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Via Email to BOS.PublicComment@co.nevada.ca.us

Nevada County Board of Supervisors
950 Maidu Avenue
Nevada City, CA 95959

Re: Comments on January 25, 2022 Agenda Item 29: Proposed Negative Declaration (EIS21-0002), General Plan Land Use Amendment (GPA21-0001) and Zoning District Map Amendment (RZN21-0001)

Dear Honorable Supervisors:

On behalf of the undersigned interested parties and myself (together, the "Objectors"), I respectfully submit the following comments on the agenda items referenced above and the underlying Application of Dylan Murty and Dana Law (together, "Applicants"). This letter supplements my letter to Senior Planner Matt Kelley dated October 27, 2021 ("the Oct. 27 Letter") with respect to the same proposed General Plan Amendment and Rezone Project (the "Project"). That letter is incorporated herein by reference and attached for your convenience. To avoid duplication, the contents of the October 27 letter are not repeated here, but must be considered to gain a full understanding of Objectors' position on the agenda items.

I. Introduction

Objectors own parcels adjacent or in close proximity to the subject parcel. Given the unprecedented, long-term drought forecasted for our region, Objectors are gravely concerned about the sustainability of groundwater supplies they rely upon for domestic use. Objectors oppose Applicants' project because it is virtually certain the proposed rezone from RA to GA will lead to commercial cannabis cultivation on the property, an activity the County previously determined will cause foreseeable, substantial and unavoidable impacts to groundwater supplies, recharge and management.[1] Indeed, in connection with the enactment of the County's Cannabis Ordinance, the County determined that commercial cannabis cultivation on RA-zoned parcels such as the subject property is *infeasible* due to these substantial and unavoidable impacts to groundwater, among other factors.

In an overt bid to avoid the hurdles posed by CEQA and the County's prior findings, Applicants submitted a highly unusual and perhaps unprecedented Application – one which does not include a development plan. Surely, Applicants have a development plan in mind. No rational landowner would spend thousands of dollars in County and consultant fees for a

[1] The Board Agenda Memorandum prepared by the Planning Department fails to include groundwater depletion in its summary of Objectors' and others' expressed concerns. The omission of Objectors' primary concern is troubling. Moreover, under CEQA, the Board must consider comments on all issues in deciding whether to adopt a negative declaration.

general plan amendment and rezone on a whim.[2] And, just as surely, that plan includes commercial cannabis cultivation for the many reasons stated below. Yet, by omitting a plan, Applicants contrived a scenario under which they hoped the County would conclude – wrongly – that it need not evaluate the environmental impacts of future cannabis cultivation on the property at present.

Thus far, this gambit has succeeded. The Planning Department persuaded the Planning Commission that the County can defer examination of the environmental consequences of future cannabis cultivation on the property under the rubric that such activity is speculative. On this critical point the Planning Commission was misled. Because cannabis cultivation is at least a reasonably foreseeable consequence of project approval, CEQA *requires* the County to study the potential environmental impacts of that activity now.

The Planning Department also advised the Planning Commission that potential impacts to Objectors' and others' groundwater supplies – impacts the County previously characterized as substantial and unavoidable – could and would be considered and mitigated at a future development stage or in connection with an ADP permit application. However, if the subject property is rezoned AG, Applicants could construct one residence and apply for an ADP permit and ACP without a development proposal. Further, when they do submit a development proposal, any CEQA review likely will not encompass cannabis cultivation. The ministerial permitting process does not, and practically speaking could not, require meaningful mitigation of groundwater impacts, as these have been deemed "unavoidable." Moreover, the CEQA checklist touted by the Planning Department to the Planning Commission was not intended to apply to RA-zoned parcels, as these are excluded from the Cannabis Ordinance.

Apart from these issues, the Application is incomplete. It fails to provide any justification for the proposed rezone, as required by County Code sec. L-II 5.9 sub. 5, and fails to disclose a Code violation issued months before the Application was submitted, as required in the application form.

For all these reasons, Objectors ask that the Board apply its independent judgment and analysis and reject the draft resolution for a Negative Declaration and the draft ordinance for a rezone. While Objectors do not oppose the proposed general plan amendment in principle, the most practical and sensible way forward is for the County to defer consideration of Applicants' entire project until Applicants submit an amended Application that includes a proposed development plan.

II. The Board Should Reject the Proposed Negative Declaration

Objectors' October 27 Letter demonstrates that in multiple respects the Planning Department's actions run afoul of the California Environmental Quality Act ("CEQA"), Cal. Pub. Res. Code §§ 21000, *et seq.* in connection with the Initial Study and Proposed Negative Declaration (the "IS/ND") prepared for this project. During the November 17 hearing, Lee Auerbach, on behalf of the Objectors, spoke to many of the same issues. The Objectors' contentions can be boiled down to five core points:

[2] That Applicants have a development plan is further demonstrated by the fact they sought two additional well permits less than two weeks after the Planning Department voted to recommend the project, bringing the total number of wells on the property to at least three.

