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**de la Guerra, Sheila**


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**Sent:** Friday, March 8, 2019 11:56 AM
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**Subject:** Rotman/Browstein Comment Letter for March 12 Hearing on Hoop Houses
**Attachments:** 18839741_1_March 12 Comment Letter re Hoop House Ordinance Amendment.docx


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Dear Honorable Supervisors,

Attached please find our Comment Letter for the upcoming March 12 Hearing on Hoop Houses.

Thanks for your attention to this matter!

Best regards, Amy Steinfeld


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March 8, 2019

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**VIA E-MAIL: SBCOB@CO.SANTA-BARBARA.CA.US**

Santa Barbara County Board of Supervisors
105 E Anapamu Street
Santa Barbara, CA 93101

RE: Hoop Structures Ordinance Amendment
March 12, 2019 Hearing
Agenda Item No. 1

Dear Supervisors:

My firm represents Sara Rotman, owner of Busy Bee's Organics, a cannabis cultivator located on a 64-acre parcel (AG-II-40) immediately south of Highway 246 and at the far end of the Design Control Overlay of the Santa Ynez Valley Community Plan area ("Design Overlay"). I previously wrote to the Planning Commission to express my client's concerns regarding the proposed amendments to the Hoop Structures Ordinance Amendment, specifically the restrictions on hoops within the Design Overlay. While we support the Planning Commission's proposed development standards for hoops, we oppose: (1) reincorporation of the 4,000 square foot size limit as a criterion to qualify for a permit exemption within the Design Overlay; and (2) the proposed permit path for hoop houses within the Design Overlay.

The Planning Commission's recommendation already includes numerous mitigation measures to protect the County, such as restrictions on siting hoops on slopes, setbacks from creeks, and prohibitions on lighting. NO additional requirements should be placed on these temporary farming accessories.

The proposed permit path for landowners within the Design Overlay is not an option for farmers who have already spent hundreds of thousands of dollars applying for County Land Use Permits and complying with numerous state regulations. Effectively prohibiting the use of hoop and shade structures on over **8,000 acres** of agriculturally zoned land in the Santa Ynez Valley is unprecedented, and if implemented, will result in undue hardship on Busy Bee's Organics and countless other farmers in the Valley. Obtaining a Development Plan is not appropriate for **temporary farming equipment (not a structure)**, and will result in additional delay that could

take several years as the Planning Department must comply with CEQA for each and every development plan.[1]

Accordingly, the Board should remove the restrictions within the Design Overlay, including the proposed permit path. Farmers in the Design Overlay should be treated like other farmers in Santa Barbara County. If the Board does not remove the Design Overlay restrictions, the only permit path that should be included in the Ordinance is a land use permit, not a Development Plan. On January 30, 2019, the Commission made a separate motion, asking the Board to consider what level of permit is most appropriate for nonexempt development in certain areas of the County. (See page 5 of the Board Letter.) We hereby request that if the Design Overlay restrictions are not stricken from the Ordinance, that the Board determine a land use permit is the most appropriate type of permit. Anything more onerous is inappropriate for these temporary structures and will destroy the farming community in the Design Overlay, some of the most productive in the valley.

## I.Recommended Changes to Hoop House Ordinance

The proposed permit path would require farmers located within the Design Overlay to obtain a Land Use Permit for hoop and shade structures that are less than 20 feet tall and cover between 4,000 and 20,000 square feet (between 0.09 to 0.46 acres *per lot*) and a Final Development Plan for hoop and shade structures that are less than 20 feet tall but cover more than 20,000 square feet (*only* 0.46 acres *per lot*).

Given the profound impacts this regulation will have on the County's agricultural industry, we respectfully request that the Board reject the restrictions on hoops within the Design Overlay, and instead exempt from permitting all hoops and shade structures in the County that are under 20 feet in height and comply with the other proposed development standards in the Ordinance (no lighting, no permanent footings, compliance with riparian setbacks, etc.).

