DATE: January 30, 2012

TO: Williamson Act Compatible Use Determination Appeal Review Committee:

Ignacio "Nash" Gonzalez, Director, Department of Planning and Development

Kevin O’Day, Director, Department of Agriculture and Environmental Resources Management

FROM: Sylvia Ornelas, Planner III

RE: Williamson Act Contract No. 2001-001 (Property of Richard Greever and Michelle Stava)

Appeal of Staff-Level Williamson Act Compatible Use Determination for new Single Family Residence located at 12900 Mt. Hamilton Road in unincorporated San Jose (File 6352-51-74-11WA)

**Introduction and Scope of Decision**

The key issue in this Compatible Use Determination is whether the subject parcel contains a commercial agricultural use as described under the County’s adopted Guideline for Commercial Agricultural Use and whether the proposed development complies with the County’s adopted Guidelines. Per County Ordinance Code section C13-16, a land owner whose property is restricted by a Williamson Act contract must apply for and obtain a compatible use determination from the County prior to the undertaking of any development on contracted land. Any interested person may appeal the staff level determination to a review committee comprised of the Agricultural Commissioner and Director of the Director of Planning and Development.

**Staff-Level Determination**

On March 14, 2011, the appellants filed an application for a Williamson Act Compatible Use Determination to construct an approximately 3,120 square foot single-family residence with an attached garage on a 157-acre parcel of non-prime land located at 12900 Mt. Hamilton Road, San Jose (APN 612-43-008). In a letter dated November 9, 2011, staff issued a determination that the subject parcel does not comply with the “Guideline for Commercial Agricultural Use” (Attachment 1) because the land is not devoted to the commercial production of agricultural commodities (Attachment 2). The documented use of the property for commercial agricultural purposes is a pre-condition to
development on land restricted by a Williamson Act Contract. Staff determined that at least 60% of the property was not used for commercial agriculture and the owner did not substantiate revenue from commercial agricultural on at least 60% of the property in three (3) of the past five (5) years.

The documentation submitted by the property owners consisted of federal tax returns from 2008 and 2009. The submitted 2008 and 2009 federal tax returns demonstrated that the property owners claimed expenses (labor, supplies, repairs and maintenance) related to the production of truffles, a highly valued underground mushroom, but reported no income from commercial agricultural sales/production. No federal tax returns were provided for 2010, and the owner submitted a statement declaring that the total farm income for 2010 was $240. During a site visit, staff observed a 3.2-acre fenced area containing three (3) species of oak trees. According to the property owners, the oak trees were planted approximately ten (10) years ago as a host for truffle production. The property owners have advised that each oak tree was inoculated with Perigord Black truffles (Tuber melanosporum). To date, no truffles have been found on-site or harvested. If truffle production were to occur, it could also qualify as a “high value crop” under Criterion 4 of the “Guideline for Commercial Agricultural Use” if the generated annual revenue from sales of agricultural commodities in three (3) of the past five (5) years were at least $250 per acre or $10,000, whichever is greater. The appellants did not substantiate compliance with any of the criterion in the “Guideline for Commercial Agricultural Use.”

Compliance with the “Guideline for Commercial Agricultural Use” is a pre-condition to the County’s consideration of land development on Williamson Act-contracted land. In light of the above staff-level determination that the subject parcel is not devoted to the production of commercial agricultural commodities, staff did not evaluate the other compatibility factors (“Guideline for Compatible Use Development on Restricted Lands” to determine whether a single-family residence would be “incidental to” the agricultural use on the land.

**Contract History**
The subject parcel is restricted by Williamson Act Contract 2001.001, which was approved by the Board of Supervisors (Board) on December 12, 2000 (Attachment 3). The appellants assert the Board approved the contract based on the property’s open space use; however, the parcel does not meet the state statute definition of “open space” in the Williamson Act. Government Code Section 51201(o) defines ”open space” as:

>“the use or maintenance of land in a manner that preserves its natural characteristics, beauty, or openness for the benefit and enjoyment of the public, to provide habitat for wildlife, or for the solar evaporation of seawater in the course of salt production for commercial purposes, if the land is within:

1. A scenic highway corridor . . .
2. A wildlife habitat area . . .
3. A saltpond . . .
(4) A managed wetland area . . . .
(5) A submerged area . . . .
(6) An area enrolled in the United States Department of Agriculture Conservation Reserve Program or Conservation Reserve Enhancement Program.