(1) Based on the Application, Applicants' past conduct and surrounding circumstances, future cannabis cultivation on the subject property is a foreseeable, if not inevitable, consequence of project approval and thus should have been included in the project description and fully considered in the Initial Study, which improperly characterizes the project as a mere "legislative action" with virtually no environmental consequences (Oct. 27 Letter, sec. A);[3]

(2) The County cannot bypass CEQA requirements through "piecemealing" under the pretext that the environmental impacts of foreseeable cannabis cultivation will be considered at a later stage of development (*id.*, secs. B.1, B.2);

(3) The County's findings in conjunction with the issuance of the Cannabis Ordinance comprise substantial evidence that cannabis cultivation may have a *substantial* and *unavoidable* impact on groundwater supplies, recharge and management, among other environmental impacts, in contradiction to the proposed finding here that "no significant impacts result from the approval of the Project" (*id.*, sec. E);

(4) The County considered expanding the Cannabis Ordinance to RA-zoned parcels specifically but determined that cannabis cultivation on these parcels is *infeasible* due to substantial and unavoidable environmental impacts (*id.,* sec. D); and

(5) The County cannot rezone Applicant's RA-zoned parcel from RA to AG without conducting an environmental analysis (EIR) demonstrating that the County's prior findings are inapplicable to the subject property or issuing a Mitigated Negative Declaration precluding or limiting cannabis production on the property.

The Planning Department's attempted rebuttal relies principally on two propositions: (1) the potential for cannabis cultivation on the property is too speculative to trigger an impact analysis under CEQA; and (2) a CEQA checklist developed in connection with the Cannabis Ordinance would ensure that environmental impacts are considered when Applicants apply for a cultivation permit. Neither of these premises is correct.

A. <u>Future Cannabis Cultivation Is Reasonably Foreseeable, Rendering the Proposed Negative Declaration Deficient Under CEQA</u>

There are at least eight reasons why future cannabis cultivation on the property is a reasonably foreseeable, if not assured, consequence of the proposed rezone, and thus, must be included in the project description for purposes of CEQA:

1. Applicants request a rezone from RA to AG. Unless Applicants sought the rezone arbitrarily (which the Board should not presume to the case), they must have some future activity in mind which they cannot pursue under an RA designation but can pursue under an AG designation.

2. Commercial cannabis cultivation is the *only* agricultural activity mentioned in the Application. Surely, if Applicants contemplated some other agricultural activity, they would have identified it at the time of the application or since, as the prospect of

[3] Given this significant shortcoming, the proposed Resolution recital/finding that "the IS/ND analyzed all of the potential environmental impacts of the proposed Project" is incorrect and requires the Resolution to be rejected.

future, commercial cannabis cultivation has resulted in considerable controversy and increased Applicants' costs.

3. During the Special Meeting of the Planning Commission on November 17, 2021, Applicants' consultant Andy Cassano acknowledged that the potential to cultivate cannabis is what "makes the [proposed] downzoning worthwhile." Draft Minutes of Planning Commission Special Meeting on November 17, 2021 ("Draft Minutes") at 7. This is tantamount to a concession by Applicants that future cannabis cultivation is not merely Applicants' intention, it is the *primary impetus* for their Application. Mr. Cassano further stated that if zoning remains RA, Applicants "would be looking at a way to achieve more sites." *Id.* Thus, Applicants are counting on revenue from cannabis cultivation (and potentially the sale of one or more parcels that would be zoned for that activity) in place of revenue from the potential sale of a greater number of smaller parcels not zoned for cannabis.

4. During the Special Meeting, Senior Planner Kelly recited a list of land uses permissible under AG but not RA zoning. Apart from commercial cannabis cultivation, these uses are community care facilities greater than six, agricultural support uses (farm equipment sales, feed stores, feed lots), retail plant nurseries, airstrips, heliports, surface mining and low density camp. Draft Minutes at 2. It is ludicrous to suggest that Applicants intend to pursue any of these alternative uses, leaving commercial cannabis cultivation – again, the sole agricultural use mentioned in the Application – as the *only* plausible reason for the proposed rezone.

5. Applicants cultivated a considerable quantity of cannabis unlawfully beginning shortly after they purchased the property in 2020. *See* Aerial Photograph in Objectors' October 27 Letter at 3. The Application improperly fails to disclose that on June 5, 2020, the California State Water Resources Control Board issued a Notice of Violation to Mr. Murty respecting that cannabis cultivation.[4]

Enforcement Actions

Enforcement ID	Enforcement Type	Enf. Order No.	Title	Program	Effective Date	Status
438902	Notice of Violation	None	NOV 08/05/2020 for Dylan Murty	IRRICANNABIS	08/05/2020	Active

Total Enforcement Actions: 1

Item 18 on the application form required Applicants to identify "any Code violations occurring on this property, including the issuance of a Warning Notice or a Citation." GPA/Zone Change Application, Filing Instructions & Checklist.

