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BOARD OF SUPERVISORS
EL DORADO COUNTY
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February 24, 2011

Via E-mail (suzanne.allendesanchez@edcgov.us)

Board of Supervisors
c/o Clerk of the Board of Supervisors
County of El Dorado
330 Fair Lane
Placerville, CA 95667

Re: Response to Appeal by Syers Properties III, LLC of the January 13, 2011 Planning Commission Determination of Consistency with the Town Center West Development Plan Regarding the Proposed CVS/pharmacy.

Dear Board of Supervisors:

We represent Armstrong Development Properties, Inc. ("Armstrong"), the developer for the proposed CVS/pharmacy located in Planning Area E of the County of El Dorado Town Center West Development Plan ("TCW Development Plan"). Planning Area E is allocated for up to 35,000 square feet of commercial services and retail uses.

As you know, on January 28, 2011, Syers Properties III, LLC ("Syers"), owners of the Market Place at Town Center East, filed an appeal, dated January 27, 2011, of the Planning Commission's January 13, 2011 unanimous decision upholding the Planning Department's 2009 finding that the proposed CVS/pharmacy in Town Center West is consistent with the TCW Development Plan.

The purpose of this letter is to respond to the arguments raised in Syers' appeal. For the reasons set forth herein, Syers' appeal lacks merit. The Planning Commission's decision to uphold the County Planning Department's 2009 consistency determination and allow the County Building Department to issue building and grading permits should be upheld.

Syers begins its appeal by alleging that the consistency determination by the Planning Department and Planning Commission is unreasonable, constitutes an abuse of discretion and is not supported by substantial evidence. Syers' assertion fails for several reasons.

First, the consistency determination was reasonable. The allocation for commercial service and retail uses (Category C uses) in Planning Area E of the TCW Development Plan includes, among other uses, stationer, office supplies, newsstands, delicatessens, fast food restaurants, and florists. The proposed CVS/pharmacy will include consistent commercial uses such as the sale of stationary, office supplies, newspapers, magazines, pre-packaged food, and flowers.

Second, the consistency determination was not an abuse of discretion. The Planning Department followed the procedure set forth in the TCW Development Plan which provides that additional uses may be permitted if they are similar in nature to those listed in the TCW Development Plan.

Third, the consistency determination was supported by substantial evidence. The Planning Department's September 28, 2009 letter provided that the proposed CVS/pharmacy, "while not a use specifically listed in the Development Plan, is similar in nature to other Category C uses established within the Development Plan, and that accordingly such a drug store operation is a permitted Category C use at the Property."

Below are responses to Syers' specific arguments raised in its appeal.

A. Town Center West and East Are "Distinct Yet Complimentary" Developments.

The TCW Development Plan does state that the Town Center West and Town Center East are "two *distinct* yet complimentary" developments. (TCW Development Plan at 1) [emphasis added]. The County could have decided to process one Development Plan for both Town Center West and Town Center East. However, the County decided to process two distinct Development Plans. The TCW Development Plan was approved by the Board of Supervisors in May 1995. The Town Center East Development Plan ("TCE Development Plan") was not approved by the Board of Supervisors until August 1995. The TCE Development Plan, approved after the TCW Development Plan, does not reference Town Center West. The TCW Development Plan and TCE Development Plan were created separately and were not meant to function as related documents.

None of the guidelines or standards in the TCW Development Plan preclude a drug store use in Town Center West. Additionally, nothing in the TCW Development Plan or the TCE Development Plan provides for allowing certain land uses in one Town Center while precluding the same use in the other Town Center. Therefore, the fact that drug store uses are specifically permitted in one of the Town Center East Planning areas does not prevent a consistency finding that drug store uses are permitted in Town Center West.

Furthermore, the TCW Development Plan's procedure for permitting uses in Town Center West that are not explicitly listed in the TCW Development Plan does not require that the County consider the TCE Development Plan. Rather, the TCW Development Plan states that the additional uses should be "similar in nature to those established within the Town Center *West*

Planned Development." (TCW Development Plan, at 5) [emphasis added]. Consequently, the TCE Development Plan does not have to be reviewed when making a consistency determination for a use in Town Center West. Thus, the fact that a drug store is a listed use in the TCE Development Plan has no bearing on the consistency of having a drug store in Town Center West.

