Fw: Shingle Springs - 76 Gas Station/Circle K Mini Mart - Design Review Appeal - DR-0011-A-2
Suzanne Allen de Sanchez
to:
Cynthia C Johnson
07/29/2009 09:59 PM
Show Details

Can you print this letter and add it to the packets.

Thanks,

Suzanne Allen de Sanchez, MPA
Clerk of the Board of Supervisors
El Dorado County
530.621.5394

-----Forwarded by Suzanne Allen de Sanchez/PV/EDC on 07/29/2009 09:59PM -----

To: <suzanne.allendesanch@edcgov.us>
From: "Larry Larsen" <llarsen@thatchlaw.com>
Date: 07/29/2009 11:33AM
cc: <lillian.macleod@edcgov.us>, "Griffin Williamson" <griff@totalprojex.com>, "Ahmad Ghaderi" <ghaderia@asengineer.com>
Subject: Shingle Springs - 76 Gas Station/Circle K Mini Mart - Design Review Appeal - DR-0011-A-2

Suzanne, we would appreciate it if you would deliver copies of the attached letter to the members of the Board of Supervisors in advance of their meeting next Tuesday, August 4, regarding this project. If that is a problem, please let us know and we can arrange for direct delivery to the Board members.

Larry C. Larsen
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July 29, 2009

VIA ELECTRONIC MAIL

Honorable Members of the
El Dorado County Board of Supervisors
330 Fair Lane
Placerville, CA 95667

RE: DR00-0011/76 Gas Station & Circle K Mini Mart
Design Review Appeal Hearing
Hearing Date: August 4, 2009

Honorable Members of the Board:

This firm represents Convenience Retailers, LLC, the property owner and applicant with respect to design review of a proposed 76 Gas Station & Circle K Mini Mart to be located on the southeast corner of the intersection of Mother Lode Drive and South Shingle Road in the Shingle Springs area. The unanimous approval of the project design by the Planning Commission has been appealed to your Board for consideration at your August 4, 2009 meeting. We write at this time to address several issues raised by the appellants regarding the sufficiency of the project's Final Environmental Impact Report ("FEIR") and ask that this letter be made part of the record of proceedings in this matter.

In many respects, the appeals contain factual inaccuracies and misstatements of law with respect to the project approvals. Many of the issues raised start from a faulty premise - that the use on this property, as opposed to the project's design, is in issue. As County staff has properly noted, the proposed use of this property is "by right" under Zoning Code Section 17.32.020.B. The issue under consideration is architectural design, as provided by Zoning Code Section 17.14.130, due to the project's proximity to US Highway 50.

This matter has been under consideration and review for many years - all as the product of this required discretionary design review and insistence by project opponents[1] that an Environmental Impact Report ("EIR") was a necessary predicate to approval of design review. Now that the EIR has been completed and certified, the County has properly approved our client's application. As we

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[1] The principal project opponent throughout this matter has been the Friends of the Shingle Springs Interchange, Inc., the managing member of which is Jim Kidder, the owner of the competing gas station located across Mother Lode from the project site.

explain, below, the appeals do not properly raise issues of non-compliance with CEQA. Accordingly, we respectfully submit that the appeals should be denied.

While the submitted appeals are somewhat rambling in nature, the CEQA complaints can be distilled to two basic claims: (1) the project has not adequately mitigated for traffic impacts; and (2) the EIR should have been recirculated. Neither of these arguments have merit.

A. THE PROJECT ADEQUATELY MITIGATES ITS TRAFFIC IMPACTS

Contrary to the claims of the appellants, the FEIR, based upon the expert opinions of the County Engineer, environmental consultants and CalTrans' officials, contains substantial and effective mitigation measures to address the project's impacts on traffic. The appellants erroneously maintain that the project's traffic impacts will remain significant even after implementation of the substantial improvements to the local roadways, which will be provided, or partially-funded, by our client. Substantial evidence in the record belies appellants' claims.