6. The Planning Department perceived a sufficient likelihood of future cannabis cultivation to require Applicants to amend their application to include a discussion regarding the financial impacts of cannabis cultivation. Accordingly, in May 2021, Applicants submitted an updated Application which includes such an analysis. Of course, if Applicants do not intend to cultivate cannabis they could have said so and avoided the additional cost and effort associated with this supplemental analysis.

[4] *See* https://ciwqs.waterboards.ca.gov/ciwqs/readOnly/PublicReportPartyAtGlanceServlet?reportID=2&paagrPartyID=610577&paagrFiveYearVios=true. Objectors brought this compliance issue to the Planning Department's attention via email to Mr. Kelley on December 21, 2021. Oddly, no copy of this email is lodged in the Planning Department's project file and the Planning Department makes no reference in the Board Agenda Memorandum to the Notice of Violation or Applicants' failure to disclose it in the Application.

7. Menkin Nelson, a cannabis licensing consultant, submitted a 13-page letter dated November 15, 2021 to the Planning Commission in an attempt to refute Objectors' CEQA objections with respect to cannabis cultivation. Presumably, Ms. Nelson was paid by Applicants, who would have had no incentive to do so absent their obvious intent to commercially cultivate cannabis.

8. Applicants' consultant Cassano sent a letter to the Planning Commission dated June 1, 2021, in which he took "strong exception to [the] position that Harmony Ridge Resort is a 'private park' requiring a 1000' setback to any future cannabis cultivation activities" and supplied an alternative analysis on the subject.[5] If Applicants do not intend to cultivate cannabis, why would they have asked (and presumably paid) their consultant for this additional work?[6]

Individually, each of the above signs points toward future cannabis cultivation. Collectively, that conclusion is inescapable. Accordingly, the County cannot avoid proper CEQA review by pretending the prospect of cultivation is "speculative." Indeed, it is difficult to reconcile the Planning Department's incompatible positions under which it considered cannabis cultivation not too speculative to require a financial analysis but too speculative to require an environmental analysis. Similarly, the Planning Department may have difficulty explaining why it prepared a comprehensive EIR in connection with the Cannabis Ordinance – also a "legislative action" where it could only speculate as to the number and extent of commercial cannabis cultivation permits that would be sought – and yet seeks to avoid such an analysis here, where multiple factors make cannabis cultivation on the subject property reasonably foreseeable.

B. <u>The "Cannabis CEQA Compliance Checklist" Provides No Meaningful Environmental Review or Any Mitigation Measures with Respect to Groundwater Depletion, which the County Found to Be a Foreseeable, Substantial and Unavoidable Consequence of Cultivation</u>

In comments to the Planning Commission at the November 17 hearing and in the current Board Agenda Memorandum, the Planning Department suggests that a CEQA checklist developed as part of the Program Environmental Impact Report (PEIR) established for the Cannabis Ordinance will provide a sufficient environmental review when Applicants or others apply for CCP or ADP permits in the future. This is incorrect. With respect to groundwater depletion in particular, the checklist provides no meaningful review and requires no mitigation measures. To the contrary, the only section in the checklist that directly addresses a potential decrease in groundwater supplies acknowledges that groundwater depletion is substantial and unavoidable. Checklist, section 8.2. And, all the checklist requires is confirmation that the applicant complied with section L-II 3.30 subs. G.1.d.xiii of the Cannabis Ordinance. That subsection addresses impacts to "streams, rivers, or other water bodies," not groundwater, which, again, the PEIR determined will be substantial and unavoidable. An applicant relying on groundwater need only provide a "description of the source of water [and] water storage locations." *Id*. No meaningful environmental review or mitigation measures are contemplated.

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[5] This letter responded to a memorandum dated March 23, 2021 from B & W Resorts, Inc., owner of the Harmony Ridge Resort, and Lee Auerbach to the Community Development Agency and Planning Department, which is incorporated by reference. Subsequent to the date of that memorandum, Applicants submitted building permits for two additional wells.

[6] Objectors only recently became aware of items 6, 7 and 8, and had no opportunity to present these issues at the Special Meeting for consideration by the Planning Commission. Item 3 was raised after Auerbach addressed the Planning Commission, affording him no opportunity to respond.

Additionally, by virtue of the fact that the Cannabis Ordinance allows commercial cultivation only on parcels zoned AG, AE or FR, the checklist could not have been intended to apply to RA-zoned parcels such as the subject property.

These factors underscore the necessity of evaluating potential groundwater impacts on Applicants' RA-zoned parcel *before* considering a rezone to AG.

III. The Board Should Reject the Proposed Rezone Because the Application Omits Material Information

Independent of the fatal absence of an EIR or mitigated negative declaration, the Board should not approve the proposed rezone because the Application is incomplete.

