SOMACH SIMMONS & DUNN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

500 CAPITOL MALL, SUITE 1000, SACRAMENTO, CA 95814
OFFICE: 916-446-7979 FAX: 916-446-8199
SOMACHLAW.COM

October 14, 2024

Via Email Only

Board of Supervisors
County of Lake
c/o Clerk of the Board
255 N. Forbes Street
Lakeport, CA 95453
clerkoftheboard@lakecountyca.gov

Re: Supplemental Documentary Evidence in Support of Appeal of Planning Commission's Approval of Highland Farms Cannabis Farm (UP 20-96) and Adoption of its Mitigated Negative Declaration (IS 20-116)

Dear Chairman Sabatier, Vice-Chair Crandell, and Supervisors Simon, Green, and Pyska:

This letter provides and transmits supplemental documentary evidence to the Lake County (County) Community Development Department (CDD) and the Board of Supervisors (Board) in support of the Appellants' Thomas Lajcik's and Margaux Kambara's (Lajciks) appeal challenging the Planning Commission's approval of the Highland Farms Cannabis Farm (UP 20-96) (Project) and adoption of its Mitigated Negative Declaration (MND) (IS 20-116).

This supplemental documentary evidence has been preceded by several submissions. On May 28, 2024, the Lajciks filed their appeal with the County challenging the Project's approval and adoption of the MND. On July 26, 2024, the Lajciks submitted documentary evidence supporting their appeal to CDD and the Board. On August 8, 2024, the Lajciks submitted a letter to CDD and the Board replying to a letter sent by the Project applicant on July 19, 2024, and rebutting several assertions made by the applicant in its letter. On August 12, 2024, the Lajciks sent an email to CDD expressing concern with the news that CDD intended to request a continuance of the matter at the August 13, 2024, Board hearing, and refuting the applicant's claims that the documentary evidence submitted by the Lajciks was disallowed. On October 11, 2024, the Lajciks sent a letter to CDD and the Board opposing CDD's purported second request for a continuance of the matter to be made at the October 22, 2024, Board hearing, and further opposing CDD's ongoing violations of the California Environmental Quality Act (CEQA). These previous submissions are incorporated herein by reference.

On October 11, 2024, CDD forwarded the Lajciks several documents submitted by the applicant in response to the appeal and evidence supporting the appeal. Amongst other things

that had already been submitted to the County, this submission included revisions to the project description; revisions to the initial study; additional water analysis; an additional biological resources survey and analysis; and a letter responding to the Lajciks' July 26 evidentiary submission. This material will be addressed in a separate submission in an effort to streamline material to the Board.

First, this letter addresses the applicant's prior claims that some documentary evidence submitted by the Lajciks is disallowed. Next, the new supplemental documentary evidence supporting the Lajciks' appeal is briefly described. Lastly, the letter explains why CEQA still requires an EIR be prepared here.

Documentary Evidence Supporting an Appeal is Allowed and Appropriate Here

Ordinance Number 3129, passed in February 2023, modified the County Code to add section 21-58.36, which expressly allows the submission of "documentary evidence and/or written argument" in support of appeals made to the Board challenging Planning Commission decisions. Section 21-58.36 specifies that this evidence must be submitted "no later than 96 hours prior to the date at the time of the Public Hearing." Ordinance Number 3129 also amended subsection 68.4(d) of Article 68 of Chapter 21 of the County Code to define documentary evidence as "*[a]ny* document which is offered and admitted as evidence during an Administrative Appeal, Planning Commission Appeal, or a Board of Supervisors Appeal…." These are broad provisions clearly intended to promote the inclusion of evidence.

The Lajciks have followed and continue to follow these requirements by submitting documentary evidence well in advance of Board hearings, certainly well in advance of the 96-hour requirement. Indeed, at the request of CDD, the Lajciks submitted their initial documentary evidence 18 days prior to the August 13th Board hearing. At the August 13th Board hearing, the applicant's legal counsel suggested that some of the evidence submitted by the Lajciks should not be reviewed by the Board because it is outside of the scope of the original appeal. This is incorrect and misguided. The evidence previously submitted by the Lajciks, and the evidence submitted now, falls within the scope of the original "Reason for Appeal" handwritten on the appeal application form. The reasons listed on the appeal form were purposefully broad and encompass "CEQA and other legal violations" related to serpentine soils, "other environmental protection violations," cumulative traffic effects on Highland Springs Road, insufficient hydrology and biology reports, and public land uses. The full scope of the Project's CEQA violations, environmental issues, and other legal violations were not and could not have been known by the Lajciks at the time they filed their appeal, given the short 7-day appeal period. (See County Code, § 58.31(b).) With additional research and analysis, and with the benefit of having more physical space than available in the short appeal form, the Lajciks have been able to more precisely articulate their Project concerns. Each piece of evidence provided by the Lajciks falls within the scope of the broad categories handwritten on their appeal.

