

MEMORANDUM

Date: July 18, 2016
To: Donna Gerber, Joe Canciamilla
From: M. R. Wolfe & Associates, P.C.
Re: Potential Changes to Contra Costa County Urban Limit Line to Accommodate Tassajara Parks residential development project

Section 82-1.018(a) of the Contra Costa County Zoning Code authorizes the County Board of Supervisors, without voter approval, to change the urban limit line (“ULL”) with a 4/5 majority vote if it can make one or more specified findings based on substantial evidence in the record. One of those findings is that “a majority of the cities that are party to a preservation agreement and the County have approved a change to the Urban Limit Line affecting all or any portion of the land covered by the preservation agreement.” Sec. 82-1.018(a)(3).

You asked for our legal opinion addressing whether a proposed Memorandum of Understanding (“MOU”) between Contra Costa County, the City of San Ramon, the Town of Danville, and the East Bay Regional Parks District purporting to “preserve” approximately 17,700 acres in the Tassajara Valley outside the County’s ULL, while simultaneously enabling the expansion of the ULL by 30 acres to accommodate a residential development project, constitutes a “preservation agreement” sufficient to support a decision by the Board of Supervisors to modify the ULL under Section 82-1.018(a). Our analysis follows.

Short Answer

We conclude the MOU does not constitute a “preservation agreement” as that term was understood when the ULL was originally approved by voters as part of Measure C in 1990, and re-affirmed in Measure L in 2006. Although neither Measure C, Measure L, nor the Zoning Code specifically define the term “preservation agreement,” the legislative record reveals that it derives from the 1987 “Briones Hills Agreement,” a joint resolution by the County and several cities that established a

mutual policy of non-annexation and agricultural/open space preservation of unincorporated lands in the Briones Hills area of the County. The Briones Agreement was arguably the first multi-jurisdictional action to head off urban sprawl in the County's history, and was the clear antecedent to the current ULL and related 65/35 development policy. That Agreement was strictly land-protective, and did not facilitate or authorize ancillary development in or adjacent to the areas it protected.

By contrast, the land preservation provisions in the Tassajara Parks MOU are illusory. All the lands the MOU purports to protect are already situated outside the County ULL, outside the Danville and San Ramon Urban Growth Boundaries and Spheres of Influence, and outside the service areas of any special district. The lands therefore enjoy the maximum degree of legal protection from future urban development afforded by the County's land use laws. In other words, the MOU "preserves" no agricultural or open space lands that are not already fully "preserved."

Furthermore, the MOU appears to have been crafted primarily to enable or facilitate the expansion of the current ULL in order to accommodate the Tassajara Parks Project, a proposed development of 125 high-end, single-family homes on 30 acres outside the ULL. The MOU obliquely but unmistakably references the Tassajara Parks Project and its EIR, then declares that in the event the County approves the Project the MOU will constitute a "preservation agreement" sufficient to justify expanding the ULL under Section 82-1.018(a)(3).

Finally, the "agreement" reflected in the MOU is vague and diffuse. Nothing bars any signatory agency from unilaterally repudiating or otherwise withdrawing from the agreement, without penalty. Although local government agencies may not contract away the police power, they can enter into agreements that create incentives for compliance and/or disincentives for unilateral termination or violation.

In sum, the MOU would directly enable urban development on lands now outside the ULL, without securing any new, substantive protections for other agricultural or open space lands in exchange. For that reason, it does not constitute a "preservation agreement" for purposes of approving an expansion of the ULL under Section 82-1.018(a)(3) of the County Zoning Code.

A more detailed analysis follows.

Materials Reviewed

We have reviewed the MOU together with the text of County Measure C as approved by the voters in 1990 and later codified in the Zoning Code, County Measure J approved in 2004, County Measure L approved in 2006, and various ballot arguments, staff reports, and other materials comprising the legislative record of these measures. We have also reviewed the 1987 Joint Resolution of the County and several cities known as the “Briones Hills Agreement,” which formed the basis for the “preservation agreement” justification for changing the ULL now codified. Finally, we have reviewed the Project Description section of the Draft EIR for the Tassajara Parks Project, which the County released for public review in May, 2015.

