
ENVIRONMENTAL LAW

September 24, 2007

Chairperson Michael Cooney
Santa Barbara County Planning Commission
123 E. Anapamu Street
Santa Barbara, California 93101

RE: Naples TDR Program, Item # 3, 9/26/07

Chair Cooney and Members of the Planning Commission:

This office represents the Naples Coalition, a California public benefit corporation including liaison individuals from the Los Padres Chapter of the Sierra Club, the Santa Barbara Audubon Society, Santa Barbara Chapter of the Surfrider Foundation, Citizens Planning Association of Santa Barbara County, League of Women Voters, Santa Barbara County, Santa Barbara County Action Network and the Gaviota Coast Conservancy. The Naples Coalition's mission is to preserve the rural character of the Naples area on the Gaviota Coast.

The conflict between the Santa Barbara Ranch's principally 100 acre zoning and the hundreds of sub-standard, non-conforming parcels on the rural Gaviota Coast is extraordinary. The importation of this suburban development into the County's recognized rural area will irrevocably change the open, rural nature of this portion of the Gaviota Coast for ever.

Santa Barbara County's Local Coastal Plan and the California Coastal Act contain numerous policies, goal and standards that apply to Naples, including provisions addressing agricultural preservation, urban utilities and infrastructure, coastal access and ecological protection. As far back as 1982, when the LCP was adopted, the value and importance of the rural Gaviota Coast was apparent to the County supervisors, the California Coastal Commission and the public at large. Today, with tourism and agriculture serving as the mainstays of the County's economy, preservation of the integrity and rural character of the Gaviota Coast is critical.

Embedded in the Local Coastal Plan is Policy 2-13, providing the basis for the TDR process and this proposed program. A transferred development rights program was developed by Solimar Consulting at the direction of County management through a working group process. The TDR Working Group provided comment to Solimar during the preparation of earlier versions of the TDR program, but the Naples Coalition and others voiced concerns throughout the Working Group process that the proposed TDR framework had serious, fundamental flaws. The Naples Coalition's concerns led to the development and submittal of an alternative TDR Program to the Working Group that is included as Attachment G to the Staff Report.

The recent changes to the TDR Framework and Feasibility study from prior versions are substantial. Initially, the public was told the revised TDR program documents and Staff Report

would be released for review at least a month before the September 26 Planning Commission hearing. The release date of the documents was repeatedly delayed and they were finally made available to the public on September 13, less than 2 weeks before the PC hearing. **This short review period, after major changes in each of the core documents (the TDR Framework and Feasibility Study) has prevented a complete review of the current status of these programs and thus precluded informed public comment on the proposal.**

Based on a cursory review, it appears that some of the concerns previously voiced have been addressed, while other issues remain outstanding. A preliminary analysis of these issues follows.

Suggested Action: Naples Coalition suggests that the Planning Commission defer final action on the proposed action by at least 30 days to allow a complete analysis of the recently-released changes by the interested parties. We further suggest that the Planning Commission schedule a special hearing that includes an invitation to the TDR Working Group members to make presentations on the TDR Program. The TDR Working Group spent considerable time reviewing and analyzing TDR Program options and features. Those deliberations and information is not captured in the Staff Report or other materials. The Commission would benefit from understanding how the policy issues and program details are related.

We have identified several foundational issues that are ripe for discussion by the Planning Commission discussion at this time. These include:

1. Non voluntary participation in TDR by the developer if a rezone is requested.
2. Any degree of feasibility warrants TDR program adoption and implementation.
3. Ample time must be allowed for TDR to become effective.
4. A fair and reasonable valuation methodology must be adopted.
5. The County needs to actively explore additional funding sources for the TDR program.

We continue to believe that the Attachment G (“A TDR Program for Naples” submitted by the Naples Coalition) approach is superior to the proposed TDR framework as it more effectively addresses the above foundational issues. In any case, we implore the Planning Commission to recommend that the TDR Framework be modified to address three fundamental issues detailed below. Without these changes, we question whether the purposes and requirements of Policy 2-13 will be met and are concerned that the TDR process will be reduced to a perfunctory process without meaningful success in moving the development from Naples to an urban area.