Most of Syers' specific arguments are based on a misunderstanding of the size and scope of modern CVS/pharmacies. Syers ignores the differences between the current CVS/pharmacy site in Town Center East, which took the retail space over from Longs, and the CVS business model providing for smaller stores focusing on convenience-type drug store and pharmacy items. The proposed CVS/pharmacy in Town Center West will not be "major retail" or a "department store" selling "general merchandise." The CVS in Town Center East is 23,436 square feet with a wide variety of merchandise. The proposed CVS/pharmacy in Town Center West will be significantly smaller at approximately 14,575 square feet and will sell convenience and pharmacy items. The proposed Town Center West CVS/pharmacy is a reduction in square footage of approximately 40% as compared to the old Longs store square footage in Town Center East. The proposed CVS/pharmacy will be ancillary and supportive of the primary uses in Town Center West. Employees and customers of other businesses in Town Center West will use the proposed CVS/pharmacy to pick up a prescription or convenience item while working or shopping in Town Center West.

Syers asserts that the reason the current CVS/pharmacy (formerly Longs) is located in Town Center East is because drug stores are expressly permitted in Town Center East. However, it is also true that Longs located in Town Center East years ago because Town Center East developed faster than Town Center West, which is just now developing. The fact that Longs previously located there has no bearing on whether CVS can now locate in Town Center West. Also, just because more retail uses are explicitly listed as allowed in Town Center East does not take away from the fact that retail uses are also allowed in Town Center West. For example, Syers states that only 4% of Town Center West is approved for commercial/retail uses. While true, it is a meaningless argument as there is still 4% of Town Center West that can be used for commercial retail uses and the proposed CVS/pharmacy fits within that 4%.

Syers argues that Town Center East was designed to be a "central gathering place." Customers do not linger at or around a drug store. Rather, they go into the store, pick up what they need, and leave. Consequently, there is no reason that a drug store should be in Town Center East, rather than Town Center West, to help promote Town Center East as a central gathering place.

B. The Planning Department and Commission Determinations Were Procedurally Correct.

The Planning Department's September 28, 2009 letter to El Dorado Hills Investors, Ltd. clearly provided that although the proposed CVS/pharmacy was "not a use specifically listed" in

the TCW Development Plan, it is "similar in nature to other Category C uses established within" the TCW Development Plan, "and that accordingly such a drug store operation is a permitted Category C use at" the proposed site in Town Center West.

At the January 13, 2011 Planning Commission meeting, the Planning Commission voted unanimously to pass a motion upholding the Planning Department's 2009 consistency determination. Syers argues that the Planning Commission should have adopted a resolution or set forth written findings or interpretations as allegedly required by the TCW Development Plan. Syers misinterprets the TCW Development Plan.

Section 1.5 of the TCW Development Plan provides that additional uses may be permitted when the Planning Department determines that "such uses are found to be similar in nature to those established within" the TCW Development Plan. If the Planning Department is unable to make such a determination, the applicant (Armstrong) may request that the "Planning Commission make a finding permitting such use . . . and, by resolution of record, set forth its findings and its interpretations." (TCW Development Plan at 5).

Therefore, for a finding of consistency by the Planning Department, no resolution or findings are required. A resolution is only required if the Planning Department is unable to make the finding and the applicant (Armstrong) requests that the Planning Commission make the determination.

Here, the consistency determination came before the Planning Commission on an appeal by a project opponent (Syers). Neither the Planning Department nor the applicant requested that the Planning Commission make the consistency determination. The Planning Commission's motion to uphold the Planning Department's consistency determination after a public hearing and Commission discussion was appropriate.

C. The Planning Department and Planning Commission Were Correct in Finding a Drug Store Is "Similar in Nature" to Permitted Town Center West Retail Uses.

The Planning Department's September 28, 2009 consistency determination and the Planning Commission's January 13, 2011 decision to uphold such consistency determination were appropriate decisions supported by substantial evidence. The proposed approximately 14,575 square foot CVS/pharmacy will include commercial uses such as the sale of newspapers, magazines, stationary, office supplies, pre-packaged food, and flowers. These uses are consistent with the TCW Development Plan's allocation for commercial service and retail in Planning Area E. (TCW Development Plan at 5). The commercial service and retail uses (also known as TCW Development Plan "Category C" uses) include, among other uses, office supplies, stationer, newsstands, delicatessens, fast food restaurants, and florists. Furthermore, the approximately 14,575 square foot store will easily fall within the 35,000 square foot cap on Category C uses in Planning Area E of the TCW Development Plan. Therefore, the proposed CVS/pharmacy use is similar in nature to the TCW Development Plan uses and no major modification to the TCW Development Plan through an amendment is necessary. Consequently,

as is discussed in further detail below in Section D of this letter, no additional environmental review is required.

The TCW Development Plan also provides that uses stated in the Specific Plan for Town Center West include, **but are not necessarily limited to those listed**. (TCW Development Plan at 2) [emphasis added]. Moreover, the TCW Development Plan explicitly notes that "not all appropriate and viable [land] uses can be 'listed' at any given time" and "additional uses may from time to time be **found to be consistent** with the intent and purpose of the Town Center West Planned Development." (TCW Development Plan at 3) [emphasis added]. If the additional use is similar to those established in the TCW Development Plan, the County should allow the additional use. (TCW Development Plan at 5).