County Code section L-II 5.9, subsection 5, requires the applicant for a rezone to submit a "statement justifying the need for the amendment, why the amendment is in the public interest, and how the amendment will ensure consistency with the Nevada County General Plan." While Applicants attempt to justify the proposed general plan amendment, the Application does not identify a single benefit of or justification for the proposed rezone. With respect to rezoning, the Application merely foreshadows Applicants' intent by noting that "[t]he current market for rural property in Nevada County tends to be for parcels that are 10-20 acres and larger that are appropriately zoned for cannabis cultivation." Murty General Plan Amendment and Rezoning Project Description, January 2021, at 2. As the Application fails to satisfy Code requirements and the absence of any specific plan or proposal makes meaningful findings impossible, approval of the rezone ordinance by the Board would be an abuse of discretion.

Further, as noted in item 5 on page 4 above, Applicants improperly failed to disclose in their Project Information Questionnaire (the "Questionnaire") a Code violation (warning notice) issued to Mr. Murty by the California Water Resources Board on June 5, 2020 related to illegal cannabis cultivation on the subject property (*i.e.*, "IRRICANNABIS").

Applicants also failed to disclose they had applied for a Class 1 well permit on September 14, 2020. Section 17 of the Questionnaire requires applicants to "[l]ist any building or grading permits, related to this project that have been applied for and/or issued." As the Application does not include a future development plan and the property is otherwise undeveloped, this well, by definition is "related" to the project.

The Board should take into account that on November 30, 2021, less than two weeks after the Planning Commission hearing on the application, Mr. Murty filed building permit applications for two additional Class I wells on the property, bringing the total number of wells to at least three.

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Permit Number	Department	Permit Description	Application Date	Closed or Final Date	Status	Relation to APN
CC21-0270	Code Compliance	No Data	12/20/2021		OPEN	Current APN
EH21-0757	Environmental Health	Well, Class 1	11/30/2021		CORRECTIONS	Current APN
EH21-0758	Environmental Health	Well, Class 1	11/30/2021		CORRECTIONS	Current APN
GPA21-0001	Planning	General Plan Amendment	2/24/2021		STAFF REPORT COMPLETE	Current APN
PLN21-0051	Planning	Discretionary	2/24/2021		STAFF REPORT COMPLETE	Current APN
RZN21-0001	Planning	Zoning Map Amendment	2/24/2021		STAFF REPORT COMPLETE	Current APN
EH20-0491	Environmental Health	Well, Class 1	9/14/2020	3/9/2021	CLOSED	Current APN

Surely, the existence of these permit applications, among other things, demonstrates that Applicants have a definite development plan in mind.

IV. Objectors Take No Position on the Proposed General Plan Amendment

Reducing the overall density of the project site from 18 potential units to 4 potential units likely would reduce domestic groundwater consumption, an outcome Objectors consider desirable. Moreover, Objectors concur with the view, stated in the Board Agenda Memorandum, that due to development constraints, limiting the subdivision of this parcel into four, 20-acre parcels is "likely the highest and best use of the property." Memorandum at 6. Of course, these benefits can be obtained by rezoning the property RA-20, to which Objectors would not object, rather than AG-20.

V. Conclusion

For the foregoing reasons, the Planning Department erred when it characterized the Project as a legislative action without foreseeable environmental impacts and concluded that a Negative Declaration can be issued. As a consequence, the Planning Commission's recommendations to the Board are based on incorrect and incomplete information. Accordingly, the undersigned respectfully request that the Board, applying its independent judgment and analysis:

1. ~~Reject the proposed Resolution Adopting a Negative Declaration (EIS21-0002)~~ For the Proposed General Plan Land Use Map Amendment (GPA21-0001), Zoning District Map Amendment (RZN21-0001) for Dylan Murty and Dana Law;

2. Reject the proposed Ordinance Amending 1) Zoning District Map 64, to Rezone Assessor's Parcel Number 034-160-001 Located at 10460 Harmony Ridge Road, Nevada City, California from Residential Agricultural – 5 with Planned Development Combing District (PD) to General Agricultural – 20 (AG-20); and

3. Direct the Planning Department to prepare an EIR or suitable Mitigated Negative Declaration, or require Applicants to resubmit their Application with a proposed development plan.

Sincerely,

Lee Auerbach
[redacted]

Leah Leddy
[redacted]

(signatures continued on next page)

Carl Balistreri
[redacted]

Matthew Duerst and Michelle Duerst
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October 27, 2021

Via Email

Matt Kelley
Senior Planner
Nevada County Planning Department
950 Maidu Avenue, Suite 170
Nevada City, CA 95959

Re: Comments on Draft Initial Study/Negative Declaration for the Murty and Law General Plan Amendment and Rezone Project

Dear Mr. Kelley:

On behalf of the undersigned interested parties and myself, I respectfully submit the following comments on the County of Nevada's ("County") Draft Initial Study and Negative Declaration ("IS/ND") for the proposed Murty and Law General Plan Amendment and Rezone Project (the "Project").