SUMMARY OF RECOMMENDATIONS

Generally, the Naples Coalition believes that TDR is an essential part of the County's strategy to preserve the rural nature of the Gaviota Coast. While we believe a TDR program must be adopted, we believe that the program that has been proposed by Solimar suffers from several foundational flaws and must be corrected for the TDR program to meet the requirements of Policy 2-13 and to function at the most effective level possible. **Specifically the proposed TDR program lacks assurances that the developer will in fact participate, and if they do, that the valuations and terms of the acquisition of development rights on the parcel will be reasonable.**

We believe that the Planning Commission should defer a final action on the proposed recommendations for at least 30 days to allow a complete analysis of the many changes to the TDR Framework and Feasibility Study.

Finally, we urge the Planning Commission to expand upon the staffs' proposed recommendations to include several additional features.

- Recommend that a robust TDR program be adopted expeditiously, include the necessary elements to ensure landowner participation, provide adequate time for acquisition funds to be generated, and ensure that the price set for the acquired development rights is reasonable and not excessive.
- Direct staff to identify strategies to secure the remaining funds necessary for complete acquisition of the Santa Barbara Ranch lands, including "closing the gap" to secure sufficient funding to allow retirement of all development on the site and ultimately transfer or encumbrance of the lands for public open space purposes.

DETAILED COMMENTS

1. Procedural Issues and Availability of Documents

Although the Staff Report is dated September 7, 2007, it was made available to the public on September 13, 2007. Many of the attachments reflecting new documents (that have not been previously discussed in the Working Group or in the DEIR) are dated August 2007. (See D, E & F. Attachment C is also a new document, undated but from the administrative draft of the revised draft environmental impact report.) The complexity and technical nature of this information and short period for review has hampered the public's ability to fully respond to the proposal. As such, we request that the Planning Commission defer final action for at least one month and we reserve the ability to amend our comments, responses and positions as the information is more fully digested and other circumstances warrant. We recognize that the Planning Commission is only making an advisory recommendation at this time concerning the general scope, framework and characteristics of the TDR program. While we appreciate that

there will be several future opportunities to further comment, we think it is important to try to get the TDR program off to a good start in the right direction, rather than having to “fix” it later.

Suggested Action: the Planning Commission should defer final action on the TDR Program recommendations for at least one month.

2. “Partial Feasibility” is Misleading – Any Feasibility Warrants TDR Program Adoption and Implementation

The Staff Report recommends a finding that TDR is partially feasible, and thus the program should be adopted and implemented, but also that the rezone should proceed. This interpretation improperly allows the County to proceed with rezoning lands underlying the entire development, when the finding admits that much of the development could be located elsewhere as required by the LCP. The TDR program must be adopted and allowed to operate for some period of time before any rezoning is justified. When rezoning is contemplated, only the rezoning necessary for the remaining development (that cannot be relocated into the urban area) is permissible.

Policy 2-13 clearly establishes that the TDR feasibility issue must be addressed as a condition precedent, or threshold issue, prior to County consideration of any of the land use approvals. The Staff concurs. See Staff Report at page 3 (“Precedent to all of these [land use approval] actions, the County must first make a determination of TDR feasibility under CLUP Policy 2-13.”).

The Staff’s proposed analysis, however, turns the purpose, intent and functioning of the TDR process on its head. Staff contends that since the preliminary TDR feasibility analysis has concluded that about 57% of the development right value may be covered by the TDR program, TDR is only partially feasible. Policy 2-13 does not require 100% retirement of development rights value to trigger application of the TDR requirement. If any of the development may be relocated off of the Naples townsite through TDR, TDR is feasible and must be pursued. Implementing the purposes of Policy 2-13 requires that first step is finding that any amount of TDR is feasible, then implementing TDR for as long as the TDR program generates funds to buy down Naples development rights. **Only after the TDR program has been exhausted should the process of rezoning be contemplated.**

The staff’s recommendations are flawed in suggesting that the rezone may occur before the TDR program has been adopted and allowed to work, and to consider rezoning the entire site. Any rezone must be limited only to those areas that cannot be preserved through the TDR program, after an effective program has been implemented for a reasonable period of time. It makes no sense to consider rezoning lands that are slated to be preserved through the TDR program. Depending on the effectiveness of the TDR program, a rezone may not be necessary as any residual development on Naples may be able to proceed as rural, agricultural development for which findings of General Plan and LCP policy consistency may be made. Staff’s proposed

approach rushes to complete approval of the proposed development without considering the best way to preserve Naples and meet the goals and requirements of the LCP and General Plan.

