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BY U.S. MAIL AND EMAIL (MJENKINS@CITYOFGOLETA.ORG)

Michael Jenkins
City Attorney
City of Goleta
130 Cremona Drive, Suite B
Goleta, CA 93117

RE: New Zoning Ordinance – Sec. 17.30.070 (Streamside Protection Areas)

Dear Mr. Jenkins:

This letter is submitted on behalf of SyWest Development, owner of the site of the former Goleta Drive-in Theatre at 907 S. Kellogg Avenue.

The following comments pertain to Section 17.30.070 of the City of Goleta's proposed New Zoning Ordinance ("NZO"), as attached to the staff report for your November 5 City Council meeting. Section 17.30.070 sets forth an elaborate framework for the City to consider a reduction to the required streamside protection area ("SPA") upland buffer. Despite its cursory reference to the General Plan, this new framework appears untethered from the City's existing General Plan policy setting forth the applicable standards for an exception to the SPA buffer. (See General Plan Policy CE 2.2.) Section 17.30.070 provides no additional guidance to City decision-makers, certainty to property owners, or transparency to interested stakeholders. Instead, the proposed policy elevates determinations over SPA buffers to a labyrinthine level of complexity. As drafted, Section 17.30.070 would conscript the City Council and Planning Commission into applying legal standards as to what constitutes a regulatory taking – a task that confounds even judges and seasoned practitioners. For these reasons, and as set forth in further detail below, SyWest requests that the language of Section 17.30.070 be revised to address these fatal defects.

I. The Requirements of Section 17.30.070 Far Exceed Those Requested by the California Coastal Commission as part of the Eastern Goleta Valley Community Plan.

As we understand, part of the rationale for the adoption of the elaborate process set forth in Section 17.30.070 may have been to anticipate potential requests by the California Coastal Commission ("CCC"). In considering whether to approve an amendment to the County of Santa Barbara's local coastal program adopting the Eastern Goleta Valley Community Plan ("EGVCP), the CCC indeed requested that certain language be added to the County's Coastal Zoning Ordinance ("CZO"). The County ultimately adopted this language as sections 35-192.4 through 35-192.6 of its CZO. However, the language recently added to Section 17.30.070 of the NZO goes far beyond the already stringent requirements in the EGVCP in several key respects.

First, the requirements proposed in Section 17.30.070 would apply in both the Coastal Zone and non-Coastal Zone areas. The language in the County's CZO applies only to a property owner seeking a coastal development permit in the Eastern Goleta Valley Community Plan area. (CZO, Sec. 35-192.5, 35.192.6.)

Second, Section 17.30.070 as drafted mandates that all required findings be supported by "substantial evidence," while the language requested by the CCC and adopted by the County merely requires the governing body (i.e., Board of Supervisors or County Planning Commission) to **make** the required findings. (See CZO, Sec. 35-192.6.) As a threshold problem, the NZO does not define "substantial evidence." As you are aware, moreover, the "substantial evidence" standard is used in the California Environmental Quality Act ("CEQA") context and provides fertile ground for litigation over the sufficiency of evidence supporting an agency's findings. (See Pub. Res. Code § 21168.5; Cal. Code Regs., title 14, § 15384; see, e.g., *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502; see also Elisa Barbour and Michael Teitz, CEQA REFORM: ISSUES AND OPINIONS, Public Policy Institute of California (April 56, 2015) , at p. 15 [noting that even among CEQA practitioners, the law's flexible and vague standards, including "substantial evidence," are a source of uncertainty].)

Third, Section 17.30.070 as drafted includes **additional** and problematic findings that are not required by the EGVCP:

- Section 17.30.070 B.2.c.i requires a finding that "Based on **a City-approved, third-party economic consultant's review and** consideration of the economic information provided by the applicant, as well as any other relevant evidence, adherence to the 100-foot SPA upland buffer would not provide an economically viable use of the applicant's property." (Emphasis added.) The emphasized language is not included in the County's CZO and is ambiguous as to whether the Reviewing Authority (City Council or Planning Commission) has the discretion to make this finding *against* the recommendations or conclusions of the economic consultant.

- Section 17.30.070 B.2.c.vii requires a finding that "The project is located on **a** legally created lot." (Emphasis added.) This finding should be revised to provide for projects located on multiple lots and for situations where an applicant may be seeking a lot line adjustment as part of project entitlements.

- Section 17.30.070 B.2.c.viii requires a finding that "The project is consistent with all other applicable biologic goals, objectives, policies, actions and development standards from the Goleta General Plan, Local Coastal Program, and Zoning Ordinances." This finding is unnecessarily duplicative with the land use consistency analysis required under CEQA. (See CEQA Guidelines, §15125(d) and Appendix G.) The proposed language also overlooks situations where a project applicant may be seeking a variance from another applicable standard.

Fourth, Section 17.30.070 as drafted specifically requires review by a City-approved, third-party biologist and a City-approved, third-party "economic consultant." Although such review may be appropriate for projects of a certain scale, requiring these third-party studies for a smaller project where only a minor variance is requested is inequitable and unreasonable.

Fifth, Section 17.30.070 as proposed requires a "Initial Assessment and Biological Report," terms which are not defined elsewhere in the NZO. Presumably these terms refer to the Initial Site Assessment and biological report required for projects that "have the potential to have a direct or indirect effect on ESHAs." (See Secs. 17.30.020, 17.30.030.) However, it is possible that a project may fall within the 100-foot SPA buffer without having the potential to have a direct or indirect effect on ESHA. It is unclear whether Section 17.30.070 as proposed would require that *any* project within the 100-foot buffer comply with ESHA requirements, in addition to the third-party biological and economic consultant studies described above.