As explained below, in connection with the IS/ND the County failed to comply with several mandates of the California Environmental Quality Act ("CEQA"), Cal. Pub. Res. Code §§ 21000, *et seq.* Under the facts and circumstances, an environmental impact report ("EIR") must be prepared to adequately analyze the Project's ultimate, potentially significant, adverse environmental effects.[1] Substantial evidence – including the County's own prior findings respecting impacts associated with cannabis cultivation – supports a fair argument that the cultivation that foreseeably will result from Project approval may have a significant impact on the environment, particularly with respect to groundwater depletion.

Approval of the Project by the County Board of Supervisors in reliance on the IS/ND would violate CEQA for at least six reasons. First, the County improperly focuses its analysis on the environmental impact of the legislative process rather than the ultimate activity for which the Project application (the "Application") is made. Second, the County improperly attempts to defer environmental review of foreseeable impacts to later developmental stages when no such review will occur. Third, the County fails to show an adequate basis for its findings. Fourth, approval would contradict the County's previous determination that cannabis production on parcels zoned RA is infeasible. Fifth, substantial evidence supports a fair argument that the Project may have a significant effect on groundwater supplies, recharge and management, either standing alone or cumulatively. Finally, the County failed to meet notice requirements.

Before turning to these issues, it bears mention that Nevada County and California as a whole are suffering an unprecedented drought. As these comments were being prepared, the California Department of Water Resources reported that the 2021 water year was the driest in

[1] Alternatively, the County could issue a mitigated negative declaration modifying the Project to allow the land use amendment but not the zoning amendment or substantially limiting potential agricultural activities and/or the volume of groundwater extracted for agricultural purposes such that impacts are avoided or reduced to a less than significant level. Cal. Pub. Res. Code § 21064.5; 14 Cal. Code Regs § 15063(a).

nearly a century. That same week California Governor Gavin Newsom declared a drought emergency for the entire state and urged all residents to step up water conservation efforts. In light of these developments, projects like the present one which would exacerbate the depletion of water supplies warrant heightened scrutiny.

A. The County Improperly Focuses Its Analysis on the Environmental Impacts of the Legislative Process Itself

Throughout the IS/ND, the County describes the Project as a "legislative action" which in itself would have less than a significant impact on the environment. For example, in its Impact Discussion on Hydrology/Water Quality, the County asserts that the "*action necessary to amend* the land use and zoning designations for the subject project site would [sic] less than a significant impact on water quality or waste discharge." IS/ND at 4 (Emphasis added.)

There is no debate that the legislative process standing alone has minimal, if any, environmental impacts. But that is immaterial. The question under CEQA is whether by rezoning the subject property and/or amending the General Plan, reasonably foreseeable indirect physical changes to the environment will result. The County improperly fails to address such impacts with respect to groundwater.

For purposes of CEQA, a "project" is defined as comprising "the whole of an action" that has the potential to result in a direct or reasonably foreseeable indirect physical change in the environment. 14 Cal. Code Regs §15378(a). The term "project" refers to the *ultimate activity* for which approval is sought. *Id.* §15378(c). The lead agency must describe the project to encompass the entirety of the activity that likely will follow approval. This ensures that all potential impacts of a proposed project will be examined before it is approved. *Id.* §§15378(a),(d).

Accordingly, a lead agency may not limit environmental disclosure by ignoring the development or other activity that ultimately will result from an initial approval. *See Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171, 1200 (local agency cannot argue that approval of regulation is not a project "'merely because further decisions must be made' before the activities directly causing environmental change will occur"); *City of Antioch v. City Council* (1986) 187 Cal.App.3d 1325 (piecemeal review of development of infrastructure for undeveloped site resulting in negative declaration was improper, even though future developments of the site would be examined in later EIRs, because infrastructure extension was approved to allow site to be developed). Otherwise, applicants would be incentivized to submit projects piecemeal in stages calculated to avoid or minimize environmental review, as applicants Murty and Law (together, "Applicants") appear to have attempted here.

While Applicants have elected not to submit a development plan, their Application, past conduct and Applicant Murty's statements to third parties make clear that their ultimate objective is commercial cannabis cultivation. Indeed, almost immediately after acquiring the parcel in 2020, Applicants cultivated a large quantity of cannabis unlawfully on the property. *See* photo below and Memo from B & W Resorts, Inc. and Lee Auerbach to Community Development Agency dated March 23, 2021 at p. 2, incorporated herein by reference. If Applicants subdivide and sell some or all of the units, it is foreseeable they will market the units as potential cannabis grow sites if the parcel is rezoned AG. Apart from potential cannabis cultivation, Applicants offer no rationale for their rezoning request. As cannabis cultivation is a "reasonably foreseeable" – if not certain – consequence of approval, its impacts must be considered in the County's evaluation of the Application.