The TCW Development Plan discusses uses allowed within the General Commercial (CG) zoning district, which include a wide variety of sales and other uses. (TCW Development Plan at 2). Consequently, the TCW Development Plan is anticipating that General Commercial (CG) uses not expressly listed in the Specific Plan may be allowed in Town Center West. In fact, the County's Zoning Code provides that a **Drug Store is a use allowed by right** within the General Commercial (CG) district. (County Code §17.32.180(A)(35)) [emphasis added]. Therefore, as a permitted General Commercial (CG) use, a CVS/pharmacy should be allowed in Town Center West.

Syers argues that the County could have included major retail and general merchandise uses, such as a drug store with a drive-through, in the TCW Development Plan since they included or conditionally included such uses in the TCE Development Plan. However, as provided above, the proposed CVS/pharmacy is not major retail or general merchandise. This argument also completely overlooks the extensive discussion in the TCW Development Plan calling for flexibility in the allowed land uses in Town Center West. The TCW Development Plan explicitly acknowledges the need for flexibility in permitted uses. The Town Center is zoned General Commercial (CG) to enable the "Town Center to respond to rapidly re-defining and evolving markets." (TCW Development Plan at 1). Furthermore, the County must have expected the Category C uses in Planning Area E to be read broadly because 35,000 square feet is a very large amount of space for newsstands, florists, delicatessens, and the other specific uses described as Category C uses. (TCW Development Plan at 5).

It is important to note that there have been several consistency determinations over the life of the TCW Development Plan and the County has broadly determined uses to be similar in nature. Given this history, and the provisions in the Specific Plan, TCW Development Plan, and County Zoning Code, a CVS/pharmacy would easily be consistent with the uses in Category C of the TCW Development Plan.

Over a year after the Planning Department's September 2009 consistency determination, Syers alleges that during a December 2010 meeting with Planning Director Roger Trout, Mr. Trout indicated that the Planning Department would have found virtually any commercial use in

compliance with the TCW Development Plan because the proposed CVS/pharmacy site is not bordered by residences or other sensitive uses, and is located on a major street. Regardless of what Mr. Trout allegedly said in an informal, non-public meeting, the Planning Department's September 28, 2009 consistency determination letter bases its consistency determination on the proposed CVS/pharmacy's consistency with the TCW Development Plan's Planning Area E Category C uses (commercial service and retail). The letter does not state that the lack of residents or other sensitive uses and the location on a major street would allow any retail use. The best evidence of what factors were considered in the Planning Department's consistency determination is what was put in writing at the time of the decision, not alleged informal verbal statements made over a year later.

Furthermore, unlike as asserted by Syers, the consistency determination was based on whether the proposed CVS/pharmacy was similar in nature to the enumerated uses in the TCW Development Plan, not on whether the proposed CVS/pharmacy could be accommodated within Town Center West. Syers does not cite any evidence for its assertion that whether the use could be accommodated was ever considered in the consistency determination.

Syers repeats many of its arguments in this Section C that were raised previously under Section A of its appeal. The TCE Development Plan does not have to be reviewed when making a consistency determination for a use in Town Center West. The proposed CVS/pharmacy is an "ancillary," "support retail" use which is allowed in Town Center West. Employees of businesses in Town Center West will likely shop at the proposed CVS/pharmacy for medicine, first-aid, or food/drink items before, during, or after work. The proposed CVS/pharmacy is not a "general merchandise discount department store." As discussed previously, the 23,436 square foot former Longs site in Town Center East with 18 two-sided aisles is significantly larger than the proposed approximately 14,575 square foot CVS/pharmacy in Town Center West. Therefore, as a relatively small, ancillary, support retail, convenience-oriented use, the proposed CVS/pharmacy in Town Center West will not change the character and intent of what was planned for Town Center East and Town Center West.

CVS is going to vacate its current site in Town Center East whether it moves to Town Center West or not. It is no longer feasible for CVS to remain in the larger former Longs site in Town Center East. Furthermore, a new freestanding Walgreen's with a drive-through is now under construction within a quarter mile from the existing CVS/pharmacy in Town Center East. The new Walgreen's will severely and negatively impact the business at the existing CVS/pharmacy in Town Center East due to the location's poor visibility, limited access, poor traffic flow and no drive-through for customer convenience. If CVS remains in Town Center East with its primary competitor offering increased customer convenience, including a drive-through, it would only serve to erode any perceived future positive effect that CVS may have on Town Center East. With Walgreen's pulling customers away from Town Center East and with an ineffective CVS/pharmacy in Town Center East, such scenario would likely have a detrimental economic effect on the other tenants in Town Center East. It is in the best interest of

the County to keep CVS in the Town Center area by approving the proposed project in Town Center West.