The Briones Hills Agreement, 1987

Based on our review of County legislative records, it appears that the genesis of the “preservation agreement” exception to the general prohibition against expanding the ULL was a 1987 Joint Resolution by the County and the cities of Martinez, Pleasant Hill, Lafayette, Orinda, Richmond, San Pablo, Pinole, and Hercules, establishing an agricultural preservation area in the Briones Hills. Referred to as the “Briones Agreement,” the resolution declared a mutual policy of non-annexation of Briones Hills lands to urban service districts in order to preserve the lands for agricultural and open space use by preventing urban development. A copy of the Briones Agreement accompanies this memo as **Attachment 1**.

Nothing in the Agreement addresses, references, or relates in any way to a prospective urban development project, or suggests that its land preservation protections were a “tit for tat” exchange for accommodating development on adjacent lands. On the contrary, the sole purpose of the Agreement was to prevent urban development on the covered lands. As the City of Hercules, one of the signatories, later affirmed in the “Protect Franklin Canyon Area Initiative” approved by that city’s voters in 2004 initiative: “[t]o forestall development, Hercules entered into an agreement with other cities and Contra Costa County creating the Briones Hills Agricultural Preservation Area adjacent to [Hercules] for the purpose of protecting regional agriculture and other open space uses.”

County Measure C, 1990

In 1990, voters in Contra Costa County approved Measure C, the 65/35 Contra Costa County Land Preservation Plan Ordinance. Measure C limited urban development to no more than 35 percent of the land in the County and required that

at least 65 percent be preserved for agriculture, open space, wetlands, parks, and other non-urban uses. Measure C also established the County's Urban Limit Line ("ULL"), a line beyond which no urban land use can be designated. Measure C contained provisions ensuring that the ULL could not be modified easily in the future. The County could change the ULL boundary only upon a 4/5 vote of the Board of Supervisors, and after making at least one of seven enumerated findings based on substantial evidence in the record. Among these findings, which were and remain codified in the County's zoning code at Section 82-1.018(a) (1)-(7), is the following:

“a majority of the cities that are party to a preservation agreement and the County have approved a change to the Urban Limit Line affecting all or any portion of the land covered by the preservation agreement.”

Measure C did not specifically define the term “preservation agreement.” However, an examination of relevant language elsewhere in the Measure and the County's legislative record¹ reveals that “preservation agreements” were intended by as a complimentary means of strengthening or supporting the ULL, and that the Briones Hills Agreement was the exemplar.

For example, Measure C includes the following declaration in addition its provisions establishing the 65/35 development policy and ULL:

“(10) Cooperation with Cities. To the extent feasible, the County shall enter into preservation agreements with cities in the County designed to preserve certain land in the County for agriculture and open space, wetlands or parks.”²

Likewise, a May 14, 1990 staff report to the Board of Supervisors addressing Measure C includes a statement from then-Supervisor Tom Torlakson affirming that:

¹ In interpreting language in a voter-approved ballot measure, courts apply the same principles governing the construction of a statute, which is to “ascertain the intent of the electorate.” *People v. Ziegler* (2012) 211 Cal.App.4th 638, 650. “The language is construed in the context of the statute as a whole and the overall statutory scheme.” *Id.*

² This policy was incorporated into the County General Plan's Land Use Element in 1991 as Implementation Measure No. 3-u.

“The basic concept of a Briones Hills type preserve—the idea of an agreement between the incorporated cities and the county regarding development lines for a period of time such as 15 years—is very appealing to me the more we discuss it. Such a ‘Non-Urban Preserve’ could be established by agreement and made binding unless a popular vote in the involved jurisdictions passes favoring change.”

The staff report stressed that the ULL could be further “supported” through “preserve [sic] agreements, MOU’s among jurisdictions and LAFCO rules.”

Measure L (2006)

In 2006, voters approved Measure L, which extended the term of Measure C’s ULL to 2026, and imposed a new voter approval requirement for any proposed expansion of the ULL by more than 30 acres. As with Measure C, Measure L allowed for expansions less than 30 acres upon a 4/5 vote of the Board of Supervisors after making one of the seven listed findings. All seven of the findings, including the “preservation agreement” finding, were incorporated verbatim in Measure L, and later re-codified in Section 82-1.018(a)(1) through (7) of the County Zoning Code. Thus, the term “preservation agreement” for purposes of Measure L and the current Zoning Code means the same as it did when it was originally adopted in Measure C.

The Tassajara Parks Project

We understand the County is currently undertaking CEQA review of a proposed development project for the construction of 125 single-family homes on 30 acres in the Tassajara Valley area of unincorporated Contra Costa County. The project, known as “Tassajara Parks,” is outside the County ULL and hence requires an expansion of the ULL to allow for its development. Because the site is only 30 acres, no voter approval is required. However, the Board of Supervisors would still need to approve the expansion by a 4/5 vote after making at least one of the seven enumerated findings in Section 82-1.018(a).