The subject property does not meet any of these criteria. Therefore, the County would not have approved the application for a new Williamson Act contract as "open space" because the land did not (and still does not) meet the statutory definition of "open space."

Staff reviewed the documentation related to the contract approval and determined that the Board approved the Williamson Act contract based on the fact that the parcel is over 40 acres and is considered to be a standard sized parcel for the purposes of the Williamson Act, and the proposed future agricultural use of the land. The application for the Williamson Act contract clearly indicates the property owners anticipated planting a total of 20 acres of oak trees to produce truffles and cultivating the first crop in five (5) to ten (10) years (Attachment 4).

3.2 acres of the 157-acre parcel contain oak trees related to potential truffle production. To date, no truffles have been found on site or harvested. Therefore, in 2010, the County nonrenewed the Williamson Act contract due to the lack of commercial agricultural use on the property and the property owners did not protest the nonrenewal. The Williamson Act contract for the subject parcel will terminate on January 1, 2020.

Appellants' Position
The following outlines the appellants' position (Attachment 5). The appellants' position is indicated in italics. Following each appellant issue is a staff response.

1. Per Government Code [section] 51205 where the term "agricultural use" is used in the Williamson Act, it is deemed to include recreational and open-space use. Therefore, one of the approved uses of the Property, by statutory definition included in the Land Conservation Contract, is "recreational use." Property owners have allowed the public unrestricted access to walk, hike and picnic on the property while under the Land Conservation Contract.

The Williamson Act authorizes contracts for properties that are in "agricultural use," "recreational use" and "open-space use" as those terms are defined in Government Code section 51201. The purpose of section 51205 is to recognize that, wherever a section of the Williamson Act uses the term "agricultural use," it also encompasses "recreational use" and "open-space use" as those terms are defined in the Act, which precludes the need for the Legislature to repeat all three terms throughout every provision of the Williamson Act. Section 51205 does not, however redefine the term "agricultural use" in a way that differs from the express definition of that term in section 51201(b). Such an interpretation would create a conflict among section 51205 and the express definitions of the three
terms in section 51201. As explained above, the subject property does not meet the statutory definition of “open-space use.”

With respect to the assertion that the property meets the “recreational use” definition in the Williamson Act — the owners did not submit evidence demonstrating that the property is open for use by the public within the letter and intent of the Williamson Act. The fact that the owners may have recorded a “Consent to Use Land” for the property pursuant to Civil Code Section 813 is not sufficient to establish “recreational use.” The primary reason a property records a “Consent to Use Land” is to preclude the public from acquiring property rights via prescriptive use. The recording of such a document is not uncommon when the property is rural and uninhabited.

2. Exhibit A of the Land Conservation Contract identifies in Paragraph 1(a) a compatible use incidental to the agricultural use of the land is a single-family home for the property owner or lessee.

Exhibit A to the contract is the compatible use list (Attachment 7). This list identifies those uses that are presumed compatible with the Land Conservation Contract. This list expressly provides that any residential uses must be “incidental to the agricultural use of the land.” In other words, the use of the land for agricultural purposes is a prerequisite for development of any residential use. As explained above, the County has adopted guidelines that explain what qualifies as a bona fide commercial agricultural use and, once this criterion is met, how much of the property may be developed for “compatible uses.” The County’s adopted guidelines are fully consistent with the provisions of the Williamson Act. Government Code section 51201(b) defines “agricultural use” as “use of land for the purpose of producing an agricultural commodity for commercial purposes.” Section 51201(a) defines “agricultural commodity” as “any and all plant and animal products produced in this state for commercial purposes, including, but not limited to, plant products used for producing biofuels.” To date, there is no evidence of any onsite commercial agricultural use that meets these requirements.

3. Nine (9) years after the Land Conservation Contract was entered...the County adopted “Guidelines for Compatible Use Development on Restricted Land.” These guidelines for the first time required the use of contracted land subject to the Williamson Act program for proposed development be in commercial agricultural production as a precondition to the County considering a development application.