Syers also asserts that allowing the proposed CVS/pharmacy in Town Center West will result in blight in Town Center East. However, there is no indication that the relocation of CVS from Town Center East to Town Center West would cause any vacancy or blight in Town Center East. CVS may potentially sublease the existing CVS space in Town Center East and it is confident that it could do so. Town Center East is an active, thriving shopping center in high demand for new retail tenants. Consequently, the current CVS space in Town Center East will not remain vacant for an extended period of time. Furthermore, the consistency decision is a ministerial act that does not trigger California Environmental Quality Act ("CEQA") or any related blight analysis.

On December 1, 2010, the same day that Syers' counsel sent a letter to the County's Development Services Director objecting to the consistency determination, Syers submitted preliminary plans for a 15,000 square foot drug store with a drive-through pharmacy in Town Center East. Just two weeks later, on December 14, 2010, Syers filed its official appeal to the consistency determination. The timing of Syers' proposal for a drug store in Town Center East is suspicious at best. This last minute proposal highlights the fact that Syers' appeal is motivated by a financial landlord-tenant dispute. Syers' proposal for a drug store in Town Center East is a last ditch attempt to bolster its arguments against CVS moving to Town Center West. In fact, it exposes the truth that Syers' objections to the consistency determination for CVS in Town Center West have nothing to do with a sincere concern about the validity of such determination and are actually financially motivated.

D. The County Has Complied with CEQA.

(1) Prior Environmental Review.

Pursuant to CEQA, the development allowed under the El Dorado Hills Specific Plan was analyzed in the July 1988 Specific Plan Environmental Impact Report. In March 1995, the County completed a Negative Declaration for Town Center West. The 1995 Negative Declaration tiered off of the Specific Plan Environmental Impact Report.

The Negative Declaration describes the Town Center West project uses as office, commercial, research development and light manufacturing. Furthermore, the Negative Declaration describes Area E of Town Center West as 7.1 acres with an allowable 35,000 square feet of commercial building area. This is the same description of Area E that is included in the TCW Development Plan. The Negative Declaration also states that the uses are further defined and listed within the Concept Development Plan (which is referred to hereafter as the TCW Development Plan). (Negative Declaration, at 1). The Negative Declaration recognizes the need to support and encourage "an expanded list of permitted uses." (Negative Declaration, at 12).

The Negative Declaration states that the Town Center West project approval would pave the way for the processing of ministerial building permits. The Negative Declaration also provides that prior to issuance of building permits, County staff must find that the proposed plans are consistent with the plans, guidelines, standards, and conditions of approval of the TCW Development Plan. (Negative Declaration, at 2).

(2) CEQA Is Not Triggered by Ministerial Actions.

Environmental review under CEQA is not triggered by ministerial actions. CEQA only applies to discretionary actions. (Cal. Code Regs §15002(i)). The CEQA Guidelines define "discretionary" and "ministerial" as follows:

"Discretionary Project" means a project which requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations. (CEQA Guidelines §15357).

"Ministerial" describes a governmental decision involving ***little or no personal judgment*** by the public official ***as to the wisdom or manner*** of carrying out the project. The public official ***merely applies the law to the facts*** as presented but uses ***no special discretion*** or judgment in reaching a decision. A ministerial decision involves only the ***use of fixed standards or objective measurements***, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out. (CEQA Guidelines §15369) [emphasis added].

In addition, the County defines "Ministerial Projects" as follows:

as a general rule include those activities defined as projects which are undertaken or approved by a governmental decision which a public officer or public agency makes upon a given state of facts in a prescribed manner in obedience to the mandate of legal authority. With these projects, ***the officer or agency must act upon the given facts without regard to his own judgment or opinion concerning the propriety or wisdom of the act*** although the statute, ordinance or regulation ***may require, in some degree, a construction of its language by the officer.*** (County Code §17.72.020) [emphasis added].

The County has broad discretion in determining which of its actions are ministerial. The CEQA Guidelines provide that the "determination of what is 'ministerial' can most ***appropriately be made by the particular public agency*** involved ***based upon its analysis of its own laws***, and each public agency should make such determination either as a part of its implementing regulation or on a case-by-case basis." (CEQA Guidelines §15268) [emphasis added]. As

recommended by the CEQA Guidelines, the County made a determination as part of its TCW Development Plan that project approvals would be ministerial.

(3) The Consistency Determination and Project Approval Are Ministerial Acts Under the TCW Development Plan.

