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**VIA E-MAIL**

Board of Supervisors
COUNTY OF LAKE
255 North Forbes St
Lakeport, CA 95453

Re: **Board of Supervisors' Meeting – April 12, 2022**

**Agenda Item 6.9 – Proposed "Moratorium on New Agricultural and Cannabis Cultivation Projects, etc"**

**COMMENTS AND OBJECTIONS TO PROPOSED "URGENCY" MORATORIUM ORDINANCE, and Request for Continuance of the Hearing**

Dear Honorable Chair and Members of the Board of Supervisors of the County of Lake:

We respectfully submit this letter on behalf of our client Lake County Development Company and its affiliates to briefly raise just some of the many objections to the proposed "urgency ordinance" being suggested which threatens to impose an unjustified, overbroad, and unlawful "moratorium" on the County's consideration or approval of new agricultural or cannabis cultivation projects.

While we share the proponent's reasonable concern about on-going drought conditions impacting many parts of California, and the importance of prudent measures to support water conservation, this proposed moratorium is not the right legislative "tool" to address those concerns. We respectfully urge rejection of this mis-guided effort.

There are a multitude of reasons – legal, environmental, and public policy reasons – for rejecting the proposed adoption of this Urgency Ordinance, some of which are summarized below.

**Adoption of the "Urgency Ordinance" would violate Government Code Section 65858**.

A local government, like the County, may not adopt an interim ordinance as an "urgency measure" unless it complies with certain limited circumstances, as specified in California Government Code § 65858. Those circumstance are not shown to be present here.

**First**, there is no evidence cited in support of the proposed Urgency Ordinance demonstrating that the County is in fact currently "considering or studying" making changes to its general plan or zoning regulations related to the drought conditions that are alleged to be the

justification for the proposed moratorium, which is threshold condition required by Section 65858. Accordingly, the County may not adopt the proposed Urgency Ordinance. *See, e.g., Sunset View Cemetery Assn. v. Kraintz* (1960) 196 Cal.App.2d 115, 123-124 (1961) (Court of Appeal invalidated a County urgency ordinance related to a mortuary project, because "[n]othing in the record indicates that the ordinance formed any part of a zoning plan or that [the County] had even contemplated the ordinance [prior to a trial court's order requiring the County to process and approve the cemetery's request for a building permit]; rather the enactment of the moratorium ordinance stemmed from the County's attempt to frustrate [the cemetery's] plans.")

**Second**, the proposed Urgency Ordinance does not provide the necessary "findings" required by Section 65858. Unless the Board of Supervisors – by a 4/5 vote – can truthfully make specified "findings" that are supported by "substantial evidence" in the public record, the County may not lawfully adopt the proposed urgency moratorium ordinance. The ordinance must contain "legislative findings" (1) "that there is a *current and immediate threat* to the public health, safety, or welfare," and (2) that the *approval* of additional subdivisions, use permits, variances, building permits, or any other applicable entitlement for use which is required in order to comply with a zoning ordinance *would result in that threat to public health, safety, or welfare*."

Although the public draft of the proposed Urgency Ordinance appears to recite that various state or County agencies have declared drought-related 'states of emergency' going back to March and May of 2021, the Ordinance itself fails to make adequate "findings" that there is "a *current and immediate threat* to the public health, safety, or welfare." There is no finding, much less any substantial evidence in the record, demonstrating any new, recent, or more "immediate" threat than those old declarations of states of emergency by other agencies. See, e.g., *Building Industry Legal Defense Foundation v. Superior Court* (1999) 72 XL.pp.4th 1410 (invalidating 'urgency ordinance' suspending the processing of applications for building permits" on two grounds, including failure to make adequate findings, or produce evidence, of a "current and immediate threat" to school overcrowding due to processing of permit applications.)

**Third**, the public draft of the proposed Urgency Ordinance does not make any findings to the effect that the County's "approvals" of additional use permits or other permits will cause or "*result in that threat to public health, safety, or welfare.* There no analysis or explanation that would support such an illogical finding of some "cause & effect" relationship between the mere approval of "permits for use" and any alleged exacerbation of the threat to public welfare related to drought conditions. There is no evidence of any correlation between approval of permits to use *land* for cultivation consistent with the general plan and any increased threats of harm to public *water* resources, as they are subject to distinct regulatory regimes.

**Fourth**, there is no substantial evidence in the public record sufficient to support any attempt by the Board to truthfully make the statutory findings. The Legislature expressly insisted in Section 65858 that any attempt to adopt an "urgency ordinance" must be supported by findings of an emergency situation and an actual immediate threat, supported by substantial evidence. As the Supreme Court has stated: "[T]he mere declaration of the council . . . that the ordinance is

passed for the immediate preservation of the public health is neither conclusive nor yet sufficient." (*In re Hoffman* (1909) 155 Cal. 114, 120.)

This requirement for actual evidence demonstrating some imminent threat reflects the Legislature's concerns that an urgency ordinance, adopted "without following the procedures otherwise required prior to the adoption of a zoning ordinance," has a high likelihood of substantially and adversely impacting the rights of affected property owners and the broader community, and may lead to unanticipated consequences. (See, e.g., *Calif. Charter Schools Ass'n v. City of Huntington Park* (2019) 35 Cal.App.5th 362 (invalidating city's interim moratorium on establishment and operation of charter schools; insufficient supporting evidence of justification for moratorium); *Silvera v. City of South Lake Tahoe* (1970) 3 Cal.App.3d 554 (granting property owner's petition for writ of mandate and invalidating city's emergency zoning ordinance.)