Suggested Action: The Planning Commission should establish that the TDR program must be adopted and allowed to function for a sufficient time to generate revenues before rezoning is considered. Lands considered for rezoning should be the minimum necessary to make the developer financially whole in light of TDR revenues and investment-backed expectations.

3. Conditions of Developer's Participation - A Request for Rezoning Triggers Automatic Participation in TDR

Development of the TDR program has been impaired by a fundamental mis-reading of the requirements of Policy 2-13 and the County's capitulation to the developer's unrealistic demands. Specifically, the developer has requested, and the County has agreed, that the developer's participation in the TDR program is entirely voluntary, and that only "market incentives" can be used to induce the developer's participation. The effect of this fundamental concession is evisceration of the TDR program's effectiveness. The developer is under no obligation to actually sell any of the development rights to the TDR bank when funding is available, and if he does choose to participate, the developer may set the price at unrealistic levels and impose other terms that make the transaction unappealing or unworkable.¹ The absence of controls to ensure that the developer will sell development rights when TDR funds are available, and to ensure that the price will be reasonable infects the TDR program to the core.

Policy 2-13 establishes that rezoning is permissible only after it is determined that "transferring development rights is not feasible." TDR is a condition precedent to rezoning. When the developer submits an application for rezoning on lands affected by Policy 2-13, he/she is expressly submitting to participation in the TDR program. The purpose and intent of Policy 2-13 is defeated if the developer may unilaterally refuse to sell their development rights or may demand unreasonable amounts or terms for those development rights. The proposed program improperly vests with the developer a unilateral "veto" authority over TDR transactions.

In the CEQA context, the developer cannot legally unilaterally veto a feasible alternative. The courts have interpreted CEQA's requirement that the lead agency independently evaluate the feasibility of alternative sites as barring a developer from unilaterally vetoing an otherwise potentially feasible alternative site. *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1355 (rejecting a finding of the infeasibility of a project alternative when the only evidence of the infeasibility was applicant's "belief" and "bald claim" that it would be infeasible). Here, the developer elected to purchase the Naples townsite with full awareness of the requirements of Policy 2-13. Rezoning is necessary, as conversion of agricultural lands to residences is prohibited by California Coastal Act requirements and General Plan restrictions.

¹ For example, the TDR Framework does not reconcile the developer's interest in selling fee title to a purchaser versus the TDR Program's interest in purchasing only development rights.

Policy 2-13 establishes that rezoning is an action of last resort, and prior to gaining rezoning, the LCP clearly anticipates use of TDR to compensate the developer for the potential property rights he possesses in the property. This entire framework is thwarted if the developer is not required to participate in the TDR program. The program is not mandatory, as the developer may not elect to pursue rezoning. But when the developer submits an application to the County for approval of a rezone on Naples lands, that developer must participate in the TDR program. If funds are available and provide a reasonable return on the developer's investment, the developer must accept the funds and may not receive the rezone. Any other interpretation renders Policy 2-13 ineffective.

Suggested Action: The Planning Commission should determine that developer participation in the TDR program is triggered by the application for rezoning of Naples parcels, and recommend that the TDR Framework be revised to express this requirement.