The TCW Development Plan specifically states that "[s]ite specific project approvals shall be a **ministerial act** of the Director of Planning." (TCW Development Plan at 6) [emphasis added]. Furthermore, in the same paragraph discussing that site specific project approvals shall be ministerial acts, the TCW Development Plan states that: "Prior to issuance of a building permit, County staff shall find the proposed site specific project has received approval from the Design Review Committee and is **consistent with** the Development Plan, the Development Standards and other conditions of approval of the Town Center West Planned Development." (TCW Development Plan at 6) [emphasis added]. Also, as outlined above in the County's definition of ministerial, the guiding document for the decision (i.e., the TCW Development Plan) may require, in some degree, a construction of language by the County officer. Therefore, what little, if any, construction of language was necessary for the Planning Department to make its 2009 consistency determination for the CVS/pharmacy did not turn this ministerial act into a discretionary one.

Furthermore, in its September 28, 2009 consistency determination letter, the Planning Department affirmed that the "Development Plan comprises all discretionary County approvals necessary for the development of such Category C uses and that no further discretionary approvals will be required by the County for the proposed development of Planning Area E."

The TCW Development Plan also explicitly notes that "not all appropriate and viable [land] uses can be 'listed' at any given time" and "**additional uses may from time to time be found to be consistent** with the intent and purpose of the Town Center West Planned Development." (TCW Development Plan at 3) [emphasis added]. With respect to approving additional uses, the TCW Development Plan provides that "[a]dditional uses may be permitted when, by determination of the Director of Planning, such uses are found to be **similar in nature** to those established within the Town Center West Planned Development." (TCW Development Plan at 5) [emphasis added]. County staff simply had to determine whether the proposed CVS/pharmacy is **similar in nature** as those uses (Category C uses) established within the TCW Development Plan. The established uses are fixed standards and objective measures in the Development Plan.

(4) Syers Concedes That If the Consistency Determination and Project Approval Are Ministerial Acts, the Project Is Exempt from CEQA.

Syers acknowledges in its appeal that the TCW Development Plan states that site specific project approvals shall be ministerial acts of the Planning Department. Nevertheless, Syers argues that because the approval of the proposed CVS/pharmacy is inconsistent with the TCW Development Plan, the approval represents a significant change and modification to the plan and, therefore, an exercise of discretion. Consequently, Syers is conceding that if the CVS/pharmacy

is consistent with the TCW Development Plan, such approval is a ministerial act not subject to CEQA. As discussed above, the CVS/pharmacy is consistent with the TCW Development Plan and the County's consistency determination is well-supported. Thus, as a consistent use, such approval is a ministerial act exempt from CEQA. (Cal. Code Regs. §15002(i)).

(5) The Approval of the CVS/pharmacy Is a Ministerial Act Regardless of the TCW Development Plan's Ministerial Statement.

Syers asserts that the statement in the TCW Development Plan regarding ministerial approvals is not conclusive and that an agency must still act in accordance with CEQA. (Citing *Friends of Westwood, Inc. v. City of Los Angeles*, 191 Cal.App.3d 259, 270 (1987)). This is true. Looking beyond the TCW Development Plan's statement, the consistency determination is a ministerial act regardless of the TCW Development Plan's statement.

First, where prior environmental review has been completed during prior discretionary stages of a project, "it will seldom be necessary to require an additional environmental assessment when considering issuance of" a permit. "[M]ost of the discretionary decisions—the modifications, conditions, and the like—will have been worked out" and the "environmental impact report itself will already exist." Consequently, the prior environmental review "can be used to guide whatever discretion remains to be exercised during the" permit "approval process." (*Friends of Westwood*, 191 Cal.App.3d at 280-281). Here, as has been discussed above, the Negative Declaration for Town Center West analyzed 35,000 square feet of commercial uses in Area E of Town Center West and worked out the discretionary decisions impacting the environment from such commercial use.

Second, if the grant or denial of a permit is "governed by fixed design and construction specifications in statute or regulation, the official **decision of conformity or nonconformity leaves scant room for the play of personal judgment.**" (*People v. Department of Housing and Community Dev.*, 45 Cal.App.3d 185, 193 (1975)) [emphasis added]. Here, the approval of the proposed CVS/pharmacy is governed by the TCW Development Plan and the decision of conformity (consistency) leaves little room for personal judgment.

Third, the amount of thinking required to determine if the proposed CVS/pharmacy is "similar in nature" to those uses established in the TCW Development Plan does not rise to the level of a discretionary decision. As outlined above, the County Code's definition of ministerial projects anticipates some degree of language construction by County officials. (County Code §17.72.020). Additionally, in *Friends of Westwood*, the court found that the fact that city employees exercised "their discretion to modify a single city council established standard or to impose a single condition or modification does not automatically mean the approval process is a 'discretionary project' within the meaning" of CEQA. (*Friends of Westwood*, 191 Cal.App.3d at 280). It is only when that "discretion is exercised as to several items and in the context of approval of a major project with substantial potential effects on the environment the process moves from a ministerial to a discretionary decision." (*Ibid*). Consequently, any minor amount

of thinking, if any, required to make the consistency determination for the CVS/pharmacy in Town Center West does not turn the determination into a discretionary act subject to CEQA.

