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May 17, 2012

Chair Farr & Supervisors
Santa Barbara County
123 E. Anapamu St.
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via e mail

Re: Park Hill Estates v.2
Hearing Date May 22, 2012
Agenda item No. 7

Dear Chair Farr and Supervisors,

This is follow up on the May 1 Supervisors hearing. The issues have been narrowed down to the adequacy of review of emergency egress.[1]

Below is the missing analytical link to solve this, and it avoids clear liability for the County associated with its action on the road link in question.

Executive Summary

This project is covered by the Goleta Community plan EIR which is the master EIR. Per the CEQA guidelines, "**fair argument does not apply once a Master EIR has been prepared if the Master EIR can be construed as the "original EIR" for a subsequent project. In other words, if the project is within the scope of the Master EIR."**

Clearly this project is within the scope of the original Goleta Community Plan Master EIR (which was not the case for all the church/ synagogue CUP's in the area.)

Applying additional scrutiny to these last 3-4 units in this project, after 12 units have a certified EIR and neighbors embrace the safety of 12, is unjustified. Indeed these last 3-4 units have been anticipated by County Planning and environmental documents.

The County has liability for any impairment to the project, including delays, from its handling of the road through Tuckers Grove, if indeed that issue impacts this property.

Summary

[1] We made presentation on all issues at the hearing by County ordinance and state law de novo where any and all actions were and are available to the Supervisors.

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The staff is sending the Board a report, as it requested, that shows some improvements were required and completed at the connection of San Antonio Creek Road and Tuckers Grove under two permits, although B'nai B'rith seemingly did not do all of the improvements they had promised staff says that was covered in the subsequent separate permit. The road was a full use two way road until 1974 when the County determined it was appropriate to restrict it to emergency use only, because of the adequacy of other roads in the area.

The bottom line is that this issue is one raised by neighbors for every project in the area, and is not a justification for additional review or processing for this modest-sized housing project.

All of the impacts from this property were already analyzed and anticipated in the Master EIR for the Goleta Community Plan. No other project, including the three churches in the area, have had focused EIR's required on the area circulation.

We have spent 2 years of processing, fine tuning changes to a project with 12 lots, where 12 additional second units could be built without Environmental Review (and neighbors, in 2007 testimony, indeed anticipated the second units would occur). A MND was certified in 2007 anticipating these 12 or 24 units for the property.

Environmental community positive
The voices in this have been from neighbors- NIMBYs, not the voices of the environmental community. Indeed this creates a great public environmental benefit by its West Campus Point UCSB Cheadle Center for Biodiversity and Ecological Restoration off site grassland mitigation.

Met all Neighbors requests
We have met all neighbors' requests for project modifications and have been stuck for 2 years trying to explain that the inclusionary-affordable housing is something that the County requires us to deal with. We are dealing with it in the most practical manner possible. The project has gone from 17 market homes and one affordable on 14.85 acres to 14 market homes and one affordable. The only "bonus" unit for this now is the one on-site affordable unit so if the County thwarts the project by two more years of review because of the "15th home", it is specifically thwarting the project because of the affordable home.

No Nexus
The Fire Department has said that this project meets and exceeds all Fire Department Standards. I spoke to Will Robertson of Roads and he said that there is no nexus between that Tuckers Grove road connection and the Park Hill project and that the project's road fees cannot be used for further work on that road connection. The County has never considered more improvements there to justify that work being a project on the GTIP list.

There is no nexus to require anything more of this small project on the County's chosen road grid and CEQA cannot be the basis to require anything more, so there is nothing to be gained in analyzing additional mitigations. Road and Fire say there is no nexus for this project; CEQA cannot conclude otherwise.

De Novo

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The Supervisors have jurisdiction of this project as a de novo appeal (County Code 35.102.050C). "**DE NOVO** Anew, afresh. Considering the matter anew, the same as if it had not been heard before and as if no decision previously had been rendered" (Lectlaw definitions).[2] The Supervisors can take any action which the Planning Commission could have taken.

There are no other issues on the project, once the project is clear of the unreasonable requirement that it examine the road grid which the County has created. We urge you to recognize that a mitigated ND adequately analyzes the impacts of the project and urge you to approve the project.

We believe the County will not be complying with its Housing Element and state law related obligations to projects with bonus density and affordable housing if it effectively thwarts this via additional review.