Aerial view of cannabis cultivation on subject parcel, Fall 2020

B. The County Improperly Attempts to Defer Consideration of Foreseeable Environmental Impacts to Groundwater

In its Impact Discussion respecting Hydrology/Water Quality, the County suggests that the foreseeable, indirect environmental impacts of the Project can be addressed at a later juncture. IS/ND at 21. It states, "[f]uture development on the site, including permitting for the potential future cultivation of cannabis would be subject to building permit issuance and compliance with the California Building Code along with any required annual cannabis licensing inspections." *Id.* This attempt to "kick the can down the road" is unavailing for two reasons. First, it is not permitted by CEQA. Second, there is no requirement or provision for an environmental impact review with respect to groundwater or otherwise in connection with a building permit or cannabis cultivation permit.

1. CEQA Requires that the Current Environment Review Encompass All Foreseeable Stages through the End Result of the Project

Although a project ultimately may go through several approval stages, the environmental review accompanying the first discretionary approval must evaluate the impacts of the ultimate development that will flow from that approval. This prevents agencies from chopping a large project into little ones, each with a minimal impact on the environment, to avoid full environmental disclosure. *See* 14 Cal. Code Regs §15003(h); *Bozung v. LAFCO* (1975) 13 Cal.3d 263, 283. *See also California Unions for Reliable Energy v. Mojave Desert Air Quality Mgmt. Dist.* (2009) 178 Cal.App.4th 1225, 1249.

As stated in a leading treatise:

> [A] general plan amendment or rezoning to accommodate a development project is only an initial step in the approval process. Even though further discretionary approvals may be required before development can occur, *the agency's environmental review must extend to the development envisioned by the initial approvals*. It is irrelevant that the development may not receive all necessary entitlements or may not be built. Piecemeal environmental review that ignores the environmental impacts of the end result is not permitted.

CEB OnLAW, Practice Under the California Environmental Quality Act, § 6.31 (2021) (emphasis added) (*citing Christward Ministry v Superior Court* (1986) 184 Cal.App.3d 180, 193 (EIR should have been required for general plan amendment designating existing landfill site to permit various waste-disposal activities even though EIR would be required later if use permits were actually sought for such activities); *City of Carmel-by-the-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 251 (county violated CEQA by preparing negative declaration for rezoning and reserving preparation of EIR until later stage of approval); *Citizens Ass'n for Sensible Dev. v. County of Inyo* (1985) 172 Cal.App.3d 151,167 (county improperly prepared negative declaration for general plan amendment and rezoning for proposed shopping center followed by later negative declaration for subdivision map and road abandonment for same project, because, by bifurcating review, county failed to examine potential impacts of entire development).

2. The County's Suggestion that Environmental Impacts to Groundwater Will Be Assessed in the Future Is Illusory

The requirements for a commercial cannabis cultivation license are set forth in the Nevada County Cannabis Cultivation Ordinance ("NCCO"), Nevada County Code § L-II 3.30. Nowhere in the NCCO is there any provision for an assessment of environmental impacts to groundwater or otherwise in connection with the application for a commercial cannabis cultivation permit. Nor is there any provision for such a review in the building code. Thus, the County's suggestion that environmental impacts related to the Project's ultimate objective can or will be addressed at a later developmental stage is fiction. Those impacts must be addressed now.

C. The County Provides an Insufficient Factual Basis for a Determination to Issue a Negative Declaration

Where, as here, an initial study checklist is used to provide the lead agency's findings for a negative declaration, the checklist must be supported by evidence in the administrative record. Although findings relating to the Project's impacts may be shown in a checklist, to provide an adequate basis for judicial review, an initial study should disclose the data or evidence supporting the study's environmental findings. *Citizens Ass'n for Sensible Dev. v. County of Inyo* (1985) 172 Cal.App.3d 151,171.

In *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, the court rejected a negative declaration that was supported only by a bare-bones environmental checklist. There was no indication in the record of the source or content of the data that county staff relied on in preparing the checklist, nor was there an explanation of the initial study's conclusion that potentially significant impacts would be fully mitigated. Describing the checklist as a "token observance" of CEQA requirements, the court held that a lead agency has a duty to investigate potential impacts and provide support for a negative declaration. The record must demonstrate, and not simply assume, that significant impacts will not occur. This prevents a lead agency from providing a superficial analysis of a project's potential impacts in the initial study and then defending its decision to adopt a negative declaration by pointing to the absence of evidence of any significant environmental impacts. The County failed to meet this standard here.

Subsequent to the *Sundstrom* decision, the CEQA Guidelines were amended to provide that the impact findings in an initial study checklist or other form must be briefly explained to show there is some evidence to support the entries. 14 Cal. Code Regs §15063(d)(3). The explanation "may be either through a narrative or a reference to another information source such as an attached map, photographs, or an earlier EIR or negative declaration." *Id*. The County supplies neither.

In addition, the environmental checklist form in CEQA Guidelines Appendix G includes instructions requiring that an initial study explain the basis for findings that the project's impacts will be less than significant. With respect to groundwater supplies, recharge and management, in particular, the County supplies none.