Fourth, the approval of the CVS/pharmacy is not just partially a ministerial action. When a project approval involves both ministerial and discretionary actions, the project will be deemed discretionary. (*Friends of Westwood*, 191 Cal.App.3d at 270-271). Here, all approvals necessary for the CVS/pharmacy -- the consistency determination, site specific project approval, and the issuance of building and demolition permits -- are all ministerial actions.

(6) *Friends of Westwood, Inc. v. City of Los Angeles* Is Distinguishable From the Current Dispute.

Syers cites *Friends of Westwood, Inc. v. City of Los Angeles* for a very narrow issue regarding a local agency's responsibility to act in accordance with CEQA. (*Friends of Westwood*, 191 Cal.App.3d at 270). We also cited *Friends of Westwood* for general rules of law related to ministerial and discretionary actions. However, the particular holding in *Friends of Westwood* does not apply to the current dispute because the case is distinguishable on its facts.

In *Friends of Westwood*, the court held that the approval process for a building permit was a discretionary act under CEQA. However, the project at issue in that case was a major construction project including 26-stories and 363,000 square feet. (*Id.* at 262). The court narrowed its decision by clarifying that it was only addressing the approval process for a "project unusual in size, dimension, and location" and that "[r]un of the mill building permits are 'ministerial' actions not requiring compliance with CEQA." (*Id.* at 265, 277). The city employees in *Friends of Westwood* exercised substantial discretion in establishing standards that the project was required to satisfy and in waiving compliance with standards that the city council had established by ordinance. (*Id.* at 273-274). The project had to go through a rigorous "plan check" process where city employees had the power to set standards and insist on modifications to the building plans to require compliance with new standards that the employees created. (*Id.* at 277-278). Additionally, unlike the current dispute, there had been no prior environmental review for the project at issue in *Friends of Westwood*. (*Id.* at 280-281). Consequently, *Friends of Westwood* provides important guidance for distinguishing ministerial versus discretionary actions but the holding is distinguishable from the facts at hand and actually supports the County's approval as a ministerial decision.

(7) No Further Environmental Review Is Required.

Syers further argues that the County has not performed any analysis regarding the consistency determination as required by CEQA. (Citing Pub. Res. Code §21166; Cal. Code Regs §15162(c)). However, Syers provides no support for its conclusory statement that additional CEQA analysis is required.

As with any decision or subsequent decision on a project, environmental review is only necessary if it is a discretionary decision. (*San Diego Navy Broadway Complex Coalition v. City*

of *San Diego*, 185 Cal.App.4th 924, 935 (2010); see Cal. Code Regs §15162(c)). Without "such discretionary approval, the agency has no jurisdiction to prepare" additional environmental review. (*Id.* at 935, citing *Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga*, 82 Cal.App.4th 473, 479 (2000)). As discussed in detail above, the consistency determination and project approval are ministerial acts not subject to CEQA.

However, even assuming Syers is correct that the County's actions are discretionary, no additional environmental review is required under CEQA. After environmental review has been performed for a project, "the statutory presumption flips in favor of the developer and against further [environmental] review." (*Moss v. County of Humboldt*, 162 Cal.App.4th 1041, 1049-1050 (2008)). CEQA Section 21166, cited by Syers, is designed to "restrict the powers of agencies 'by prohibiting [them] from requiring a subsequent or supplemental environmental impact report' unless the stated conditions [in Section 21166] are met." (*Id.* at 1050, citing *Bowman v. City of Petaluma*, 185 Cal.App.3d 1065, 1073-1074 (1986)).

Under CEQA Section 21166, when environmental review has been prepared for a project, no additional environmental review is required unless one or more of the following events occurs: (1) Substantial changes are proposed in the project which will require major revisions of the Negative Declaration; (2) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the Negative Declaration; or (3) New information, which was not known and could not have been known at the time the Negative Declaration was certified as complete, becomes available. These are the same Guidelines Section 15162(c) cited by Syers.

The proposed CVS/pharmacy does not trigger any of the circumstances under CEQA Section 21166. First, there are not substantial changes proposed to the project. The proposed CVS/pharmacy is consistent with the TCW Development Plan. It is also consistent with the Negative Declaration which designated Area E for commercial uses and it falls within the 35,000 square foot commercial cap required in the TCW Development Plan.