The undisputed facts in the record:

- San Antonio Creek Road through Tuckers Grove was a full use 2-way road until the County limited its use in about 1974 (S. Zeluck testimony, written submittal).
- These owners bought the property and embarked on development efforts before the County limited that road use.
- The County did a master EIR for the Goleta Community plan, covering development of this property, in 1991, well after the road connection status that exists now was in place.
- The master EIR found that there were potentially significant impacts associated with developing properties north of Cathedral Oaks and Foothill but found overriding considerations and standard mitigation measures.
- The County has subsequently adopted environmental documents for the housing element that anticipate additional units above the base density from 1991 and found there are no significant effects from the small incremental additions through bonus density and inclusionary-added units.
- The Park Hill project is fully within the density covered by the master EIR and the subsequent housing element environmental reviews.
- The Tuckers Grove exit was indeed used as an evacuation road in the most recent fires (D. Brown at Supervisors and C. O'Connor in writing to PC).
- The Park Hill property has, in addition to the master EIR, a certified MND in 2007 that approved 12 homes on 1 acre lots.
- The County has uniform fire protection policies imposed on each project, including number of access roads within the project. The first Park Hill project proposed in 1997 had 1 point of access (on the east) (See letter from County submitted to the record). The County required a second access at the south which was added. This exceeds the current Fire Department standard of two points of access when 30 homes are developed.
- The Park Hill v.2 project proposed in 2010 added a third emergency link to Pennell through the edges of lots served by the cul-de-sac that is directed towards the north of the project. The neighbors (through D. Vickers) requested that we eliminate that emergency connection which

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[2] **DE NOVO** Anew. afresh. Considering the matter anew, the same as if it had not been heard before and as if no decision previously had been rendered. Ness v. Commissioner, 954 F.2d 1495, 1497 (9th Cir. 1992). Such review is 'independent.' Premier v. Fuentes, 880 F.2d 1096, 1102 (9th Cir. 1989).

we did (see project file- A. Tuttle can confirm). This extra emergency length would have allowed people from the north or south to travel through the project if San Antonio Creek Road was blocked south of Pennell and before the projects eastern entrance. As it is, the two road links within the project add to the emergency circulation in the area if San Antonio Creek Road is blocked.

- The County has not put improvement of the Tuckers Road connection on the GTIP list of road projects, as it has not to date determined that those improvements are necessary and appropriate.
- The applicants have offered to dedicate the $203,000 road fees to the closest road issue including this, if the County will accept that but Roads say that can't be done because this is not on the GTIP list.
- In the 2007 hearing, the then President of the San Antonio Creek owners association said "this 12 lot approval means there will be 24 homes there as we expect all to have second units."
- Our current project plan with setbacks thwarts development of second units on all lots, thus limiting maximum residences to 15+1 if project at PC is approved or 14+1 if compromised proposed before the supervisors is approved.

Analysis

The fire safety issue has two sub components that have not been appropriately separated: -is it safe for the residents of the new homes on the Park Hill site? Are new residents being brought to an area that is unsafe from a fire standpoint?

This issue is already handled in the master EIR in the Goleta Community Plan. This is also the issue that the CEQA initial study checklist goes to.

A second subset of this issue could be- does the addition of new homes in the area pose a threat to the lives of existing residents? There is a County CEQA guideline section "risk *of upset and danger"* but it relates to major energy facilities. One of the many problems with applying it to infill housing is that there is no threshold of significance at which one triggers a potential impact. How could infill housing approved by the Fire Department be remotely considered like an energy facility for which the risk is that there will be a major malfunction and release of dangerous substances? The threshold would have to be above any number of units proposed to date in any version of the project, since (at least) 12 homes are already certified in prior environmental documents, 14 in the master EIR and up to 18 via the Housing Element subsequent environmental review.

It would be discrimination against this project to say its additional 3 or 4 homes above the existing approval has the possibility of creating a significant impact. The County did not say the 4 homes in the Castro 4 lot subdivision exceeded that threshold (indeed the 4 homes could become 8 units with 1200 square foot second units being allowable on each as a second unit). Neighbors have certified to the Supervisors that 12 homes are acceptable, and in 2007 neighbors said they expect the 12 to become 24 with 2nd units. By not raising the issue of fire endangerment on Castro or other matters, it is evident that what matters is the composition of those additional 3 or 4 homes. Only Park Hill Estates has one of those additional homes being an affordable unit.