**The proposed Moratorium Ordinance would be unlawful for many other reasons.**

**Grandfathering pending applications**: The proposed Ordinance would create an arbitrary "grandfathering" exception for certain permit applications, by creating an arbitrary and unlawful distinction between permit applications which the County staff has reviewed and forwarded to the State Clearinghouse and those applications (such as those of our client) which have been reviewed by County staff but are still "in the queue" for processing due to County personnel shortages, turnover, and other causes beyond the control of the applicants. There is no provision in State law allowing the use of "submission to the State Clearinghouse" as a valid basis for such distinctions.

While we believe it would be appropriate and necessary to provide for "grandfathering" pending permit applications if any moratorium were to be imposed, this would not be a lawful approach. All previously-filed permit applications that have undergone Planning Staff review should be exempted from any new moratorium.

"**Line- Jumping**:" The Board should take into account that there is substantial evidence that many permit applications appear to have been allowed to unfairly and improperly "line-jump" ahead in the processing queue, being placed ahead of applications that were submitted much earlier. The Board should direct Staff to investigate the rampant practice of allowing such arbitrary and unfair line-jumping by later-filed applications before adopting any moratorium and establishing a grandfathering exemption.

For example, the use permit applications of our client, Lake County Development, were duly submitted for County review more than a year ago, between October and December 2020. Had the County processed those applications in a timely manner consistent with the Permit Streamlining Act and the California Environmental Quality Act ("CEQA"), their applications would have either been fully approved by now or would at least have been advanced to the State Clearinghouse.

**Denial of Constitutional Rights to Due Process and Equal Protection**. A local government may not lawfully use an urgency ordinance to arbitrarily target or discriminate against a particular project or type of development project, as this proposed ordinance would do. (*Kieffer v. Spence* (1984) 153 Cal.App.3d 954 [invalidating city's interim ordinance targeting particular video gaming establishments].) If indeed the true concern underlying the proposed moratorium is the drought condition, then there is no rational basis for the Board to seek to prohibit only new agricultural projects, as distinct from all new water users.

**CEQA**: The terse staff memo accompanying this agenda item indicates that the County may attempt to claim that this proposed moratorium ordinance should be "exempt" from CEQA review and compliance. There is no substantial evidence offered, however, to support any claim an CEQA "emergency" exemption. The Court of Appeal rejected such an "emergency" CEQA exemption in *Los Osos Valley Associates v. City of San Luis Obispo* (1994) 30 Cal. App. 4th 1670 [rejecting a similar water shortage argument]:

> An emergency under CEQA also is "… a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services. 'Emergency' includes such occurrences as fire, flood, earthquake, or other soil or geologic movements, as well as such occurrences as riot, accident or sabotage." ( Pub. Resources Code, § 21060.3.) The exception for action under CEQA for emergencies "… is … extremely narrow." ( *Western Mun. Water Dist. v. Superior Court* (1986) 187 Cal. App. 3d 1104, 1111.) "We particularly note that the definition limits an emergency to an 'occurrence,' *not a condition*, and that the occurrence must involve a 'clear and imminent danger, demanding immediate action.'"

To the contrary, such a moratorium would undoubtedly result in significant adverse effects on the environment, including "displacement" impacts as well as impacts on the local economy and resultant impacts on the physical environments. The memo does not address the "exemptions" to the claimed exceptions. The Board should not act on the proposed ordinance unless and until the County complies with CEQA.

**The proposed Moratorium Ordinance would result in General Plan inconsistencies**. To the extent that a moratorium, if adopted, would halt most new agricultural development (including cannabis) in the County which is currently planned or in process on lands designated for such uses in the applicable County General Plan, it would be fatally inconsistent with the Plan. Zoning actions inconsistent with a general plan are invalid, and "void ab initio." (*Lesher Communications v. City of Walnut Creek* (1990) 52 Cal.3d 531.)

The proposed Ordinance is overbroad, and improperly seeks to impose a blanket prohibition on approvals of land use permits. However, permission to use *land* for agricultural purposes is distinct from permission to use public *water* resources. The County's continued review and approval of use permits for cannabis cultivation, for example, does not automatically result in increased water consumption in Lake County, nor does it inherently or unconditionally confer

rights for water usage. And of course the County retains to the authority to impose reasonable conditions on its land use permits calculated to conserve the use or consumption of public water resources – without completely prohibiting the approval of new use permits for cultivation.

Adoption of the proposed Urgency Moratorium Ordinance would not only be unlawful, it would be unnecessary, overbroad, and over-kill – like using a sledgehammer to drive a nail.

We respectfully urge the Board to reject this proposal. This sudden, and un-studied, proposal has been put forward abruptly, without adequate opportunity for analysis by County staff, and without adequate notice and time for public review and response. Accordingly, in the event that this ill-considered action is not dropped completely, in the alternative, we respectfully request that it at least be continued for reasonable time to allow for the necessary analysis and public review that is not being afforded by the proposed hearing on April 12, 2022.

Thank you for your consideration of these comments and objections..

Very truly yours,

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DPL:cm

cc: Anita Grant, County Counsel, *via email*
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