The Tassajara Parks MOU (April 29, 2016 draft)

The County, the Town of Danville, the City of San Ramon, and the East Bay Regional Park District are currently considering entering into a Memorandum of Understanding (“MOU”) that purports to “preserve” approximately 17,700 acres of land in the unincorporated Tassajara Valley (“Tassajara Valley Agricultural

Enhancement Area”). As the draft MOU itself affirms, all of this land is now: (1) outside the County ULL, the Danville UGB, and the San Ramon UGB; (2) General Plan-designated for agricultural and opens space land use; (3) beyond the sphere of influence (“SOI”) of any municipality; and (4) outside the current service areas of any special district providing water and sewer service.

Under the current draft MOU, the parties would agree among other things not to annex lands in the Agricultural Enhancement Area; not to support any proposal that would annex or extend services to the Area unless it would serve non-urban uses; to uphold the existing agricultural and open space policies, and generally to support future policies and practices that would enhance agriculture and preserve open space, wetlands, parks, and other non-urban uses in the Area.

Notably, the draft MOU states: “This MOU is intended to be a ‘preservation agreement’ under the Land Use Element (Chapter 3) of the County of Contra Costa General Plan 2005-2020 (‘County General Plan’) and Section 82-1.018 of the ordinance code of Contra Costa County (‘County Ordinance Code’).” The draft MOU also states, without referring to the Tassajara Parks Project or its EIR by name:

“13. Notwithstanding anything contained in this MOU to the contrary, the Parties agree that in the event the County, in its discretion as Lead Agency, certifies an Environmental Impact Report (“**EIR**”) pursuant to CEQA and the CEQA Guidelines, and approves the project described in that EIR (“**Project**”) where the Project (1) permanently preserves at least five hundred (500) acres of land for non-urban uses such as recreation, open space, agriculture, grazing, scenic, wetland preservation and creation, and habitat mitigation, and (2) provides an irrevocable dedication of at least \$4 million (“**Dedication**”) to an agricultural enhancement fund established by the County (“**Fund**”), the County shall have authority to find that this MOU satisfies the requirements of section 82-1.018(a)(3) of the County Ordinance Code.

“14. The Parties agree that the provisions of this MOU shall not be interpreted to prevent the County or any other governmental entity from approving or supporting a Project, for which a notice of preparation has been sent to the Office of Planning and Research prior to the effective date of this MOU, that meets the requirements of this section or from taking any action in furtherance of such Project.”

It is quite clear that the “Project” referred to in the MOU is the Tassajara Parks Project – and only that project. The Project EIR (May, 2016) acknowledges that “The Project seeks to change the ULL to include the 30-acre Residential Development Area.” Draft EIR p. 2-2. The Draft EIR does not however, reference the MOU by name.

Does the Tassajara Parks MOU serve as a “preservation agreement” sufficient to support a modification to the ULL under Section 18-1.018(a)(3) of the Zoning code?

In its current form, the MOU does not appear to constitute a “preservation agreement” as understood by Measure C, Measure L, and their subsequent codifications. As discussed, the genesis of the “preservation agreement” exception to the general prohibition against changing the ULL was the 1987 Briones Hills Agreement. That Agreement was intended solely to preserve the affected lands from urban development. It did not enable, either directly or indirectly, any urban development on other lands nearby or adjacent.

First, the “preservation” commitments in the MOU appear to be illusory. The lands within the “Agricultural Enhancement Area” are already fully preserved for agriculture and open space uses and protected from future urban development to the maximum extent feasible under the County’s current ULL, General Plan, and land use regime generally.

We understand the lands are neither at risk from imminent private development pressure, nor susceptible to foreseeable future attempts at annexation or urban service extension by any municipality or special district. Thus, the MOU cannot and will not, as a matter of law, extend any additional or more stringent legal protections to these lands than those already protecting them now.

Furthermore, even if the MOU’s preservation provisions were non-illusory, they would not be enforceable in any meaningful way. Nothing in the MOU provides for any disincentives or penalties for any party’s decision to withdraw from it or violate its terms. While local government agencies generally may not contact away their right to exercise police power in the future,³ in practice inter-agency MOUs often include substantive disincentives to minimize the risk of unilateral

³ *Arco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 800.

termination by one or more parties. No such provisions appear in the MOU. On the contrary, the MOU appears to have been crafted solely to serve as a nominal “preservation agreement” to provide the basis for a finding justifying the 30-acre expansion of the ULL to accommodate the Tassajara Parks Project.