1. The "Reference Sources" Cited Contain No Substance

As support for its finding that the Project would have "less than significant impact" to groundwater supplies, the IS/ND cites two, purported reference sources in its Appendix: "A. Planning Department" and "D. Building Department." The Planning Department's circular reference to itself and its bare bones reference to a sister agency are insufficient under CEQA as they do not reference an information source such as a map, photographs, earlier EIR or negative declaration.

The County's failure to reference an earlier EIR is not surprising. The EIR it finalized only two years ago in connection with the NCCO found that commercial cannabis cultivation would cause significant, unavoidable, detrimental impacts to groundwater. *See* Sections D, E, below.

2. The Impact Discussions on Hydrology/Water Quality and Utilities/Service Systems Fall Short As They Do Not Substantively Address Impacts on Groundwater Supplies, Groundwater Recharge or Sustainable Groundwater Management

In lieu of a meaningful citation to sources of information, the County could have supplied a narrative discussion on the potential impacts of Applicants' foreseeable future development, including commercial cannabis production. 14 Cal. Code Regs §15063(d)(3). For most of the potential environmental issues, the County *does* provide such a narrative. *See, e.g.,* IS/ND at 10 (anticipated impacts to air quality "will be minor when taken in context with the size and scope of the property and the anticipated future use for residential and agricultural purposes"); 17 (anticipated that development of future residential and agricultural uses on the project site would result in small but incremental increases in CO2 levels from the new vehicle trips to this site as well as from minor construction activities"); and 24 ("While construction activities to develop the project site will result in some increases in noise, construction noise is temporary in nature...."). However, as to the potential impacts of future development on groundwater supplies, recharge and management, the County's discussion is silent.

The County's checklist for Hydrology/Water Quality appropriately includes the critical question of whether the proposed project would "Substantially decrease groundwater supplies or interfere substantially with groundwater recharge such that the project may impede sustainable groundwater management of the basin." However, the Impact Discussion at page 21 fails even to mention these issues. Its bald conclusion that the Project will result in "less than a significant impact" pertains only to "water quality or waste discharge." *No conclusion whatsoever is stated as to groundwater supplies, recharge or management*.

As the County's checklist identifies groundwater supplies, recharge and management as environmental issues that must be addressed, the IS/ND fails by the County's own standards to meet CEQA requirements.

D. Project Approval Would Run Afoul of the County's Prior Findings that Environmental Issues Make Cannabis Production on RA Zone Parcels Infeasible

The County extensively evaluated environmental impacts related to cannabis cultivation in the final EIR and underlying documents, studies and analyses which preceded the enactment of the NCCO in 2019.[2] There, the County's stated objectives included "defin[ing] specific zones within the County in which production of commercial cannabis cultivation will be allowed" and "defin[ing] within the specific zones, the total area of commercial cannabis cultivation that will be allowed." https://www.mynevadacounty.com/DocumentCenter/View/27167/ORD18-2-EIR18-0001-Cannabis-PC-SR, Attachment 1 at 39. According to the Findings, a total of 27,207 parcels zoned AG, AE and FR then existed within the County. *Id.* at 82.

The County ultimately determined that with respect to cultivation on those parcels zoned AG, AE and FR, unavoidable, significant environmental impacts on groundwater supply, recharge and management, among other physical conditions, were outweighed by certain economic, legal, social, technological and other benefits. Statement of Overriding Considerations, Section V.B. of the EIR CEQA Findings, *id.* at 89-91.

Significantly, the County considered and rejected a project alternative that would have permitted cannabis cultivation in parcels zoned RA, including the Applicants' parcel, in addition to parcels zoned AG, AE and FR. The County concluded that also allowing cultivation in RA zones was *infeasible* in that it "would not meet the project objectives aimed at protection of the environment and reduction of potential cannabis cultivation nuisances." *Id.* at 84.

It is a fundamental legal tenet that one cannot achieve indirectly that which cannot be achieved directly. Allowing Applicants or others who own parcels in RA zones to rezone those parcels to AG so as to permit cannabis cultivation would contravene the County's prior determination that cannabis cultivation in those zones is infeasible. Moreover, approving the Application would set a precedent that could lead to a flood of rezoning applications posing the potential to increase the total number of parcels subject to cultivation by approximately 76%. *Id.* Applicants, who purchased the subject parcel after the NCCO was enacted, should not be treated differently than any other owner of an RA-zoned parcel.

In any event, the County's previous finding that environmental impacts make cannabis cultivation on RA zone parcels infeasible further necessitates an EIR for the current Project or a mitigated negative declaration that precludes rezoning and/or cannabis cultivation.

E. Substantial Evidence Supports a Fair Argument that the Project, Including Foreseeable, Cannabis Cultivation, May have a Significant Effect on the Environment

Under CEQA, an EIR is required where substantial evidence supports a fair argument that a project may have a significant environmental impact. Cal. Pub. Res. Code § 21080(c)(2); Cal. Code Regs 14, §§ 15064, 15382. That threshold easily is met here.