**This change will only require the following minor amendments to the Ordinance, including the removal of: Section 35.42.140.C.1.a(6) and all references to C.1.a.6:**

**~~(6) Hoop structures and shade structures located in the Critical Viewshed Corridor (CVC) Overlay within the Gaviota Coast Plan area or in the Design Control (D) Overlay within the Santa Ynez Valley Community Plan area cover more than 4,000 square feet per lot, but are not visible from public roadways or other areas of public use. Landscape screening shall not be taken into consideration when determining whether the structures are visible from public roadways or other areas of public use.~~**

## II.Hoops Offer Many Benefits to Farmers and the Environment

Hoop structures are an important tool for the cultivation of specialty crops in Santa Barbara County, particularly berries and more recently, cannabis. We previously delineated many of the benefits hoop houses offer. In short, hoop houses (1) slow evaporation and reduce crop water demand; (2) reduce the occurrence of insects and other pests, allowing growers to limit their

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[1] Santa Barbara County Code § 35.82.080(D)(2) ["After receipt of an application for a Development Plan, the Department shall review the application in compliance with the requirements of the California Environmental Quality Act."].)

dependence on pesticides and other chemicals; (3) reduce the presence of mold; (4) improve soil and plant quality; and (5) extend the growing season, leading to a reduced footprint. In addition, hoops are becoming increasingly necessary to due climate change, which has led to higher temperatures in the valley. Hoops protect crops from UV radiation and sun damage.

Hoop houses not only benefit crops and reduce environmental impacts, but they are necessary for cannabis cultivators to farm in the Valley because they protect the plants from heavy metals and pesticide drift. This is particularly important for cannabis, as the crop is subject to stringent third-party testing requirements—some of the most stringent in the United States. The testing regulations, drafted by California's Bureau of Cannabis Control, require that all cannabis products undergo testing by third-party laboratories that probe the samples for safety and dosing accuracy. The testing covers potency, pesticides, microbiology, terpenes, heavy metals and more.[2]

We are not opposed to California's testing requirements, as the Bureau's goal of protecting the end user, or consumer, is a laudable one. But without hoop houses to shield her cannabis plants, Ms. Rotman's farm is directly exposed to pesticide drift from neighboring vineyards, where Myclobutanil,[3] and other pesticides, are sprayed onto grapevines.[4]

While generally thought to be safe for use on vines,[5] when heated, Myclobutanil produces toxic fumes, including hydrogen chloride, hydrogen cyanide, and nitrogen oxides. Thus, any cannabis byproduct that requires combustion (i.e., extreme heat) prior to consumption—edibles, concentrates, vape cartridges, and flower—should not and cannot come into contact with Myclobutanil. Myclobutanil is a systemic fungicide, meaning it is absorbed at the site of application (ex. leaf) and distributed throughout the rest of the plant, thereby providing more comprehensive protection from fungal infection. As a systemic chemical, myclobutanil cannot be removed by washing treated crops, although residue will decrease in plant tissues over time. The final remaining residue levels vary considerably and are highly dependent on the rate of application, the time of last application before harvest, and how well the specific plant clears the chemical from its system.

Without hoop houses, Ms. Rotman's cannabis crop will be constantly and considerably exposed to the Myclobutanil drift from neighboring vineyard properties, rendering her crop entirely useless; unsuitable for use by consumers and unable to pass the State's testing requirements for cannabis. (See Bureau of Cannabis Control Residual Pesticide Testing Regulation, 16 CCR § 5719 [the presence of residual Myclobutanil cannot exceed 0.1 micrograms per gram, and if a sample fails residual pesticide testing, the batch from which the sample was collected "shall not

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[2] In addition to testing requirements in effect during 2018, as of January 1, 2019, cannabis cultivators' products are subject to terpenoid testing, mycotoxin testing, heavy metals testing, and water activity testing of solid or semi-solid edibles. (16 CCR § 5715(d); see also 16 CCR §§ 5717, 5721, 5723, 5725.)

[3] Myclobutanil is the active ingredient in several brands of pesticides, including Eagle 20EW.

[4] Mycolobutanil is a conazole class fungicide used to prevent the growth of powdery mildew, dollar spot, brown patch, and other fungal pathogens, and is commonly used on wine grapes.