Notwithstanding, this evidence will be included in the administrative record for the Project should the appeal be denied and CEQA litigation commence. (See, e.g., Pub. Res. Code, § 21167.6(e).) This evidence would form the basis for legal claims and provide proof of claim exhaustion, pursuant to CEQA. As the respondent to any legal claim that may rely on this evidence, the County would ultimately be required to address it and possibly respond to judicial inquiry about why evidence was ignored during administrative proceedings. Hence, it makes little sense for the Board to ignore this evidence now on the flawed theory that the evidence may be excluded from the scope of the original appeal.

Supplemental Documentary Evidence Further Supports the Appeal

The Lajciks herein submit supplemental documentary evidence in further support of their appeal. This substantial evidence is included as attachments to this letter, and exhibits to those attachments, supplementing the evidence submitted with the July 26 letter. Below is a summary of some of this evidence.

- Serpentine (see supplemental Attach. A): A certified geologist confirmed that serpentine formations and soils exist on the Project site, and both the County and applicant now acknowledge that a serpentine area exists onsite and that this area may contain naturally occurring asbestos. Naturally occurring asbestos is classified as a Toxic Air Contaminant that the California Governor's Office of Planning and Research instructs lead agencies to address *in* their CEQA documents, not after the fact. The applicant's consultant acknowledges that the use of the current unimproved roadway creates a risk of airborne serpentine dust, and the applicant confirms that the use of this roadway may occur for up to three years until Stage 2 of the Project, yet no analysis is performed and no mitigation offered for this obvious significant impact. The applicant's submission of a serpentine dust mitigation plan, or any of its other post-hoc material, is not a substitute for CEQA-required evaluation and mitigation, which must occur in a CEQA document prior to public review (see, e.g., EXH-248 and EX268 to supplemental Attach. A [California Governor's Office of Planning and Research (OPR) guidance on preparing mitigated negative declarations and analysis of naturally occurring asbestos]) and, in any event, is inadequate.

- Special-Status Species (see supplemental Attach. B): Serpentine formations are considered sensitive habitat by the California Department of Fish and Wildlife and were analyzed as such in the County's recent July 2024 Guenoc Valley Mixed Use Planned Development Project Draft Partially Revised Environment Impact Report (EIR) with mitigation to offset impacts. The County must perform this same analysis and offer comparable mitigation for the Project.

- Wetlands (see supplemental Attach. A): Aerial imagery shows expansive and interconnected wetlands not identified in the MND, which, when superimposed

over the Project site plan, show a clear impact to wetlands. CEQA requires that this significant impact be analyzed and mitigated.

- Cumulative Traffic and Roadway Safety (see supplemental Attach. C): A lack of proper signage identifying Highland Springs Regional Park and speed limits creates a hazard on Highland Springs Road for recreationists and local drivers from existing cannabis cultivation truck traffic that will be exacerbated by the Project, in addition to the other cumulative roadway hazards discussed in the July 26 submission. This type of personal observation for a non-technical matter like local roadway safety can constitute substantial evidence. (*Ocean View Estates Homeowners Assn., Inc. v. Montecito Water Dist.* (2004) 116 Cal.App.4th 396, 402; *Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal. App. 3d 872, 882.) This issue must be analyzed.

- Odor (see supplemental Attach. D): A commenter in support of the appeal introduced observational evidence that local cannabis cultivation results in pungent odors that impact nearby members of the public. As mentioned just above, this type of personal observation for a non-technical matter like local odor can constitute substantial evidence.

- Violation of Lake County Cannabis Cultivation Ordinance, Article 27, section 27.13(at)1.v (see supplemental Attach. D): Public trails and hunting areas are located within the required 1,000-foot setback from cannabis cultivation areas. These public areas and facilities are located on publicly owned land and are promoted by the County for recreation, as evidenced by photographs showing posted maps and markers identifying these areas, and therefore fall within the scope of the Ordinance's definition of public lands requiting a 1,000-foot setback.

- Violations of State Water Resources Control Board Cannabis Cultivation General Order and Lake County Cannabis Cultivation Ordinance, Article 27, section 27.13(aaa)4.i (see supplemental Attach. G and Attach. H): The applicant's changes to the Project's site plan and description, submitted *after* the Project was approved and the MND was adopted by the Planning Commission, do not change the Project's violation of the State Cannabis Cultivation General Order requiring cannabis operations be setback 100 feet from wetlands, nor do they cure the Project's violation of County Ordinance Article 27 section 27.13 requiring that cannabis processing facilities "front and have direct access to a paved State or County maintained road."