The FEIR properly considers the projects' traffic impacts and requires sufficient mitigation to reduce those impacts to a less than significant level. In this regard, the appeals essentially ignore the fact that the inclusion of a "deceleration lane" in front of the project on Mother Lode Drive will alleviate any traffic impacts related to project access from Mother Lode. While this lane is described as a deceleration lane, it is not to be confused with a freeway deceleration lane - that is not its function. Rather, it provides for a separate turn lane into the project that will not be part of the through-lane traffic on Mother Lode. Indeed, this separate right turn lane into the project from Mother Lode - which will be funded by the project - will actually be longer than the current dedicated left turn lane that serves the market and its gas station across the street. Traffic on Mother Lode will move much more freely than it now does. Currently, traffic on Mother Lode travels on a single lane in front of, and beyond, the project site. After construction of the project and its associated traffic improvements, traffic will travel in two lanes along the project frontage, with separate turn lanes provided to access both the project, via the new, dedicated lane, and the market across the street, via its existing left turn lane.

The efficacy of these traffic improvements is supported by the project's traffic study, the EIR and expert opinion. Moreover, staff has cogently determined that deviation from County driveway standards is appropriate, here. The County Engineer's expert conclusions have been consistent - (1) the project site is too small to accommodate the minimum desirable setback standard; but (2) the County Engineer can waive that standard (as shown on Standard Plan 109 - the setback distance can be "LESS WITH COUNTY ENGINEER'S APPROVAL"); and (3) the County Engineer has granted this approval based upon several factors -- (a) site constraints; (b) compliance with CalTrans standards (as confirmed by CalTrans); and (c) requiring mitigation via a deceleration lane along the project frontage.

It bears stating, as well, that the County Design and Improvement Standards Manual is actually a guide, not a mandate. Indeed on page 54, the Manual includes a very pertinent statement of disclosure, in emphasized capital lettering, which reads:

"STATEMENT OF DISCLOSURE:

THESE STANDARDS ARE IN CONFORMANCE WITH GENERALLY ACCEPTED ENGINEERING PRACTICES. THE INTENT OF THESE STANDARDS IS TO ESTABLISH GUIDELINES FOR PUBLIC WORKS APPLICATIONS. IT IS UNDERSTOOD THAT THESE STANDARDS WILL NOT BE APPLICABLE TO EVERY SITUATION. THE COUNTY ENGINEER HAS THE AUTHORITY TO MAKE EXCEPTIONS TO THESE STANDARDS."

Fully consistent with these standards, the County Engineer has waived the setback requirement, relying instead on an additional project condition that requires construction of an additional through lane and a dedicated deceleration lane in front of the project on Mother Lode. CEQA demands nothing more.

In addition, the project's conditions require the payment of Traffic Impact Mitigation ("TIM") fees that constitute the project's fair share of costs for other area roadway improvements that will, ultimately, be constructed as part of the County's Capital Improvement Program. While the appellants complain that these improvements will be constructed in the future, they ignore the fact that the project's contribution for these improvements is a product of the project's short-term future, not immediate, impacts. Since the TIM fees, as well as other project-funded traffic improvements, will be paid/completed prior to occupancy, the FEIR and staff report properly conclude that traffic impacts will be alleviated to permit LOS E operation in the project area. That is sufficient mitigation to result in traffic impacts that are less than significant.

The courts have made it clear that payment of fair-share fees constitutes proper and adequate mitigation of a project's share of cumulative impacts to localized traffic. *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99 [Fee-based mitigation programs for cumulative traffic impacts-based on fair share-infrastructure contributions by individual projects-constitute adequate mitigation measures under CEQA]. Here, the project's traffic study fully supports the use of fair-share fees as a part of the County's Capital Improvement Program and CEQA does not demand anything more.