[5] According to Pesticides.News, myclobutanil is "harmful if swallowed, and . . . can cause serious eye irritation. It is also suspected of damaging fertility or the unborn child. Prolonged or repeated exposure to myclobutanil can cause damage to the organs. Myclobutanil is toxic to aquatic life, with long-lasting effects." Pesticide.News, Myclobutanil – toxicity, side effects, diseases and environmental impacts (Nov. 23, 2017) available at https://www.pesticides.news/2017-11-23-myclobutanil-toxicity-side-effects-diseases-and-environmental-impacts.html.

be released for retail sale."].) These strict testing requirements only apply to cannabis; vineyards are not subject to such stringent requirements.[6]

Further, as of January 1, 2019, all cannabis samples must comply with strict heavy metals testing. The presence of lead may not exceed 0.5 micrograms per gram for both inhalable and infused cannabis products. (See 16 CCR § 5723(c).) Like pesticides, heavy metals created by vehicle traffic drift in the air from Highway 246, settling on cannabis plants and soils that are not protected by hoops. In sum, without the protection of hoops, all cannabis crops are at risk from cross-contamination.

Hoop house restrictions like MM-VIS-3 will create even more barriers to entry, as other growers will weigh compliance with feasibility and profits. It's clear that these limitations on land within the Design Overlay will also diminish the value of over 8,300 acres of prime farmland.

## III. MM-VIS-3 Is Not Feasible and Does Not Recognize the Purposes of CEQA

According to the EIR, the Hoop Structures Ordinance Amendment "is intended to simplify and streamline the permit process for hoop structures and shade structures to allow farmers more flexibility and efficient agricultural operations in support of the County's agricultural economy."[7] And two of the primary objectives of the Hoop Structures Ordinance Amendment are: (1) to "[e]xempt hoop structures and shade structures of *a given height* from planning permits on agriculturally zoned lands in the Inland Area"; and (2) "[c]larify permit requirements for *taller* hoop structures and shade structures."[8]

MM-VIS-3 is directly contrary to the EIR's stated goals and intentions. Under the proposed Hoop Structures Ordinance Amendment, hoop or shade structures, *regardless of height*, located within the Design Overlay would only be exempt from permitting if they measure less than 4,000 square feet, unless such structures are not visible from any public roadway or other areas of public use. A 4,000 square foot limit is essentially a prohibition, as no commercial farmer, cannabis cultivator or otherwise, would ever reap any benefit from such a small cultivated area. Indeed, hoop structures increase productivity, decrease use of pesticides, reduce water use, and provide added security. While recognizing these benefits in the EIR, the EIR failed to analyze the significant effects that the MM-VIS-3 will have on the environment.

MM-VIS-3 places an unreasonable 4,000 square foot size-limitation on the hoop houses within the Design Overlay. In proposing this mitigation measure, the EIR only addressed how the measure would partially remediate certain significant environmental effects, namely, visual changes to the environment (identified as visual character, public scenic views and resources, and light and glare). The EIR admits that the three mitigation measures it proposes to address

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[6] The California Department of Pesticide Regulation and the County Agricultural Commissioners enforce the use and sale of pesticides under Divisions 6 and 7 of the California Food and Agricultural Code, and Title 3 of the California Code of Regulations. These laws and regulations apply to all pesticide use; cannabis is no exception, but the further pesticide regulations on cannabis previously mentioned are much more exacting.

[7] Final EIR at S-2.

[8] *Id.* (emphasis added).

visual impacts can only provide partial mitigation, and that "impacts will remain significant and unavoidable."[9]

The EIR makes no attempt to address the new and significant effects that inclusion of MM-VIS-3 would have on the environment.[10] Specifically, by limiting the size of hoop houses to 4,000 square feet per lot within the Design Overlay, the Hoop Structures Ordinance Amendment will prevent new or expanding agricultural operations that utilize hoop houses in this area. This will, among other things, decrease productivity, and increase the agricultural footprint of each crop, use of pesticides, and water use in the Design Overlay. As a result, adoption of MM-VIS-3 in the Hoop Structures Ordinance Amendment and codified in the Land Use and Development Code could lead to greater environmental harm, standing in contrast to CEQA's desire that public agencies aim to reduce environmental damage when "feasible."[11] Without any discussion of MM-VIS-3's significant impacts, it is near impossible for the Board of Supervisors, to have "analyzed and considered the ecological implications of its action."[12]