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1 Civil Code section 813 provides, in relevant part:

The recorded notice is conclusive evidence that subsequent use of the land during the time such notice is in effect by the public or any user for any purpose (other than any use expressly allowed by a written or recorded map, agreement, deed or dedication) is permissive and with consent in any judicial proceeding involving the issue as to whether all or any portion of such land has been dedicated to public use or whether any user has a prescriptive right in such land or any portion thereof. (See, e.g., Friends of the Trails v. Blasius (2000) 78 Cal.App.4th 810, 822.)
As explained under issue #2 above, the compatible use attached to Land Conservation Contract No. 2001.001 expressly states that any residential uses must be "incidental to the agricultural use of the land." This language was part of the contract when the property owners applied for and executed the contract. This requirement is also consistent with Government Code section 51242, which prohibits cities and counties from entering into a Williamson Act contract unless the land subject to the contract "[i]s devoted to agricultural use."

The adopted Guidelines do not alter the contract language; rather, they provide more specificity regarding what constitutes a commercial agricultural use and what type of compatible use development is "incidental to" the agricultural use. The intent of the Guidelines, as adopted, is to ensure that Williamson Act contracted land complies with the Williamson Act's policies of promoting agricultural productivity and economic viability and preserving agricultural land (Government Code Section 51220). The Guidelines are used to evaluate proposed compatible use development on parcels restricted by Williamson Act contracts. This in turn protects the County and property owners from enforcement action by the California Department of Conservation.

4. The County cannot unilaterally change the terms and conditions of the Land Conservation Land Conservation Contract by adopting Guidelines for Compatible Use Development on Restricted Lands or adopt its own definition of the words which are inconsistent with the definition of words in California Government section 51200 et seq. Grever's contractual rights were created by the Land Conservation Contract on December 12, 2000. His contractual rights are "grandfathered" with the County.

As explained in the response to issue #3, the County did not unilaterally amend the contract. The purpose of the Guidelines is to provide more specific guidance regarding what constitutes a commercial agricultural use and when certain uses are incidental to and compatible with the commercial agricultural use of the property. Section 1 of Land Conservation Contract No. 2001.001 for the subject property provides in relevant part:

"This Contract is enter into pursuant to ... the Williamson Act .... This Contract is subject to all of the provisions of this Act including any amendments thereto which may hereafter be enacted. This Contract is also subject to County Ordinances implementing the Act, as amended from time to time."

Therefore the contract signed by the owners on December 12, 2000 for the subject parcel incorporated by reference all County ordinances, including future amendments. The County Board of Supervisors amended the County's Williamson Act ordinance on May 23, 2006 (Ord. No. NS-1203.113). Section C13-14 of this ordinance provides as follows:

The use and development of all contracted land must at all times comply with the Williamson Act, this chapter, the terms of the Williamson Act.
contract, and any other applicable state and local laws, regulations, ordinance and guidelines.

Per County Ordinance Code section C13-16, land owners must apply for and obtain a compatible use determination from the County prior to the undertaking of any development on contracted land. As explained above, the subject parcel is not devoted to the production of commercial agricultural commodities. Therefore, the proposed development of a 3,120 sq. ft. house does not meet the requirements for compatible uses as set forth in the Williamson Act, the Contract, or the County’s adopted Guidelines.

CONSEQUENCES OF NEGATIVE ACTION
If the denial of the Staff-Level Compatible Use Determination is upheld by the Appeal Review Committee, the applicant will be unable to apply for Building Site Approval to build the proposed 3,120 square foot single-family residence. The appellants will then have the following options: 1) appeal the decision of the Appeal Review Committee to the Board within 15 days of the action of the first-level appellate body; 2) file a new application for a Williamson Act Compatible Use Determination after establishing a history of the parcel being devoted to commercial agricultural use; 3) wait until the Williamson Act contract expires (the appellants may begin the Building Site Approval process two years before the contract expires); 4) apply for cancellation of the Williamson Act contract; or 5) apply to transfer the property from a Williamson Act contract to an Open Space Basement Agreement.

ATTACHMENTS
Attachment 1: “Guideline for Commercial Agricultural Use”
Attachment 2: Compatible Use Determination letter dated November 9, 2011
Attachment 3: Land Conservation Contract No. 2001.001
Attachment 4: Appellants Williamson Act Contract application and County staff report
Attachment 5: Appeal letter dated November 23, 2011