For example, traffic is often the most controversial issue. The March 9, 1995 Traffic Study prepared for the Town Center West Negative Declaration, attached hereto as Exhibit A, determined the trip generation rates for Town Center West based on land use. The Traffic Study used 35,000 square feet of commercial uses in Planning Area E and a total allowed commercial square footage for the entire Town Center West of 60,000 square feet. These commercial square footages are consistent with those in the TCW Development Plan. At this time, none of the commercial uses have been developed in Town Center West. The proposed approximately 14,575 square foot CVS/pharmacy falls well within the 35,000 square feet of allowed commercial uses in Planning Area E. Thus, the Traffic Study and the Negative Declaration have studied and anticipated the traffic to be generated by an approximately 14,575 square foot CVS/pharmacy commercial use in Town Center West. Therefore, Syers' argument that the traffic counts for a CVS/pharmacy in Town Center West may be different than retail uses explicitly listed in the TCW Development Plan is without merit. Any potential environmental

impacts from the CVS/pharmacy in Planning Area E of Town Center West have already been addressed in the prior environmental review.

Second, there have not been any substantial changes with respect to the circumstances as Town Center West remains mostly undeveloped. Third, there is no new information. The proposed CVS/pharmacy is simply a commercial use going into the commercially designated area in Town Center West. The proposed CVS/pharmacy fits within the 35,000 square feet of commercial use for Planning Area E analyzed in the Town Center West Negative Declaration. Therefore, no additional environmental review is necessary.

(8) Syers Is Misinformed Regarding the Proposed Site's APN History.

Syers is misinformed about the scope of the Negative Declaration. Syers argues that since the APN numbers listed in the Negative Declaration differ from APNs on Armstrong's recent pre-application worksheet, the Negative Declaration does not cover the entire CVS/pharmacy project site. However, the County's APN numbering system has changed over the years. At the time of the Negative Declaration, the APNs for proposed CVS/pharmacy site were 107-010-10 and 108-030-13. These APN numbers are clearly listed in the Negative Declaration. Moreover, the Negative Declaration clearly states that it covers the 130 acre site for the Town Center West project. The Negative Declaration and the TCW Development Plan both cover 130 acres for the Town Center West project, including the five distinct planning areas (A)-(E).

At the time of the pre-application worksheet, the APN for the same site was 117-180-10. This APN is clearly listed on the pre-application. The APN for the proposed CVS/pharmacy is now 117-180-12.

E. The Proposed Use Is Consistent With the Current General Plan and Zoning Map Designations.

The proposed property for the CVS/pharmacy has a unique history. This property has been impacted by two separate road realignments. First in 1967, the property was created by the realignment of Latrobe Road. Second, in 2010, the property was impacted by the realignment of Old White Rock Road. Prior to the realignment of Latrobe Road, the property was located to the east of Latrobe Road. After the realignment of Latrobe Road, the property is now located to the west of Latrobe Road. Prior to the realignment of Old White Rock Road, the property crossed over and beyond Old White Rock Road to the north-west. After the realignment of Old White Rock Road, the property is now located south of New White Rock Road.

It is Armstrong's understanding that, the realignment of Latrobe Road and White Rock Road, after the Specific Plan and rezoning occurred, created this specific developable parcel. In 1987 when the El Dorado Hills Specific Plan was adopted, the north-west corner of this parcel was included in the El Dorado Hills Specific Plan because it extended across White Rock Road (now Old White Rock Road) and was part of Village U. In 1987, the APN for this property was

086-070-06. This APN is clearly listed on Appendix A to the Specific Plan. As part of the Specific Plan, the property was also part of the July 1988 rezone of Specific Plan Village U parcels to Planned Development and the corresponding amendments to the General Plan.

The APN for other parts of the site were not likely listed because, at the time of the Specific Plan and rezoning, portions of the parcel were under the prior alignment of Latrobe Road and White Rock Road and, thus, were not developable lands. Furthermore, imperfect hand-drawn boundary lines in the 1980s may have also caused portions of the parcel to be inadvertently left out of the Specific Plan and rezoning.

An additional complication is that prior to the County's General Plan, the County had over twenty Area Plans governing particular areas within the County. The current zoning maps for portions of the parcel reflect the El Dorado Hills/Salmon Falls Area Plan. However, that Area Plan was superseded by the County's 1996 and later 2004 General Plan. Since a portion of the parcel was inadvertently left out of the July 1988 rezone, it was also left out of the corresponding amendments making the site consistent with the General Plan.

The County recognized this administrative oversight and has committed to fix the errors in the County-wide rezone clean-up to occur in the near future. No further legislation or other actions are required by the County prior to implementing the rezone clean-up. The County is simply cleaning-up prior administrative zoning errors because of moving property lines due to the road realignments and the lack of specificity in hand-drawn zoning maps.