In August 2018, the Commission recognized that MM-VIS-3, along with other mitigation measures proposed in the EIR, is not feasible. The Commission directed staff to "revise the [EIR] to reject three mitigation measures as infeasible (MM-VIS-1, MM-VIS-2, MM-VIS-3), delete two mitigation measures as unnecessary due to new substantial evidence submitted into the record" and modify one other mitigation measure.[13] County staff recognized that the size limitation imposed was likely infeasible, as "[c]rop protection structures are typically not employed on such a small scale, and limiting the size to 4,000 square feet would limit a farmer's flexibility" within the Design Overlay and the Critical Viewshed Corridor Overlay of the Gaviota Coast Plan area.[14]

In compliance with the Commission's direction, staff drafted the necessary Findings for Approval. Regarding MM-VIS-3 and Revisions to the EIR. The revisions to the EIR addressed the infeasibility of the mitigation measures.[15]

Such a regulation is not necessary to effectuate a substantial public purpose, because as staff admitted, MM-VIS-3 "would only marginally decrease impacts to aesthetics/visual

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[9] *Id.* at 4.2-27.
[10] See *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1027.
[11] See CEQA Guidelines § 15002(a)(2) and (3); see also *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564.
[12] See CEQA Guidelines § 15003(d); *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 86.
[13] Staff Memorandum, RE: Hoops Structures Ordinance Amendment (October 30, 2018) at 1, *available at* http://sbcountyplanning.org/PDF/boards/CntyPC/11-07-2018/17ORD-00000-00005/Staff%20Memo%2010-30-2018.pdf.
[14] *Id.* at 2.
[15] "Large acreages of cultivation (economies of scale) are required to engage in successful, full-time agriculture and a 4,000 square foot size limit would not allow the land to be used to its full agricultural potential. The mitigation measure would effectively restrict the use of crop protection structures and agricultural flexibility on D Overlay lands. As a consequence, MM-VIS-3 would create a specific economic burden on agricultural operations leading to farming inefficiencies and increased costs." (Staff Memorandum (Nov. 7, 2018), RE: Revisions (RV01) to the Final Environmental Impact Report (17EIR-00000-00004) – Hoop Structures Ordinance Amendment ("EIR Revisions") at 6-7 (emphasis added), *available at* http://sbcountyplanning.org/PDF/boards/CntyPC/11-07-2018/17ORD-00000-00005/Attachment%20C%20EIR%20Revision%20Document.pdf.)

resources."[16] And staff also admitted that "*MM-VIS-3 would essentially prevent any farmers within the D Overlay from choosing*" which types of crops to cultivate, and "*a 4,000 square foot size limit would not allow the land to be used to its full agricultural potential.*"[17]

Ms. Rotman developed her property with the expectation that she could cultivate cannabis and other products in hoop houses, and would be able to continue to expand her business. With MM-VIS-3 in place, Ms. Rotman's investment backed expectations would be erased, as she would be completely prohibited from expanding her hoop-house-based farm as anticipated. For these reasons, MM-VIS-3 goes too far, and places an enormous public burden onto the shoulders of Ms. Rotman and others similarly situated, likely constituting a "taking" of private property in violation of the Federal and State Constitutions.[18]

Accordingly, MM-VIS-3 should be rejected as infeasible, as rejection of MM-VIS-3 "would not substantially increase the severity of impacts identified in the Final EIR or result in any new significant environmental impacts."[19] In fact, as explained above, MM-VIS-3 would increase environmental impacts.

## IV. The Newly Proposed "Permit Path" for Hoop Houses Larger Than 4,000 Square Feet is Not Feasible for Farmers in the Design Overlay

At the Planning Commission Hearing on December 5, 2018, the Commission directed staff to revise the proposed ordinance amendment to include a permit path for larger structures within the Design Overlay. On January 30, 2019, the Commission recommended approval of the Hoop Structures Ordinance Amendment with nine revisions to the original ordinance amendment. The Commission also made a separate motion, as discussed below, asking the Board to consider what level of permit is most appropriate for nonexempt development in certain areas of the County; however, it was not part of the final recommendation of the Commission and is not part of the Commission-recommended ordinance amendment attached to the Board Agenda Letter.