II. The Findings Required by Section 17.30.070 Pose Problems for City Decision-Makers and Affected Property Owners Alike.

A. The Required Findings are Duplicative and Ambiguous.

As drafted, Section 17.30.070 B seems to require three distinct lists of findings, the relationship among which is not entirely clear.

Section 17.30.070.B.**1** requires findings that are consistent with the City's General Plan, Conservation Element Policy 2.2. Unlike the City's General Plan or the County's CZO, however, Section 17.30.070.B.**2.a** then requires findings "for each potentially significant adverse effect." This language may be intended to mirror CEQA's framework for disclosing various classes of impacts. If so, this is duplicative with CEQA analysis and introduces unnecessary confusion into the environmental review process. If this portion of the NZO is intended to set forth a similar but slightly different standard than CEQA, this too risks its own set of implementation challenges. Put simply, it is unclear why CEQA analysis is insufficient for purposes of analyzing the *environmental i*mpacts of a downward adjustment to the SPA upland buffer.

Section 17.30.070.B.**2.c** then sets forth yet **another** list of findings that are required to make a downward adjustment to the SPA upland buffer. As described further below, this list is fraught with fatal ambiguity. For example, the list includes environmental findings that are arguably duplicative with CEQA's required analysis, without referencing CEQA explicitly. (See, e.g., Section 17.30.070.B.2.c.v. ["The project is the least environmentally damaging alternative and is consistent with all provisions of the Zoning Ordinance other than the provision for which the exception is requested."].) This risks confusion and dispute as to whether the finding required by the NZO is synonymous with CEQA's analysis concerning land use consistency and alternatives. (See Pub. Res. Code § 21002; CEQA Guidelines §15126.6 and Appendix G.)

B. The Required Findings Draw the City Council and Planning Commission Into the Impossible Task of Adjudicating Theoretical Takings Claims.

The findings in Section 17.30.070.B.2.c require the City Council and Planning Commission to apply legal standards that are notorious for defying precise application. For example, the question of whether a proposed use violates "background principles of the State's law of property" as that phrase was used in *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003 implicates any number of common law property issues, including nuisance, easements, water rights, and the public trust. (See James L. Huffman, *Background Principles and the Rule of Law: Fifteen Years after Lucas*, 35 Ecology L.Q. 1, 7-12 (2008) [noting that the concept of "background principles" could be understood as a catch-all, affirmative defense against a takings claim and as "embrac[ing] the notion that the common law is almost infinitely malleable"].) Determining whether "[t]he use and project design" are the "minimum necessary" to avoid a taking requires the City Council or Planning Commission to draw the fine line between lawful regulation and an unlawful taking, applying nuanced legal standards in a line-defying area of the law. Applying takings jurisprudence to an actual takings claim presents challenge enough. Section 17.30.070.B.2.c.iv, as drafted, takes that exercise that one step further and asks City decision-makers to preemptively adjudicate a purely theoretical claim every time a variance to the SPA upland buffer is requsted.

Nor does the NZO specify whether the Reviewing Authority should turn to federal or state law in determining whether a downward adjustment to the SPA buffer is necessary to avoid a taking. Federal law sets forth a three-part test, including a property owner's "reasonable, investment backed expectations." But the courts have repeatedly emphasized that a regulatory takings analysis eschews any "set formula" and is essentially an "ad hoc, factual inquir[y]." (*Penn Central Transp. Co. v. City of New York* (1978) 438 U.S. 104, 124-29.) California courts have also identified additional factors that may be relevant in any particular case, while also noting that they are not to be used as a "checklist." (*Herzberg v. Cty. of Plumas*

(2005) 133 Cal.App.4th 1, 15; *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal. 4th 761, 775.) Mooring the City's decision-making to this unstable area of the law presents intractable problems with implementation and fairness.

III. Section 17.30.070 is Inconsistent with the City's General Plan.

It is well-established that a zoning ordinance that is inconsistent with a city's general plan is "invalid at the time it is passed." (*City of Morgan Hill v. Bushey* (2018) 5 Cal.5th 1068, 1079; see also *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal. 3d 531, 544-45 [describing such zoning ordinances as "invalid *ab initio*," that is, invalid from the day of enactment].)

The elaborate framework for determining whether to grant a downward adjustment to the SPA buffer is oddly disjointed from the General Plan, given that Policy CE 2.2 in the General Plan already states that the City may reduce the required SPA upland buffer below 100 feet (but not less than 25 feet) if (1) "there is no feasible alternative siting for development that will avoid the SPA upland buffer" and (2) "the project's impacts will not have significant adverse effects on streamside vegetation or the biotic quality of the stream." As described above, Section 17.30.070.B tasks the Planning Commission and City Council with making additional, ancillary lists of legal determinations that are fraught with the potential for dispute.

The staff report contemplates that the draft SPA zoning regulations could be revised "to align with the General Plan and address key stakeholder concerns." (NZO Staff Report, for November 5, 2019 at p. 4.) In light of the fatal defects detailed above, SyWest concurs with this recommendation.

Thank you for your kind consideration.

Sincerely,

Steven A. Amerikaner

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cc. Anne Wells, Advance Planning Manager (AWELLS@CITYOFGOLETA.ORG)
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