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ENVIRONMENTAL LAW

September 12, 2008

Santa Barbara County
Board of Supervisors
105 E. Anapamu Street, Suite 407
Santa Barbara, CA 93101

By email to sbcob@co.santa-barbara.ca.us



RE: September 16, 2008 Board of Supervisors Hearing, Agenda Item #10, the Transfer of Development Rights (TDR) Program for Naples

Dear Chair Carbajal and Members of the Board,

This office represents the Naples Coalition in this matter. We believe that TDR is an essential tool for the preservation of the rural character and resources of the Naples site. The current draft of the TDR Ordinance however is an extremely ineffectual tool. As Solimar stated in the TDR Study, for the program to be viable, anyone seeking to increase density beyond what applicable zoning allows must utilize TDR to obtain that density increase. We urge the Board to strengthen the Ordinance by reinstating the requirement that developers purchase transferable development credits (TDCs) for any urban zone changes that increase residential density – upzones and rezones, including awards of bonus density.

Further, in order for the TDR program to be able to work from the perspective of the community, there needs to be fair valuation, certainty in the process, and sufficient time to fund the bank. TDR will require community acceptance at receiver site locations, and financial support from donors to generate the funding necessary to significantly reduce development at Naples. It is unreasonable to expect this acceptance and financial support for a program that could not assure any reduction in development at Naples. In order to strengthen the program we urge the Board to revise the TDR ordinance to provide a fair method for valuing the development rights, a requirement that the landowner sell development rights if the Bank is able to purchase them, and a hold period to allow the bank to become funded and begin purchasing development rights before development may commence.

The Naples Coalition has proposed an alternative TDR program that accomplishes these changes and results in a significantly stronger TDR program. The changes suggested in the Coalition's alternative, as well as the capturing all upzones and rezones, would significantly improve the effectiveness of this program and increase the likelihood that development can be transferred from Naples in accordance with Policy 2-13.

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1. Initial Program Framework

As presently drafted, the TDR Ordinance does not require that developers use TDR in order to obtain any and all density increases. The previous draft of the TDR Ordinance required that all zone changes that result in higher residential density be contingent upon the purchase of TDCs. See Planning Commission Staff Report for July 23, 2008, p. 5 and Attachment B, p. 11. The rationale for this requirement is articulated in the Solimar Research Group's report "Naples TDR Program Framework" dated August 24, 2007:

[for the TDR Program to] be successful, then, the County must regulate the market it creates for additional density, and importantly, ensure that the commodity retains its value. To do so, it should not allow alternative routes to higher density that would compete with the TDR option (beyond existing inclusionary requirements and State Density Bonus laws). The Board of Supervisors should consider including in the TDR Ordinance language which clearly states that any up-zones and rezones to greater market-rate residential densities are contingent upon TDC purchases.

P. 8 (emphasis added).

The currently proposed TDR Ordinance strikes the requirement that that all zone changes that result in higher residential density be contingent upon the purchase of TDCs, and in so doing, allows for alternative routes to higher density. As Solimar warns, this will generate competition with the TDR option and will undermine the value of the TDCs.

This change to the Ordinance removes the key incentive for developers to purchase TDCs and thereby severely undercuts the ability of the TDR program to transfer development away from Naples as required by Policy 2-13. In order for the TDR program to be effective, the Ordinance must *require* that developers purchase density credits to obtain density increases for all rezones, upzones and density bonuses as originally devised. The voluntary "Density Bonus Incentives" proposed in the current draft of the TDR Ordinance require that a potential developer come forward and request to use TDR. See § 35.64.060 (B)(4). We urge the Board to strengthen the TDR program by incorporating the following provision from a previous version of the Ordinance, which states:

- A. All applications for zone change that are filed with the County on or after the effective [date] of this section, the County shall require that all rezones within the South Coast that result in an increase in residential density for market rate dwelling units on sites that meet the criteria in Subsection 35.64.060.A are contingent upon the purchase of transferable development credits from the Authority. No other means of obtaining greater market rate residential

density, other than the State density bonus law, shall be allowed on sites that meet the receiving site eligibility requirements.

