consistently recognized these lands' valuable contribution toward food production, open space, and the state's economic health. *See* Gov. Code § 51220; Civ. Code § 815; Pub. Res. Code §§ 10201, 10331. Agriculture's importance in Fresno County, in particular, cannot be overstated. In 2015, the gross production value of Fresno County's agricultural commodities was over $6.6 billion. As the City's General Plan recognizes, Fresno's "world-class" agriculture industry is an integral part of the City's long-term potential for economic development and job creation. General Plan at 2-2. And one of the General Plan's key goals for the City is to "[s]upport agriculture and food production as an integral industry." General Plan at 1-6 (Goal 5).

The League applauds the foresight the City displayed in 2014 when it developed and included Policy RC-9-c in the Fresno General Plan. It would be a step backward to unwind this progress when farmland conversion remains a serious concern in Fresno. By promoting smart growth principles and infill development, Policy RC-9-c encourages development of urban land uses within existing neighborhoods and commercial corridors, which in turn relieves the pressure to develop farmland in inefficient ways. Smart growth increases property values, and thus generates additional tax revenue for the City, by promoting high value mixed-use and transit-oriented development. Efficient development also saves the City the expense of extending services and infrastructure to dispersed developments.

Policy RC-9-c does not provide the sole legal basis for mitigation for the loss of farmland to urban development. As you are aware, the California Environmental Quality Act ("CEQA"), Pub. Res. Code § 21000 et seq., requires agencies to analyze the significant environmental impacts of projects that they approve or carry out, and *to mitigate those impacts*, where feasible, to a less than significant level. The Legislature has declared that CEQA "plays an important role" in effectuating the important public policy of preserving agricultural lands within the state. Stats. 1993, ch. 812, § 1, p. 4428. Accordingly, CEQA's environmental analysis and mitigation requirements extend to farmland conversion. *See San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 733 (EIR was deficient due to an inaccurate assessment of the amount of prime farmland to be converted as a direct result of the development project); *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 320-22 (EIR found conversion of 40 acres of farmland a significant impact even after purchase of conservation easements at a 1:1 ratio). Specifically, courts have recognized that the creation of permanent agricultural conservation easements over comparable farmland—which Policy RC-9-c currently requires—serves as mitigation for the conversion of farmland to urban uses. *See Masonite Corp. v. County of Mendocino* (2013) 218 Cal.App.4th 230, 238-41; *see also Building Industry Association of Central Cal. v. County of Stanislaus* (2010) 190 Cal.App.4th 582 (upholding General Plan farmland mitigation policies as a reasonable response to farmland conversion).

Because CEQA will require mitigation for farmland conversion in most cases anyway, removing or watering down Policy RC-9-c will not avoid the need for real mitigation. And it could have harmful side effects. Inclusion of a Farmland Preservation Program in the General Plan avoids ad hoc, inconsistent approaches to mitigation, which serves the City in two ways.

First, maintaining a legislatively adopted farmland mitigation program with clear requirements provides predictability for all landowners. Landowners considering conversion to urban uses will

have a better idea of the mitigation they will be required to implement and the cost of doing so. Landowners who wish to preserve their farmland (or entrepreneurs looking to develop farmland mitigation banks) will have greater assurance that there will be demand for agricultural easements.

Second, maintaining a legislative policy of farmland mitigation provides the City with additional protection against challenges by landowners alleging that farmland mitigation has "taken" their property without just compensation. Courts give greater scrutiny to ad hoc conditions imposed on new development than they do to requirements imposed in a uniform fashion on a legislative basis. *See San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 668-70 (legislatively adopted land use exactions of general applicability are not subject to the heightened nexus and proportionality tests). Such uniform mitigation requirements can also avoid the uncertainty created by the United States Supreme Court's "regulatory takings" decision in *Koontz v. St. Johns River Water Management District* (2013) 568 U.S. ___, 133 S.Ct. 2586, in which the Court suggested that discussions of potential ad hoc mitigation measures for a project can lead to takings liability.

The City will also likely need to conduct CEQA review if it amends the General Plan to eliminate or weaken Policy RC-9-c. General Plan amendments and updates are discretionary projects subject to CEQA, Cal. Code Regs., tit. 14 § 15378(a)(1), even if they do not specifically propose or permit development, *see City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398, 409. Accordingly, if substantial evidence supports a fair argument that an amendment will result in potentially significant environmental impacts, environmental review is mandatory. Removing the permanent conservation easement requirement in Policy RC-9-c could discourage smart growth and efficient planning and result in a variety of potential impacts from reasonably foreseeable new farmland conversion. Therefore, the City would likely need to conduct an initial study to determine the nature and extent of these impacts, and would almost certainly need to prepare an EIR for an amendment to eliminate the

Policy. As you are well aware, this process can be expensive and involves litigation risks.

Although Resolution 2017-61 initiated the process of developing an amendment to the mitigation requirement of Policy RC-9-c, for all of the reasons just discussed, it makes little sense for the City to abandon that policy. And City staff and the Planning Commission are well within their authority to recommend that the Council *not* adopt such an amendment. The Government Code specifically provides for Planning Commission consideration and approval of a general plan amendment *independently* of the City Council's determination whether to approve the amendment. Gov. Code §§ 65356, 65354. The municipal code similarly contemplates an independent role for the Planning Commission, Fresno Municipal Code § 15-4903-E, and for the Director of the Development and Resource Management Department, *id.* § 15-4904-G, I (requiring the Director to make recommendations to the City Council and Planning Commission).

The League proposes that in addition to recommending that the City Council reject an amendment to repeal the Farmland Preservation Program, staff prepare and recommend an alternative amendment for the Planning Commission and City Council's consideration. To this end, the League urges staff to develop an alternative proposal that strengthens Policy RC-9-c by extending its existing mitigation requirement to agricultural land *inside* the City limits. The Policy could also be strengthened in other ways. For example: (1) it could expressly require that mitigation land be of equal or better soil quality, have a dependable and sustainable supply of irrigation water, and be located in Fresno County; (2) it could state that proposed mitigation lands may not already be encumbered by a conservation easement of any nature; and (3) it could ensure compliance by requiring a resolution or other certificate by the Planning Commission that adequate mitigation has been secured before any building or land-use permit will issue.

The California Council of Land Trusts has prepared a guidebook to assist communities working to develop and refine their farmland mitigation programs. The guidebook has distilled the best practices

developed over the years into a farmland mitigation primer with an accompanying model farmland mitigation ordinance for use by local governments. This useful resource can be accessed online at: https://www.calandtrusts.org/wp-content/uploads/2014/03/conserving-californias-harvest-web-version-6.26.14.pdf.

I hope that the discussion in this letter will be useful to you as you move forward in responding to Resolution 2017-61. The League would welcome any opportunity to collaborate further with the City to preserve and enhance the City's agricultural values and heritage. Please do not hesitate to contact me if you have any questions or if I can assist you in any way.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP

Matthew D. Zinn

cc: Sophia Pagoulatos, Planning Manager