The County needs to look no further than its own Planning Commission Staff Report prepared in connection with the adoption of the NCCO for evidence respecting the potential impacts of cannabis cultivation. There, under the heading "Hydrology and Water Quality," the County states:

[2] Notably, the County prepared an EIR in connection with the NCCO even though its enactment, like the current Project, could be deemed a "legislative action."

> The project could substantially deplete groundwater supplies such that there would be a net deficit in aquifer volume or a lowering of the local groundwater table level.
>
> *Cumulative Impact*: The project would result in an increase in demand for local groundwater resources that could contribute to cumulative groundwater supply and impacts in areas of the County with limited groundwater resources (*e.g.*, fractured bedrock conditions). In addition, the potential decrease of water infiltration due to development of accessory structures combined with the cumulative increase in groundwater use being unknown at this time, the potential impacts would be cumulatively considerable and significant and unavoidable.

https://www.mynevadacounty.com/DocumentCenter/View/27167/ORD18-2-EIR18-0001-Cannabis-PC-SR at p. 20.

Similarly, under the heading "Utilities and Service Systems," the Staff Report states:

> The project would utilize groundwater supply for commercial cannabis irrigation. Neither the County nor the State has governing rules that would give one overlying groundwater user an advantage over a new overlying groundwater user for cannabis cultivation purposes. Neither the County nor the State have a mechanism in place to track or monitor groundwater production in individual wells. As such, commercial cannabis operations could result in overdrafting of local groundwater aquifers.
>
> Cumulative Impact: The project would increase the demand for groundwater within the Nevada Irrigation service area, and it is unknown whether the public water service providers would have adequate water supply to meet future development needs and potential commercial cannabis operations located within their service boundaries, and the existing ground water supply for some cultivation sites may be inadequate, the proposed ordinance's contribution to water supply would be cumulatively considerable and significant and unavoidable.

Id. at 21.[3]

The "considerable and significant and unavoidable" impacts described above may be amplified if the current Project is approved. That approval will facilitate the foreseeable – if not inevitable – addition of up to 40,000 square feet of cannabis cultivation (10,000 square feet for each of four potential units). This may result in further overdrafting of groundwater supplies, including the groundwater relied upon for domestic uses on adjacent and nearby properties owned by the undersigned property owners and others – including water supplied to dozens of campsites and other facilities at the abutting Harmony Ridge Resort. It also may result in a further drop in the water level of the groundwater-fed pond on the on the Balistreri property (APN 34-160-25), the sole source of water available on Cooper Road for fire suppression, during a period in which wildfire activity is on the rise.

Moreover, subsequent to the issuance of the above-referenced Staff Report, drought conditions and long-term forecasts have worsened. As noted above, within the few days

[3] The Staff Report also identified potential, unavoidable environmental impacts related to aesthetics, forestry resources, air quality and greenhouse gas emissions, and transportation and traffic. *Id.* at 19-21. These also warrant an EIR or appropriate mitigated negative declaration.

preceding the issuance of these comments, the California Department of Water Resources reported that the 2021 water year was the driest since 1924. On October 19, 2021, Governor Newsom issued a proclamation extending the drought emergency statewide and asked residents to redouble their water conservation efforts. Two months earlier, the UN-backed Intergovernmental Panel on Climate Change reported that the Western U.S. may be entering a "drought era." *See* https://www.bloomberg.com/news/articles/2021-08-12/california-drought-a-dry-season-is-turning-into-drought-era. These pronouncements and the data on which they are based constitute further substantive evidence supporting a fair argument that the Project may have a significant effect on the environment.

Finally, a mandatory finding of significance – and preparation of an EIR – is required when a project's potential impacts are individually limited but cumulatively considerable. "Cumulatively considerable" means that the increased effects of a project are considerable when viewed in connection with the effects of past, current, and probable future projects. Pub. Res. Code §21083(b)(2); 14 Cal. Code Regs §15065(a)(3). Inasmuch as the County declared in connection with the NCCO that the cumulative impact of commercial cannabis cultivation is considerable, a project that foreseeably will result in an increase in cultivation and its impacts also must be viewed as cumulatively considerable, triggering the requirement for an EIR.

F. The County Failed to Complete the IS/ND within the Required Time Period and Its Hearing Notice is Defective

Public Res. Code § 21151.5(a) requires local agencies to complete and adopt negative declarations within 180 days after acceptance of the application requesting project approval. Here, the Application is dated January 20, 2021. It was accepted by the County no later than March 9, 2021, when it was distributed for review and comment. Accordingly, the IS/ND was required to be adopted no later than September 5, 2021. In addition, the Notice of Public Hearing mailed to interested parties on or about October 8, 2021 is defective in that it states incorrectly that the hearing will take place in the Supervisors' Chambers rather than online.

Conclusion

For all of the foregoing reasons, the undersigned respectfully request that the County reject the IS/ND and prepare an EIR or, in the alternative, prepare a mitigated negative declaration with limitations designed to avoid potential impacts or reduce them to a less than significant level.

Sincerely,

Lee Auerbach
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Leah Leddy
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(signatures continued on next page)

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