- B. If a property is being considered by the County for a rezone that results in an increase in residential density for additional market rate dwelling units which has not submitted an application for receiving site status, it shall be reviewed by the Director for receiving site eligibility. The Director's decision is subject to review and approval by the Commission. The action of the Commission is final subject to appeal in compliance with Chapter 35.102(Appeals). The Commission's determination of eligibility shall be processed in compliance [with] Subsection 35.64.060.B.3. If the Commission determines that the site is an eligible receiving site, any rezone that results in an increase in residential density for additional market rate units shall require the purchase of transferable development credits from the Authority or the provision of affordable housing in compliance with State density bonus law.

Revised Draft TDR Ordinance, Attachment B, p. 11 of the Planning Commission Staff Report for July 23, 2008.

2. The Naples Coalition Alternative TDR Program

In order for the public to accept increased development at receiving sites and for funders and investors to support the TDR program financially, the TDR program must be able to assure that: 1) development rights will be available for purchase, if funds are generated; 2) that the price will be reasonable, as opposed to potentially providing a windfall to the landowner; and 3) the program will have sufficient time to raise the funds and acquire the development rights before the land is actually developed. The County's proposed program fails to meet any of these criteria. We encourage the Board to examine the Naples Coalition alternative, attached hereto as Exhibit 1, in greater detail, and compare our proposal with the draft TDR program for purposes of achieving the above 3 criteria.

The Naples Coalition's proposed TDR program that would be substantially more effective and therefore vastly superior, including a means to make faster payments to the Naples landowner for retired development and more carefully define lands under an interim hold to projections of available funds. The Naples landowner prefers a toothless and ineffective program, and staff has endorsed their preference.

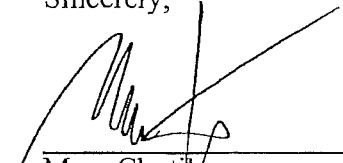
3. Ordinance Changes

As noted above, the Naples Coalition believes the TDR program as proposed is largely unworkable and ineffective, and as a result we suggest significant program modifications. If the

Board declines these programmatic changes, we offer several language changes in the attached Exhibit 2 that are necessary to strengthen the program by requiring verification of the fair market value of any sender site TDCs, and specifying that the conservation easements also specifically recognize the habitat values on preserved lands and allow restoration.

We implore the Board to consider our views and concerns on this critical issue, and craft a TDR program that has a real chance at achieving the objectives of Policy 2-13: preserving as much of Naples as possible.

Sincerely,



Marc Chytilo
For the Naples Coalition

CC: Tom Figg (tfigg@adelphia.net)

Exhibit 1

TDR Program - Naples Coalition's Alternative Elements September 12, 2008

The Naples townsite embodies a fundamental land use conflict created by the existence of hundreds of small antiquated residential parcels in an area zoned for large agricultural parcels and a landowner's use of the "takings" doctrine to gain approval of extensive development inconsistent with the surrounding rural area. One of the several strategies for de-fusing this conflict is Coastal Land Use Plan Policy 2-13 which requires the County to provide a mechanism for transferring development from Naples to areas that are more suitable for residential development.

The county hired Solimar Consulting to prepare a TDR study, and convened a working group including the landowner to shape the TDR program. The County considers itself to be legally compromised due to losses at the California Supreme Court in the Morehart case in 1998. To avoid further litigation, the County agreed to process the project proposed by the new owner, Matt Osgood and Vintage Communities. When the Working Group convened, Osgood stated he would not support any TDR program that did not give him control over the price of lands, the timing of any sale of lands, and even whether to participate in the TDR at all. The County acceded to Osgood's demands.

The Naples Coalition has developed a substitute TDR program shaped largely on the proposed Ordinance, but with important modifications. In summary, this alternative establishes an iterative process whereby the revenue generation potential of the TDR program is estimated initially and reviewed annually for a specific period of time, priority lots are identified for temporary hold for a period to allow TDR revenues to be generated and valued using a reasonable and equitable formula, and lots that are not able to be preserved based on projections of revenues are released for development. This process is iterative, so over time, as TDR program performance becomes established, lot holds may be adjusted. The landowner gets incremental funding as such funds are paid to the TDR authority, rather than at the end of the process, giving some proceeds in advance of the time profits from development would be realized. Sending site (e.g., Naples) landowners would be required to participate in the program, but this aspect of the program would be managed to enhance and accelerate the revenue stream and give certainty to both the developer and the funding sources as to preserved and developable lots.

We believe this element should be substituted from that proposed by County staff to recommend a better TDR program that is fair to both the landowner and the public. An entirely voluntary approach leaves too much of the program up to chance, unnecessarily jeopardizing the irreplaceable Gaviota Coast.