The Santa Barbara County Environmental Thresholds and Guidelines Manual lists 16 separate categories of issue area for environmental review. One area is public safety thresholds. That lists 12

types of projects that can include risks to public safety. They include oil and gas facilities, transportation of hazardous rocket propellants, and handling of radioactive materials and things of that sort. There is a threshold of significance on the risk of fatality from those extraordinary uses for which a threshold of significance is created.

Clearly development of infill housing at a density of close to 1 unit per acre per the County community plan does not trigger a public safety threshold. It does not trigger a traffic threshold either, and no one has suggested otherwise. The Goleta Community Plan describes the fire protection service under public services (other public services include electricity, natural gas, schools, and wastewater collection). The Community Plan analyzed an additional development of 6,230 housing units which has not remotely been approached. See Goleta Community Plan, final EIR page V.K-9 at figure V.K-1. It shows existing and proposed fire stations and response times within 5 minutes. The Park Hill property is within the 5 minute response time of station 19 and station 13's 5 minute response time comes right to the edge of the property.

The EIR stated that "because of the special difficulties of servicing development in relatively inaccessible foothill areas with high fire danger, development proposed for the foothills represents a potentially significant impact." The EIR adopted overriding considerations for this impact. Please note that many areas in the generically described "relatively inaccessible foothill areas" are indeed outside the 5 minute response time and indeed much more inaccessible than the Park Hill property.

Periodically the County has adopted environmental documents that renew and supplement the EIR (state clearinghouse number 90010559) including housing element ND's that anticipate the few additional units associated with inclusionary zoning that gives offsetting additional units when affordable units are provided onsite and bonus density units.

Uniformly applied conditions such as rigorous County Fire Department Standards and ever increasing building code standards in high fire zones are mitigation measures adopted to lessen the impact of anticipated environmental impacts associated with building in a high fire area.

Development of homes consistent with the community plan is anticipated, analyzed and covered by the EIR and subsequent environmental documents related to the Community Plan. It appears that the special CUP's that have been done in the area to permit various activities at the three local houses of worship do not have the same level of existing CEQA review coverage. As such they may have had additional scrutiny as to these issues as the quantity of those uses would not have been specifically anticipated in the Community Plan.

The fact that all of the CUP's have been issued for those houses of worship including their ancillary uses is evidence that the County has determined over time that the issue of fire safety is adequately addressed in that specific neighborhood to justify even uses beyond what was contemplated in the Community Plan.

As there was testimony that Lou Zeluck attempted his development efforts all the way back in 1972, it would be particularly inappropriate to have the only project that is subject to additional environmental review- be the last 3 or 4 homes proposed for this property. There is clearly no identified threshold of significance that the County would be applying to determine that the impacts

from this project would be potentially significant after conventional fire safety mitigation. There is not only no threshold of significance, but also none of the 16 issue areas covers a category of impact on neighbors by developing the property consistent with the Community Plan.

Per CEQA guidelines section 151833(a), CEQA mandates that projects which are consistent with the development density established by existing zoning, Community Plan, or General Plan polices for which an EIR was certified **shall not require additional environmental review, except as might be necessary to examine where there are project, significant effects which are peculiar to the project or its site.** This streamlines review of such projects and reduces the need to produce repetitive environmental studies."

Clearly Park Hill Estates v.2 is consistent with this requirement.

Per the analysis of the relationship of Master EIRs and subsequent environmental review OPR (State of California Governor's Office of Planning and Research) says as follows:

I. Use With Subsequent Projects

Once a Master EIR has been certified, a subsequent project may avoid the need for a further EIR or Negative Declaration when the Lead Agency finds that the project was described in the Master EIR as being within its scope (Section 21157.1, Guidelines Section 15177)..

II. Initial Study

When a later development proposal is received, the Lead Agency must prepare an initial study to analyze both of the following:

1. **Whether that proposal may cause any additional significant effect on the environment not examined in the Master EIR; and**
2. **Whether the proposal is within the scope of the Master EIR.**

When the Lead Agency for the proposal is able to make a written finding, based on the initial study, that the subsequent project is within the scope of the project covered by the Master EIR (i.e., the plan or program), no further EIR or Negative Declaration is required. Pursuant to Section 15177 of the CEQA Guidelines, **"[w]hether a subsequent project is within the scope of the Master EIR is a question of fact to be determined by the lead agency." This finding must be supported by substantial evidence in the record.**

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"(I)n the 1993 *Laurel Heights* decision, the California Supreme Court indicated that the fair argument standard derived from both the statutory language and policies underlying Section 21151, and for this reason, applies "**only to the decision**

> **whether to prepare an original EIR or a negative declaration.**" (*Laurel Heights Improvement Association v. Regents of the University of California*, supra). **Applied here, this may mean that fair argument <u>does not apply once a Master EIR has been prepared if the Master EIR can be construed as the "original EIR" for a subsequent project.</u> In other words, if the project is within the scope of the Master EIR."**
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> **http://ceres.ca.gov/ceqa/more/tas/master/Master_page3.html**

Clearly the proposed project is within the scope of the Master EIR, which includes both the original EIR and all subsequent Housing Element augmentations.