4. Valuation Issues

The valuation of the transferred development rights is critically important to the success and effectiveness of the TDR program. The initial TDR program drafts, and the 2006 DEIR, made unrealistic and inappropriate assumptions that resulted in the assignment of excessive values to the development rights. The Naples Coalition, Surfrider Foundation and EDC expended considerable resources to secure a peer review that established the valuation was incorrect, which was submitted with comments on the DEIR. The TDR Feasibility report revisions indicate that the County ultimately agreed with many of the concerns regarding these inappropriate assumptions, and now the County has conducted its own independent peer review of the valuation assumptions and conclusions. Attachment D. The public has had insufficient time to review and analyze much of the new information that is presented to the Planning Commission, and the Naples Coalition is not able to provide complete comment on the adequacy of the revised TDR Feasibility Study, Attachment E, including the reconsideration of the valuation issue.

While additional time is needed to analyze the current Feasibility report and program modifications, the issue of how the development rights are to be valued in the context of a TDR transaction is ripe for discussion. The Framework would allow the developer to set their own price, without constraints. The Naples Coalition believes that the TDR program should include a methodology for identifying a fair and reasonable price that should not be exceeded in the TDR transaction. The TDR development rights valuation must not be open to charges that the valuation is excessive, otherwise the support of the public and funding sources will be eroded if there is a basis to claim the program represents a giveaway or windfall to the developer.

Suggested Action: The Planning Commission should recommend that the TDR Framework be revised to include a methodology for identifying a fair and reasonable valuation of the development rights attributable to the Naples parcels, and that the developer be required to convey their development rights at a price not in excess of that valuation.

5. Policy 2-13 Analysis

The County's interpretation of LCP Policy 2-13 is a cornerstone of its processing any proposed residential development at Naples. While it is helpful for the County to elaborate on its interpretation, it is clear that the County's interpretation is in error and must be reconsidered.

A. *Discourage residential development of existing lots*

The Staff Report documents some of the history of the County's treatment of Naples development proposals, but concludes with the untenable conclusion that the County has done everything possible, and now may condone development under the terms of the MOU. The County's duty of "discouraging residential development" exists for as long as Policy 2-13 exists, and this exercise of TDR program review and adoption is just one more step. The County has an on-going obligation to discourage development at Naples, in part by identifying and amplifying every possible impediment to development and in part by making the TDR program as effective as possible. The County has considerable resources at its disposal. The County should focus and enhance its efforts to avoid development at Naples, including a sustained effort to identify other sources of funding to acquire the development rights and fee of these lands.

Additionally, County and state policy disallow conversion of agricultural lands to exclusively residential use in the Coastal Zone, and require findings of agricultural viability elsewhere. The Grid development alternative is largely unapproveable, even on a lot-by-lot basis due to these restrictions. The County has an on-going duty to discourage residential development at Naples and cannot abandon its interpretation of applicable policies and constraints and still claim to be fulfilling that duty.

B. *Encourage and assist land owner in transferring development rights from Naples*

As the Framework and Feasibility reports indicate, and as noted in other literature addressing TDR programs, the terms and details of a TDR program are critical to program success. The County has elected to rely exclusively on a market-based TDR program, vesting a veto authority of the program with the developer. *Supra*. While communication and coordination with the landowner is appropriate, capitulation is not. In the absence of a binding methodology to ensure the developer's participation, to ensure that valuations will be reasonable, and to ensure that the TDR program will have sufficient operating time to generate the funds estimated necessary, the TDR program is a sham. The developer's veto, the absence of a methodology for setting a fair and reasonable price, and the 18 month period, possibly doubled to a 36 month period, renders the TDR program an illusion. Instead of actually assisting in the transfer of development rights, this proposed program enables the failure of the TDR program, and thus fails to meet this core Policy 2-13 requirement.

The Staff Report and the TDR program refer to a future, unspecified development agreement between the County and developer that will provide the “final details on mechanics and time lines.” Staff Report p. 16. The core elements of any such development agreement must be specified at this time to establish the feasibility and viability of the TDR program. While the precise development agreement details may not be available at this time, certain core performance standards, valuation methodology and timelines should be articulated now for the Planning Commission’s review.