The fundamental steps that we suggest be substituted in place of the Staff's proposal are the following:

Step 1 – Assess Sources and Timing of Funds for Acquisition

Once the TDR Ordinance is developed and the Authority established, a "Source of Funds" analysis is performed to estimate a range of how much money the TDR Authority could generate over what time periods for purchase of development rights at Naples. Funds would come from TDR credits, from contributions and loans, and from the proceeds of any sale or development of government-owned lands dedicated to funding the TDR program.

The Source of Funds analysis should be both realistic and optimistic, and include income projections for each year that the program is operational. The Program should be set on an eight year calendar, approximately the length of time to process a similar project through the Coastal Commission. As described below, the landowner will receive TDR funds throughout the 8 year period, and will be able to develop lots that are not identified for acquisition.

Step 2 – Process Application and Prioritize lots

The County has stated its intention to process the development applications at the same time as the TDR ordinance, so by the time the TDR Ordinance is adopted, County action on the LCP changes and development envelopes will be complete and pending before the California Coastal Commission. The County's initial development approvals provide the initial lot configuration for prioritizing lots for preservation, subject to future revision depending on Coastal Commission action. Lots are ranked in order, with this ranking determining the sequence of TDR Authority acquisition of lots.

Step 3 – Priority Lot Valuations

The TDR program was designed to apply to preserve the lots from development, not provide an inflated and unearned return based on the value of entitled and developed homesites. The landowner is entitled to a fair return on their investment however, so a reasonable and equitable valuation methodology must be established. One methodology we have suggested is by aggregating the valuations of any buildable grid lots to provide a value for the new lot recognized in the entitlement process.

Step 4 – Apply Funds Estimate to Priority Lot Valuations to List "Protected" Lots

Applying the available funds estimate to the value of the prioritized lots demonstrates how many of the ranked lots could conceivably be acquired through TDR. The lots that cannot be acquired based on the estimate of funds are cleared for development, while development of those that are expected to be acquired is temporarily suspended, subject to the annual re-assessment process below.

Step 5 - Rezone with deed restrictions

All of the lots are then rezoned under the Naples Planned Development District. The priority lots that are capable of being acquired based on the initial funding estimate have their entitlement

approval suspended. Those lots that are not protected are available for development subject to the normal permitting processes.

Step 6 – Annual administration

Each year the revenue forecast is compared to actual and adjusted as appropriate, for individual years and for the cumulative period. Lots acquired are removed from the top of the list, and if it appears that there will not be sufficient funds to acquire all identified priority lots, other lots will be eliminated from the bottom of the priority list, and TDR-based encumbrances on development removed.

Step 7 – Conclude TDR at Naples

At the end of the TDR program time frame, any protected lots that remain with deed restrictions have those restrictions removed.

The Coalition believes that the prominence of the Gaviota Coast and the threats posed by this development will lead to private foundations, public funding agencies and legislative bodies identifying funds to help preserve Naples as open space. Funding for open space preservation is competitive, and each source requires some levels of certainty in order for funding decisions to proceed. Without the required engagement of the landowners, community efforts to preserve the land, through both TDR and capital fundraising, cannot proceed. As proposed, the TDR program is designed to fail.

Exhibit 2

TDR Ordinance Changes - new text in underline and italics

§ 35.64.010

¶ B.1 Program Description

[landowners] are compensated at *not more than the verified* fair market value . . .

REASON: Needed to prevent gouging and ensure public funds used in TDR will be priced fairly.

¶ C.1. Goals

Delete phrase “the maximum number”

REASON: Needed because the ordinance does not set priorities - and community and California Coastal Commission have indicated priority should be preservation of the Coastal Bluff, not necessarily the maximum number of lots.

§ 35.64.050

¶ C.5 conservation easement. Add to last sentence of paragraph: from ownership of the property *and protect the open space, natural and agricultural resources on the property in perpetuity.*

REASON: merely severing development rights does not ensure the open space values will be preserved.

§ 35.60.090 - TDR Authority

¶ D. conservation easements. Revised second sentence: The conservation easement (or equivalent legally enforceable mechanism) must sever, in perpetuity, all rights to develop or use the property except for open space, *habitat restoration and protection*, grazing, and agricultural crop production.

REASON: merely severing development rights does not ensure the open space values will be preserved and since some forms of development and use are specified, such as agricultural uses, habitat restoration and protection should also be identified as a permissible use and activity.