Accordingly, the newly proposed permit path in the proposed Ordinance would require farmers located within the Design Overlay to obtain a Land Use Permit for hoop and shade structures that are less than 20 feet tall and cover between 4,000 and 20,000 square feet (between 0.09 to 0.46 acres *per lot*) and a Final Development Plan for hoop and shade structures that are less than 20 feet tall but cover more than 20,000 square feet (*only* 0.46 acres *per lot*).

A Final Development Plan, which requires compliance with the California Environmental Quality Act (CEQA) and a public hearing, is not an option for farmers who have very narrow margins. Obtaining a Final Development Plan is also not appropriate for a temporary farm accessory,[20]

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[16] *Id.* at 6.
[17] *Id.*
[18] *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 775-76.
[19] Staff Memorandum (Nov. 7, 2018), RE: Revisions (RV01) to the Final Environmental Impact Report, *supra*, at 7.
[20] The required findings for all Final Development Plans demonstrate that temporary hoop structures are not the type of "structure" contemplated by the code. (See Santa Barbara County Code § 35.82.080(E)(1) [For example, streets and highways must be found to be adequate and properly designed to carry the type and quantity of traffic generated by the proposed use, and

and will result in additional delay that could take several years as the Planning Department must comply with CEQA for each and every development plan. Simply stated, requiring a Final Development Plan before installing hoops on more than 0.46 acres per lot would destroy many businesses within the Design Overlay entirely.

Regarding cannabis specifically, all cannabis cultivators (outdoor, indoor, mixed-light, and nursery) are already required by the Land Use and Development Code to submit Landscape Plans and Screening Plans for review and approval before receiving a permit: "All cultivation shall be screened to the maximum extent feasible to avoid being seen from public places, including but not limited to, public rights of way, shall comply with Section 35.34 (Landscaping Standards)," and other standards.[21] Additionally, all Landscape and Screening Plans must "include landscaping which, within five years, will reasonably screen the view of any new structure, including greenhouses and agricultural accessory structure, and on-site parking areas from the nearest public road(s)."[22] Accordingly, the requirement of a Final Development Plan is duplicative of the already-onerous regulations for cannabis cultivation, and this additional requirement will only delay and force legally compliant cannabis businesses to shut down if they cannot plant crops this spring.

## V. Conclusion

The proposed restrictions on hoop and shade structures of less than 20 feet in height are inconsistent with the Board of Supervisors' direction to County staff. The Board expressly directed County staff to clarify regulations for only those hoop and shade structures greater than 20 feet in height, and to retain the existing permit exemption of all others 20 feet in height or less. The limitations placed on hoops within the Design Overlay are in direct conflict with this direction.

Additionally, the proposed permit path for landowners within the Design Overlay is not an option for cannabis farmers who have already spent hundreds of thousands of dollars applying for local County Land Use Permits and complying with numerous state regulations. If regulations are to be imposed on hoop and shade structures in the Design Overlay, they should only be applied to those <u>over 20 feet</u> in height and should be treated similarly to other non-exempt structures—as permitted uses subject to design review approval and reasonable development standards. However, such regulations, and their significant effects, would need to be adequately addressed in a recirculated EIR.

Thank you for your careful consideration of these comments. My client and I will be present at the March 12 hearing to provide additional oral testimony and answer any questions you may have.

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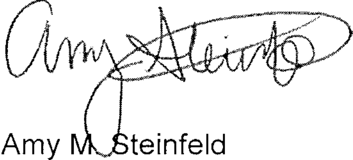
there must be adequate public services, including fire and police protection, sewage disposal, and water supply to serve the proposed project].)

[21] Santa Barbara County Code § 35.42.075(C)(3).

[22] *Id* § 35.42.075(C)(3)(a).

Respectfully submitted,



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