B. CONFLICT AMONG EXPERTS DOES NOT RENDER AN EIR INADEQUATE

To support its claims, FSSI has submitted purported expert opinion that conflicts with the opinions of the County's own experts, as well as CalTrans' officials. Based upon these opinions, the appellants maintain that design review approval will violate CEQA. Appellants are wrong.

While a conflict among experts may preclude approval of a project in the absence of an EIR, here, where the EIR has been completed, any such conflict is irrelevant. The County is perfectly justified in relying upon the environmental conclusions reached by the experts that prepared the EIR, even if other experts might disagree. *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.*

(1988) 47 Cal.3d 376; *State Water Board Cases* (2006) 136 Cal.App.4th 674. Moreover, the same deferential standard applies to the County's right to rely on its own expert staff with respect to information contained in the EIR. *Greenebaum v. City of Los Angeles* (1984) 153 Cal.App.3d 391. Since the record is replete with substantial evidence to support staff's recommendation and the conclusions of its retained environmental experts, there is no reason to disturb the Planning Commission's unanimous decision to approve this project based upon any purported dispute among experts.

C. FORMAL RESPONSE TO ISSUES RAISED POST-FEIR IS NOT REQUIRED

FSSI, and its representatives, have peppered the County with letters and opinions post-FEIR and have complained that the County did not formally respond. The short answer to this point is two-fold: (1) the letters simply regurgitate the central themes of prior comment letters; and (2) CEQA does not require formal response to such letters.

In this regard, CEQA does not require that the County respond to comments on the FEIR. Thus, while the CEQA Guidelines do require a written response to significant environmental issues raised in the response to comments on the Draft EIR (CEQA Guidelines §15088(a), 15132), there is no requirement to respond to comments submitted after public review of an FEIR (CEQA Guidelines §15207). Nevertheless, the County has done so through its staff and consultant reports. Moreover, there is no requirement that the public even be permitted the opportunity to review an FEIR (CEQA Guidelines §15089(b). Here, the County, permitted such review. In sum, the County has gone above and beyond the CEQA requirements for soliciting and responding to public comments on the EIR.

In the case of *City of Poway v. City of San Diego* (1984) 155 Cal.App.3d 1037, the Court of Appeal soundly criticized the process whereby project opponents submit late project objections, especially when those objections simply repeat issues previously raised. The tactic utilized by the City of Poway is quite similar to the tactics utilized by Appellant, FSSI, here and the Court's admonition is equally apt:

> "Here, the draft EIR circulated April 1. Poway commented in writing on June 3. Poway's comments received adequate response. On August 10, the day of the hearing, Poway filed 53 challenges to the EIR. Understandably, delay is a tactic in environmental disputes to force developers to accede to project design changes simply because of the economic pressures to move a development forward. Fairness is a concept not yet outmoded. We think the dumping of 53 challenges on the day of the hearing without explanation as to the obvious delay is unconscionable. Moreover, all of Poway's challenges were anticipated by the draft EIR." *City of Poway v. City of San Diego*, supra, 155 Cal.App.3d 1037,1044.

D. RECIRCULATION OF THE EIR IS NOT REQUIRED

In conjunction with the assault on the project's EIR, the appellants, almost in passing, assert that the EIR must be re-circulated for further public comment because of changes in the project's mitigation measures. Not surprisingly, the appellants cite no authority for this claim.

Contrary to the appellants claims, recirculation is only required when "significant new information is included in a final EIR." Pub. Res. Code §21092.1. The statutory phrase "significant new information," a predicate for requiring recirculation of a final environmental impact report, means new information that the project will have new or more severe adverse effects on the environment than previously disclosed. *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 26 Cal.Rptr.2d 231. The fact that new information is added to an EIR after circulation of the DEIR does not require recirculation, unless the new information is significant. Section 15088.5(a) of the CEQA Guidelines, which serves to implement the Supreme Court decision in *Laurel Heights,* addresses this directly and provides examples of when recirculation is required - none of which apply here. As the County's environmental consultant has explained, recirculation is only required:

- When the new information shows a new, substantial environmental impact resulting from the project or from a mitigation measure;
- When the new information shows a substantial increase in the severity of an environmental impact, except that recirculation would not be required if mitigation that reduces the impact to insignificance is adopted;
- When the new information shows a feasible alternative or mitigation measure, considerably different from those considered in the EIR, that clearly would lessen the environmental impacts of the project and the project proponent declines to adopt it;
- When the draft EIR was "so fundamentally and basically inadequate and conclusory in nature that public comment on the draft EIR was essentially meaningless.