C. Re-evaluate land use designation if TDR is not feasible

The Staff Report concludes that feasibility is impaired by “the dearth of receiver sites and lack of upfront capital.” Staff Report p. 17. These constraints are products of the assumptions and limitations that the framers of the TDR program created themselves. The County Board of Supervisors has limited potential receiver sites by restricting the TDR program to the South Coast, despite the benefits that preserving Naples would offer north county residents and in face of the fact that most new residential development and upzoning that could fund the TDR bank is currently occurring in the north county. The TDR Framework demands that all funds must be available up front, when the funding methodology proposed will generate revenues over a number of years, and there is no statutory or legal constraint on how long the TDR “hold” period can or should be. Finally, the County has not itself sought to either identify or generate funds that could capitalize the TDR bank. The TDR Program design has itself manufactured the determination of partial infeasibility.

Further, the County’s delays in starting the TDR program have contributed to program ineffectiveness. Policy 2-13 was adopted in 1982, and the litigation over Naples initiated not long thereafter. The TDR program should have been initiated then. In 1995 the County approved the Official Map for Naples, formally acknowledging that residential development on the newly recognized lots was possible - and should have initiated the TDR program then. In 2002, the County signed the processing MOU for residential development with the current applicant, and the TDR program most definitely should have been initiated at that time. Instead, the County took no actions to initiate the TDR program until the application was complete and the environmental review process for residential development was started. Given this history of procrastination, it is essential that the County now take a strong and proactive lead in this issue.

The determination of feasibility of TDR is a critical step in the process of Policy 2-13 compliance, but it is hardly the first or only step. The TDR program, even given its currently ineffective character, is clearly feasible to retire at least a majority of the residential development at Naples. The level of effectiveness is limited only by the arbitrary assumptions integrated into the TDR Feasibility Study.

Suggested Action: The Planning Commission should direct the County Planning and Development Department to expand and enhance its work on the TDR program. The first step

would be to schedule a special meeting of the Planning Commission and TDR Working Group to review the policy and program options and provide direction to staff.

6. Procedures and Sequencing

The Staff Report proposes a three step process for TDR Program approval and action on the application of rezoning and development approval. We question whether this sequence is appropriate, in light of the need for the TDR program to gain momentum and generate funds before and lands are released for development. Policy 2-13 anticipates that the development rights acquired in the TDR program are the rights existing prior to the rezone. Approving the rezone before TDR has operated to retire development rights is inconsistent with this fundamental precept.

Similarly, in the event a development agreement serves to implement portions of the TDR program and/or Policy 2-13 compliance, the agreement's core terms (addressing TDR) must be circulated with the TDR Program itself.

The Staff has recommended a finding that the TDR program can retire a portion of the residential development potential at Naples. Staff should be directed to identify and develop other strategies to achieve the funding necessary to preserve the entire Naples site, including acquisition of the land in fee for public use.

Finally, the allocation of priorities for extinguishment of development rights must be subject to greater public review and involvement.

Suggested Action: the Planning Commission should direct that the TDR program be allowed to function for a reasonable period of time before the rezoning occurs.

7. Disclaimer

The Naples Coalition has had limited time to review the Staff Report and the substantial amount of new and revised materials associated with this complex topic, and hereby alerts all participants that it reserves the right to amend its position and comments as this information is digested and analyzed and as circumstances warrant.

In conclusion, the limited time for public review of the Staff Report and the new materials associated with this complex topic has constrained the breadth and depth of the Naples Coalition's analysis and comment. We encourage the Planning Commission to allocate sufficient time to conduct a complete review of the policy issues associated with TDR at Naples, and then the program details that follow. The Planning Commission should hear and consider the TDR Working Group's perspective on this important program.

It is clear that several elements of the TDR Program should be re-evaluated: whether the developer should be required to participate in the TDR program as a condition of a request for rezoning Naples lands; how the Naples sending sites should be valued, and how long the TDR Bank will have to complete the purchase of the Naples development rights before final entitlements are granted.

Thank you for your careful review of this issue and consideration of our comments. The TDR program offers a valuable “win-win” method to satisfy the property rights of the landowner while achieving community goals of preserving Naples and the Gaviota Coast. As the County does not have experience in developing and operating a TDR program, the Commission should ensure that its consideration and deliberations provide adequate analysis and direction to give the TDR program the greatest opportunity to succeed.

Sincerely,

Marc Chytilo
For the Naples Coalition