Interplay between the Map Act and CEQA.

> "The California Environmental Quality Act (CEQA) [1] provides that in mitigating or avoiding a significant effect of a project, "a public agency may exercise only those express or implied powers provided by law *other than* [CEQA.]"[2] **In other words, a city may not rely on CEQA as an independent source of legal authority to impose conditions of approval on a map**.[3]" [3]

There is no nexus for Park Hill doing anything to upgrade the current County road grid so environmental review of the road grid is totally inappropriate.

CEQA and Housing

CEQA expressly recognizes that the local agency must balance producing such information with the statewide objective of facilitating housing.

> Often overlooked is that included in the statutory language is legislative intent regarding provision of housing and, impliedly, public services for residents: all agencies of the state government which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage, **while providing a decent home and satisfying living environment** for every Californian [Pub. Resources Code §21000(g) (emphasis added)].
>
> In addition, CEQA's goal includes the directive to: Ensure that the long-term protection of the environment, **consistent with the provision of a decent home and suitable living environment** for every Californian, shall be the guiding

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[3] Pub. Resources Code, § 21004 [emphasis added].[FN3] Corona-Norco Unified Sch. Dist. v. City of Corona, 13 Cal. App. 4th 1577, 1587, 17 Cal. Rptr. 2d 236, 81 Ed. Law Rep. 217 (4th Dist. 1993) (explaining that CEQA is not a source of public agency power).[FN4] E.g., Gov. Code, §§ 66411, 66411.1."

> criterion in public decisions [Pub. Resources Code §21001(d) (emphasis added)].

For the County to even pause as it has to determine whether its action in restricting full access through the San Antonio Creek Road- Tuckers Road link is such that more review might be required of that very issue before this project can go forward puts the County clearly under the liability demonstrated in the Half Moon Bay case[4] where the city was held for all damage to a property from its action which impaired the property's development. If there is indeed substantial evidence that the County has errantly limited traffic through San Antonio Creek Road- Tuckers Grove, first there is no nexus between that issue and development of Park Hill at densities proposed, as the extra 3 or 4 units represent a small fraction of the 450 homes and lots in the area and hundreds of users of houses of worship, but if the County views it as such, it has assumed full liability for damage to the property.

The purpose of environmental review is to identify impacts and mitigation. Clearly the County has no nexus to require that the Park Hill project or its last 3-4 units improve the Tuckers Grove connection when this is for the use of others in the area, so there is no functional purpose of doing a focused EIR other than more delay. That road connection was unilaterally restricted by the County when it was deemed supplemental to other roads that existed in 1974; it is not required by the Fire Department, and it has not been required for other projects. Indeed this has been used as a third point of access in recent fires and has not even been identified as a future improvement by the County.

Neighbors in many meetings with us have said "it is all about property values. Their belief is that an affordable unit will degrade their property values, even though this will be no more than a detached second unit that is a rental that exist many places in the neighborhood. This point of view is misplaced both factually and legally.

> Under California Supreme Court and appellate case law, it is clear that opposition groups that are wholly supported by project proponent competitors seeking to advance only economic interests would not have standing to sue under CEQA. *See Citizens of Goleta Valley v. Board of Supervisors* (1992) 52 Cal.3d 553 (*Goleta II*); *Long Beach Savings and Loan Association Redevelopment Agency* (1986) 188 Cal.App.3d 249.
>
> In the *Goleta II* decision, the court stated
> CEQA review must not be used as "an instrument for the oppression and delay of social, economic, or recreational development and enhancement," *Citizens of Goleta Valley v. Board of Supervisors* (1992) 52 Cal.3d 553 (*Goleta II*)

WOLLMER, v. CITY OF BERKELEY

The Wollmer v. City of Berkeley case held that a project that was based on base density but then enhanced with a bonus density did not trigger CEQA review as if the bonus density element of the