In our opinion, the MOU does not constitute a “preservation agreement” under Section 82-1.018(a)(3) as that term was understood when it was included originally in Measure C in 1990, and since then in subsequent voter approved ballot measures. It does not “preserve” any lands that are not already subject to the maximum degree of protection from urban development afforded by law, and even if it did, it is not enforceable in any meaningful sense.

Thus, if 4/5 of the Board of Supervisors agrees to expand the ULL to accommodate this residential development, the County in effect will be sacrificing the integrity of the ULL without procuring for its residents and voters any material land preservation benefit it return.

Thank you for the opportunity to provide this opinion, and please call with any questions.

MRW:
attachments

THE BOARD OF SUPERVISORS OF CONTRA COSTA COUNTY, CALIFORNIA

Adopted this Order on August 4, 1987 by the following vote:

- AYES: Supervisors Powers, Fahden, Schroder, Torlakson & McPeak
- NOES: None
- ABSENT: None
- ABSTAIN: None

SUBJECT: A Joint Resolution of the) RESOLUTION NO. 87/483
 Cities of Martinez, Pleasant)
 Hill, Lafayette, Orinda,)
 Richmond, San Pablo, Pinole,)
 Hercules and Contra Costa)
 County establishing an)
 agricultural preservation area)
 in the Briones Hills.)

WHEREAS, the lands within the Briones Hills are generally planned for agricultural or other open space uses by the County and the cities as defined in Section 65560 of the Government Code; and

WHEREAS, the predominant use of land in this area is for agricultural and grazing purposes, with secondary uses being for parks and watershed purposes; and

WHEREAS, lands within the Briones Hills lying between the West County cities and communities and the Central County cities are difficult to serve with sewer, water, police and other urban services; and

WHEREAS, the lands within the area are generally designated as Open Space, Agricultural Lands, Parks and Recreation, Watershed or other compatible open space categories on the adopted County and city open space plans; and

WHEREAS, the lands are generally located outside of LAFCO adopted municipal or urban service district spheres of influence; and

WHEREAS, the County and the affected cities, hereby declare that the lands described below are worthy of retention in agricultural and other open space uses for the overall best interests of the cities, the County and the State; and

NOW THEREFORE BE IT RESOLVED by the Contra Costa County Board of Supervisors and the City Councils of Martinez, Pleasant Hill, Lafayette, Orinda, Richmond, Pinole, and Hercules hereby all agree to a policy of non-annexation to urban service districts and cities for agricultural and open space properties which would lead to urban development between these cities bounded generally as described below and as shown on Exhibit A of this resolution:

- on the east and south by the Martinez, Pleasant Hill, Lafayette and Orinda City Spheres of Influence
- on the west by the Richmond, Pinole and Hercules City Spheres of Influence
- on the west and north from Rodeo to Martinez by the LAFCO adopted sewer sphere of influence boundary and the Solano/Contra Costa County line.

BE IT FURTHER RESOLVED that the Board of Supervisors and the aforementioned City Councils request the Local Agency Formation Commission of Contra Costa County to honor this agricultural preservation agreement for this area and to continue to act in a manner consistent with the preservation of the aforementioned lands for agricultural and other open space purposes; and

BE IT FURTHER RESOLVED that this agreement will be reviewed by the participating agencies after results of the decennial Federal Census are available; any proposed changes shall be considered in concert with the LAFCO review of sphere of influence for cities and agencies; and

BE IT FURTHER RESOLVED that should incorporated lands within the Briones Hills area become detached from the signatory cities and become unincorporated land, that area shall be included within this agricultural preservation area established by this resolution without further action by the parties hereto; and

BE IT FURTHER RESOLVED that this resolution is not intended to affect the property rights of land owners under the existing General Plan and zoning (including the right to apply for 5 acre parcels).

I hereby certify that this is a true and correct copy of the action taken and entered on the minutes of the Board of Supervisors on the date shown.

ATTESTED: August 4, 1987
PHIL SATCHELOR, Clerk of the Board
of Supervisors and County Administrator

By Ann Cavallaro, Deputy

cc: Community Development
County Counsel
County Administrator
LAFCO
All Cities