An EIR is Required

As demonstrated by substantial evidence in the administrative record, the Project's environmental analysis violates CEQA as well as local and state regulations and orders. CDD's acceptance and review of the applicant's post-approval, post-MND project changes

and environmental analysis likewise violates CEQA, as explained in the Lajciks' October 11 opposition letter to the Board and CDD. For the lead agency to not prepare an EIR here, there must be "no credible evidence" in the record demonstrating that a project *may* result in a significant environmental impact. (*Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1318; *Preserve Poway v. City of Poway* (2016) 245 Cal.App.4th 560, 576; *Georgetown Preservation Society v. County of El Dorado* (2018) 30 Cal.App.5th 358, 370.) However, there is in fact credible evidence that the Project may significantly impact serpentine formations, special-status plant species endemic to serpentine formations and soils, air quality and human health (from naturally occurring asbestos and odor), wetlands, roadway safety, etc. Nothing provided thus far by the applicant obviates this evidence, and indeed some of the applicant's material supports this evidence (such as the applicant's consultant's confirmation that use of the unimproved access road creates health risks associated with serpentine dust, and the applicant's confirmation that this unimproved road may be used for up to three years with up to 52 vehicles per day traversing a serpentine area). Even if it did, under the "fair argument" test, when " 'such evidence is found, it cannot be overcome by substantial evidence to the contrary.' " (*San Bernardino Valley Audubon Soc'y v. Metro. Water Dist.* (1999) 71 Cal.App.4th 382, 389; see also *Gentry v. City of Murrieta* (1995) 36 Cal. App. 4th 1359, 1399-1400; *Citizens' Com. to Save Our Village v. City of Claremont* (1995) 37 Cal. App. 4th 1157, 1167-1169.) Essentially, once the "fair argument" standard is met, as it is here, the MND cannot be cured.

An abundance of CEQA caselaw requires the preparation of an EIR here. CDD and the applicant cannot repair the MND with post-approval project redesigns and environmental analysis and mitigation as they purport to do. OPR, in its guidance on preparing mitigated negative declarations, is clear that this is not allowed. OPR informs that "project changes and mitigation measures must be agreed to or made by the proponent *before* the draft MND is circulated for public review and comment. In other words, *the draft document must reflect the revised project*, with changes and mitigation measures." (See EXH-248 to supplemental Attach. A, emphasis added.) Moreover, as explained in the Lajciks' October 11 opposition letter, conformity with a County departmental requirement to prepare a dust mitigation plan or any other ameliorative requirement "does not insulate a project from EIR review where it can be fairly argued that the project will generate significant environmental effects." (*Georgetown Preservation Society*, *supra*, 30 Cal.App.5th at 372, internal citations omitted.) The fact that the applicant was required to, and proceeded to, prepare a serpentine dust mitigation plan provides additional evidence that an impact exists (see supplemental Attach. A). Likewise for its Project revisions to purportedly avoid wetlands (see supplemental Attach. B).

In any event, a challenger need only make a fair argument that there *may* be one significant impact not evaluated in the MND to require the preparation of a full EIR. (*San Bernardino Valley Audubon Soc'y v. Metro. Water Dist.* (1999) 71 Cal.App.4th 382, 400; *City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398, 405, 414 ["…there is

substantial evidence of a fair argument for potential significant environmental impact. Accordingly, we conclude that the trial court properly ordered the County to comply with CEQA by preparing an EIR"].) This standard has been met here.

At the August 13 Board hearing, one Board Member noted that the County has never prepared EIRs for cannabis farm projects. The Lajciks do not argue that EIRs are required for all cannabis projects, but certainly one is required for this Project. Indeed, many jurisdictions throughout the State successfully prepare negative declarations for cannabis projects. Those documents, however, are usually tiered from programmatic EIRs prepared for agency-wide ordinances allowing cannabis farming and/or sales, wherein the totality of environmental impacts have been considered and mitigation has been adopted that applies to all subsequent, covered projects. Here, no such programmatic EIR exists. If the County were to prepare a programmatic cannabis cultivation EIR, then perhaps CEQA review for future cannabis farm projects can be successfully streamlined. But here, the MND is not a tiered document and its adequacy must be viewed insularly. Through that lens, the MND does not comply with CEQA.

Because the MND "fails even to recognize the problem" for some issues, such as impacts to serpentine formations and special-status species, neighboring water supplies, and cumulative roadway impacts, and mischaracterizes others, such as the scope of wetlands and wetland impacts, the appeal must be granted, the Planning Commission's Project approval and MND adoption must be rescinded, and a full EIR must be prepared. (*Ocean View Estates Homeowners Assn., Inc.*, *supra*, 116 Cal.App.4th at 401; see also *Farmland Protection Alliance v. County of Yolo* (2021) 71 Cal.App.5th 300, 312 ["the [statutory] requirement that a full environmental impact report is required when substantial evidence supports a fair argument a proposed project may have a significant effect on the environment" cannot be overridden; "[t]hus, the trial court erred in ordering the County to prepare a limited environmental impact report after finding substantial evidence supported a fair argument of significant environmental impacts to the three species"].) This will be the remedy ordered by a court, which will fall on the shoulder's of the applicant to finance, along with all of its attorneys' fees, the County's attorneys' fees, and petitioner's attorneys' fees and costs.

If you have questions, please feel free to contact Casey Shorrock at (916) 446-7979 or cshorrock@somachlaw.com.

Sincerely,

Casey A. Shorrock
Kelley M. Taber

cc: Johanna DeLong, Assistant Clerk (johanna.delong@lakecountyca.gov)
Mary Claybon, Associate Planner (mary.claybon@lakecountyca.gov)