Syers cites *Neighbors in Support of Appropriate Land Use v. County of Tuolumne*, 157 Cal.App.4th 997 (2007) for the assertion that a county may not grant an ad hoc zoning exception to benefit one parcel. This is true. However, the County will not be granting the proposed CVS/pharmacy site an ad hoc zoning exception because the site is being treated the same as any other site within Planning Area E of the TCW Development Plan. Unlike in *Neighbors in Support of Appropriate Land Use*, the TCW Development Plan allows flexibility in determining additional uses, the proposed CVS/pharmacy is not an explicitly disallowed use, other sites in Planning Area E could have applied for a drug store use, and the County followed an express procedure to allow the additional use. Consequently, the consistency determination is not an ad hoc exception or an unreasonable benefit to a particular parcel within a given zone.

Regardless of the parcel's unique history and inclusion in the Specific Plan, the governing document for the development of the parcel is the TCW Development Plan. It is undisputed that the TCW Development Plan covers the entire parcel and that Plan governs the development of the current parcel.

F. The Applicant Is Not Attempting to Amend the TCW Development Plan Without Public Scrutiny.

Armstrong is not attempting to amend the TCW Development Plan without public scrutiny. In fact, Armstrong is not attempting to amend the TCW Development Plan at all.

Armstrong has followed the procedure set forth in Section 1.5 of the TCW Development Plan to allow additional uses in Town Center West. Additional uses may be permitted in Town Center West when the Planning Department determines that such uses are "similar in nature to those established within" the TCW Development Plan. (TCW Development Plan at 5). The County Planning Department determined that the proposed CVS/pharmacy is similar in nature to those other commercial uses listed in the TCW Development Plan. Consequently, no amendment to the TCW Development Plan is required.

In a showing of good faith and willingness to provide an opportunity for public scrutiny, the County Board of Supervisors allowed Syers' appeal in front of the Planning Commission on January 13, 2011. This public hearing gave Syers and community members a public venue to express their concerns about the consistency determination. However, the Planning Commission agreed with the Planning Department's 2009 consistency determination.

Syers' speculation and allegations regarding prior letters for this proposed development as well as attempts to avoid public scrutiny for prior proposed developments in Town Center West are not relevant to the current dispute and appear to try to take attention away from the current dispute and the County's inclusive approach to allow public comment and scrutiny at the January 13, 2011 Planning Commission meeting.

The Planning Department's consistency determination was appropriately based on an analysis of the TCW Development Plan. Town Center West is a "distinct" development. As such, the owners and merchants in Town Center East should have made their investment decisions based on the TCE Development Plan. Due to the high demand for retail space in Town Center East, the relocation of the CVS/pharmacy from Town Center East to Town Center West will not result in a long-term vacancy or blight in Town Center East.

An amendment to the TCW Development Plan is not required. As discussed above, the proposed CVS/pharmacy is not a "Major Retail," general merchandise, or anchor store. The CVS business model calls for smaller convenience oriented stores. This is a change from the prior Longs business model which provided for larger buildings and a wider variety of merchandise. The proposed CVS/pharmacy will not sell "general merchandise." The products sold at the proposed CVS will be limited to convenience-type drug store items and a pharmacy. Consequently, the proposed CVS/pharmacy does not result in a minor or major change under County Code Section 17.04.070. The approval of similar uses is governed by the TCW Development Plan.

As mentioned above, Syers' last minute attempt to propose a drug store in Town Center East is nothing more than a business strategy to keep a drug store in their development and prevent the loss of a tenant. That business transaction has no bearing on the County's decision.

It is important to note that CVS is currently a tenant in Town Center East but CVS has purchased the proposed site in Town Center West. CVS is dedicated to a long-term investment

in the County in Town Center West. CVS will also work with Syers to re-lease their current space in Town Center East.

Conclusion.

Syers' appeal is completely unfounded. The County has followed appropriate procedures and made an appropriate consistency determination. The County has gone above and beyond what is required by law to provide Syers and others with a public forum to express their concerns. However, their concerns lack merit. Armstrong respectfully requests that the Board of Supervisors deny the appeal, thereby upholding the consistency determination, and direct the County Building Department to issue the grading and building permits for the proposed CVS/pharmacy in Town Center West.

I am happy to discuss any of the issues addressed in this letter. Please contact me at any time. We appreciate the County's attention to this matter.

Sincerely yours,

HOLLAND & KNIGHT LLP



Amanda J. Monchamp

AJM:s l

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Gina Paolini, Senior Planner
Pierre Rivas, Principal Planner
Charlene Tim, Planning Commission Secretary

Attachments: Exhibit A: March 1995 Traffic Study for Town Center West Negative Declaration