The new information from Caltrans regarding the sufficiency of the mitigation for impacts regarding access rights and the implementation of Measure Y do not implicate these concerns. To the contrary, they further demonstrate that the project EIR requires adequate mitigation. Convenience Retailers has agreed to implement the newly-required mitigation measures, thereby precluding any need to recirculate the EIR for further comment.

Moreover, mere disagreement among experts does not require recirculation, just as it is not a basis for finding an EIR to be inadequate. When experts submit information challenging the conclusions on a subject already evaluated in the EIR [e.g., traffic impacts relating to project

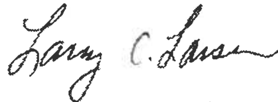
driveway access, which is exhaustively evaluated and properly mitigated] this additional information does not require recirculation. *Cadiz Land Co. v. Rail Cycle* (2000) 83 Cal.App.4th 74, 97 [County not required to revise and recirculate EIR based on experts conclusion that future expansion of the project would change the water flow due to increased water pumping resulting in claimed increase in contamination]. Accordingly, the County is not required to recirculate the EIR for further comment when no significant new information has been added after public review of the Draft EIR.

E. CONCLUSION

For many years the former and current owners of this project have been pursuing a "simple" architectural review of their project - a review required only because of the project's proximity to US Highway 50. In compliance with the County's directives, the owner has completed a lengthy and costly EIR process in full compliance with CEQA. Because the CEQA arguments raised by appellants fail to demonstrate that the EIR is in any respects inadequate, we respectfully submit that the unanimous approval of the Planning Commission should be affirmed and, accordingly, the appeals against the project should be denied.

Very truly yours,

LAW OFFICES OF
GREGORY D. THATCH



LARRY C. LARSEN

LCL:ll
L8106.ltr

cc: Griffin Williamson, Total ProjeX Corporation (via e-mail)
Suzanne Allen de Sanchez, Clerk of the Board (via e-mail)
Lillian MacLeod, County Planning (via e-mail)
Paula F. Frantz, Deputy County Counsel (via facsimile)

El Dorado County Economic Development Advisory Committee

2009 EDAC Meeting Schedule

Public comments will be received on each agenda item as it is called. Comments shall be limited to three minutes per individual. Matters not on the agenda may be addressed by the general public during Open forum. Public comments during Open Forum are limited to three minutes per individual.

Wednesday, July 29	Wednesday, November 4
Bldg. A, conf. Room A	Wednesday, November 18
Wednesday, August 12	Wednesday, December 2
Wednesday, August 26	Wednesday, December 16
Wednesday, September 9	Wednesday, December 30
Wednesday, September 23	Wednesday, January 13, 2010
Wednesday, October 7	Wednesday, January 27, 2010
Wednesday, October 21	Wednesday, Feb. 10, 2010

*** *Note:* Beginning July 29th all EDAC meetings are held every other Wednesday 8:00 – 9:30 a.m. throughout year at 330 Fair Lane, Bldg. A Office of Emergency Services Conference Room, Placerville, CA 95667 unless otherwise noted.**

*** *Note:* Beginning July 30th all EDAC Regulatory Reform subcommittee meetings are held every other Thursday 8:00 – 10:00 a.m. throughout year at 330 Fair Lane, Bldg. A Office of Emergency Services Conference Room, Placerville, CA 95667 unless otherwise noted.**