[4] (Yamagiwa v. City of Half Moon Bay, *523 F. Supp. 2d 1036 [N.D. Cal. 2007].)*

project constituted a community plan change. The bonus elements of that project in Berkeley vastly exceeded the modest bonus elements in Park Hill Estates v.2, which have been largely eroded as concessions to neighbors to reduce the bonus units to just the affordable unit. WOLLMER, v. CITY OF BERKELEY et al (2009) 179 Cal.App.4th 933

Selected quotes from that case include:

> The Legislature has declared that "[t]he availability of housing is of vital statewide importance," and has determined that state and local governments have a responsibility to "make adequate provision for the housing needs of all economic segments of the community." (§ 65580, subds. (a), (d).) Achieving the goal of providing housing affordable to low- and moderate-income households thus requires the cooperation of all levels of government. (Id., subd. (c).)
>
> "As pertinent here, the density bonus law provides that "[t]he granting of a density bonus shall not be interpreted, in and of itself, to require a general plan amendment . . . , zoning change, or other discretionary approval." (§ 65915, subd. (f)(5).) And, as explained in part II.A.4., ante, subdivision (e)(1) prohibits a local municipality from applying "any development standard that will have the effect of physically precluding the construction" of a density bonus-qualifying development."

Exclusionary Zoning

A focused EIR will kill this v.2 project and P&D previously acknowledged this. The County will be a great example of the legally repudiated planning principle of exclusionary zoning if they thus thwart this project.

There is distinct state law support for infill housing that exists to protect this and other projects. One is as follows:

> **"§ 65008. Discrimination; prohibition**
>
> (a) Any action pursuant to this title by any city, county, city and county, or other local governmental agency in this state is null and void if it denies to any individual or group of individuals the enjoyment of residence, landownership, tenancy, or any other land use in this state because of any of the following reasons:
> …
> (3) The intended occupancy of any residential development by persons or families of very low, low, moderate, or middle income."
>
> (3) A city, county, city and county, or other local government agency may not, pursuant to subdivision (d) of Section 65589.5, disapprove a housing development project or **condition approval of a housing development project in a manner that renders the project infeasible** if the basis for the disapproval or conditional approval includes any of the reasons prohibited in paragraph (1) or (2).

This property is pure infill property that has been subject to County process for much of the time

since 1997. The affordable housing issue went from quite manageable with a $95,000 in-lieu fee to unmanageable with a 30% inclusionary requirement and vast in-lieu fees as an alternative.

The state has advised the County that it is looking to the County to comply with Government Code Section 65863 which requires finding to justify reductions in density below local General Plan designations.[5] The county community plan included base zoning and the Housing Element which increases densities on all sites. The Bonus density law has been a state overlay on the Goleta community plan for well before the Master EIR in 1991.[6]

Conclusion

This comes down to the proposition of whether a focused EIR should be prepared because the 15th unit on the property will be an affordable housing unit, which is precisely permitted by the General Plan and which also is the most logical solution to the County's Housing Element obligations. The absurdity of the question should make answering it unnecessary.

This is the end of a 40 year earnest and well intentioned effort to have a fine project of low density on this infill site. It deserves approval. Thank you.

Very Truly Yours,

Jeffrey C. Nelson

CC: Dr. Glenn Russell
Renee Bahl, Office of CEO
Michael Ghizzoni, Office of County Counsel

[5] Feb. 9, 2011 Letter to CEO Waller from State Department of Housing and Community Development.

[6] **The bonus Density law goes back to 1979, Cal.Gov.Code § 65915,** Added by Stats.1979, c. 1207, p. 4748, § 10, eff. Oct. 2, 1979. Amended by Stats.1982, c. 1263, § 2, eff. Sept. 22, 1982; Stats.1983, c. 634, § 1; Stats.1984, c. 1333, § 2; Stats.1989, c. 842, § 3; Stats.1990, c. 31 (A.B.1259), § 3, eff. March 26, 1990; Stats.1991, c. 1091 (A.B.1487), § 64; Stats.1998, c. 689 (S.B.1362), § 6; Stats.1999, c. 968 (S.B.948), § 7; Stats.2000, c. 556 (A.B.2755), § 1; Stats.2002, c. 1062 (A.B.1866), § 3; Stats.2003, c. 430 (A.B.305), § 1; Stats.2004, c. 724 (A.B.2348), § 5; Stats.2004, c. 928 (S.B.1818), § 1; Stats.2005, c. 496 (S.B.435), § 2; Stats.2008, c. 454 (A.B.2280), § 1.)