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Board of Supervisors
330 Fair Lane
Placerville, CA 95667

Re: Interpretation of General Plan Policy TC-Xa (aka Measure Y)

Honorable Chair and Members of the Board of Supervisors:

The Board of Supervisors has recently heard a significant amount of discussion on the current level of service of Highway 50 and the effect any level of service deficiency may have on pending development projects. Whether or not Highway 50 or any other roadway is at Level of Service F is a technical engineering matter that is beyond the scope of this legal memo. Instead, this memo focuses on the ramifications of a confirmed level of service deficiency and, in particular, whether the County can approve any development if a roadway is confirmed to be at Level of Service F. The short answer to that question is that the County can approve such development so long as the County adheres to the mitigation and improvement requirements of the associated General Plan policies (Policies TC-Xb through TC-Xi).

BACKGROUND

Before delving into a discussion of the current General Plan traffic mitigation policies, it is important to first summarize the policies that preceded them. The original Measure Y was approved by voters on November 3, 1998 and provided that it shall remain in effect for ten years. It added the following five policies to the 1996 General Plan:

County tax revenues shall not be used in any way to pay for building road capacity improvements to offset traffic impacts from new development projects. Exceptions are allowed if County voters first give their approval. (Policy 3.2.2.5)

Developer-paid traffic impact fees shall fully pay for building all necessary road capacity improvements to fully offset and mitigate all direct and cumulative traffic impacts from new development upon any highways, arterial roads and their intersections during weekday, peak-hour periods in unincorporated areas of the county. (Policy 3.2.2.4)

Traffic from residential development projects of 5 or more units or parcels of land shall not result in, or worsen, Level of Service "F" (gridlock, stop-and-go) traffic congestion during weekday, peak-hour periods on any highway, road, interchange or intersection in the unincorporated areas of the county. (Policy 3.5.1.6.1.)

The County shall not add any additional segments of Highway 50, or any other roads, to the County's list of roads that are allowed to operate at Level of Service "F" (gridlock) without first getting the voter's approval. (Policy 3.5.1.6.2)

Before giving approval of any kind to a residential development project of 5 or more units or parcels of land, the County shall make a finding that the project complies with the policies added by this initiative. If this finding cannot be made, then the County shall not approve the project, or give final approval to a tentative subdivision map, until all these policy findings can be made, in order to protect the public's health and safety as provided by state law to assure that safe and adequate roads are in place as such development occurs. (Policy 3.2.1.5).

After Measure Y passed, the County and the Control Traffic Congestion Initiative Committee (the proponents of Measure Y) spent considerable time interpreting the new policies.¹ Those efforts culminated in a December 7, 1999, Board of Supervisors meeting at which the Board reviewed a range of options and voted on its preferred interpretations of the Measure Y policies.² Of particular note, the Board interpreted the term "worsen" (as used in Policy 3.5.1.6.1) to mean a measurable amount of traffic that is deemed by traffic engineering standards to have a perceptible impact on traffic congestion. Additionally, with respect to the issue of when traffic improvements needed to address aggregate impacts must be implemented, the Board concluded that, "The development project may proceed if the mitigation measures and roadway improvements are shown in the roadway plan adopted pursuant to General Plan Policy 3.5.1.1., are included in a Capital Improvement Plan which calls for the completion of the improvements within an identified, reasonable period of time, and funding sources have been identified for the full funding of the improvements and are reasonably anticipated to be available."

The Measure Y policies were later incorporated into the adopted 2004 General Plan along with alternative policies that would take effect if the Measure Y policies were not readopted by the voters at its 10-year expiration in 2008. The 2004 General Plan also included a number of other policies designed to further the goals of the General Plan and the Measure Y policies. Further refining its prior interpretation of the term "worsen," the Board included new Policy TC-Xe in the 2004 General Plan, which defined "worsen" as follows: (a) a 2% increase in traffic during a.m. peak hour, p.m. peak hour, or daily; (b) the addition of 100 or more daily trips; or (c)

¹ The 1996 General Plan was challenged in court and it was set aside by court order on February 5, 1999, but that order included the Measure Y policies among the policies to be applied in the interim period pending preparation of a new General Plan and EIR.

² Note that the Board's discretion in this regard was somewhat limited. It could not substitute its policy preferences for those of the voters, but could only interpret ambiguous provisions of the measure in accordance with the voters' intent.

the addition of 10 or more trips during the a.m. peak hour or the p.m. peak hour. Clarifying the timing of necessary traffic improvements, the Board included new Policy TC-Xf:

Prior to occupancy for development that worsens (defined as a project that triggers Policy TC-Xe [A] or [B] or [C]) traffic on the County road system, the developer shall do one of the following: (1) construct all road improvements necessary to regional and local roads needed to maintain or attain Level of Service standards detailed in this Transportation and Circulation Element; or (2) ensure adequate funding is identified and available for the necessary road improvements and those projects are programmed. The determination of compliance with this requirement shall be based on existing traffic plus traffic generated from the project and from other reasonably foreseeable projects.

Because Measure Y was to be in effect for only ten years, in 2008, the Board put a successor measure (also identified as Measure Y) on the ballot. The successor measure proposed certain revisions to Policy TC-Xa, the most significant ones being that (1) the Board can, on a 4/5 vote, add roads to the list of roads allowed to operate at LOS F³ and (2) the County can use financial resources other than developer fees to pay for necessary road improvements. The changes to Policy TC-Xa are as follows, in underline/strikeout format:

Traffic from single family residential subdivision development projects of five or more ~~units or~~ parcels of land shall not result in, or worsen, Level of Service F (gridlock, stop-and-go) traffic congestion during weekday, peak-hour periods on any highway, road, interchange or intersection in the unincorporated areas of the county.

The County shall not add any additional segments of U.S. Highway 50, or any other ~~highways and~~ roads, to the County's list of roads (~~shown in Table TC-2~~) that are allowed to operate at Level of Service F without first getting the voters' approval or by a 4/5ths vote of the Board of Supervisors.

Developer-paid traffic impact fees combined with any other available funds shall fully pay for building all necessary road capacity improvements to fully offset and mitigate all direct and cumulative traffic impacts from new development upon any highways, arterial roads and their intersections during weekday, peak-hour periods in unincorporated areas of the county.

~~County tax revenues shall not be used in any way to pay for building road capacity improvements to offset traffic impacts from new development projects. Exceptions are allowed if county voters first give their approval.~~

~~Before giving approval of any kind to a residential development project of five or more units or parcels of land, the County shall make a finding that the project complies with the policies above. If this finding cannot be made, then the County shall not approve the project in order to protect the public's health and safety as~~

³ Any such actions would be subject to review under CEQA.

~~provided by state law to assure that safe and adequate roads and highways are in place as such development occurs.~~

The successor measure was placed on the November 8, 2008 ballot. The argument in favor of the measure was signed by, among other people, Bill Center and then-Supervisor Sweeney. It passed with 71.47% “yes” votes.

In addition to authorizing the aforementioned successor measure, the Board also adopted a resolution (No. 194-2008) revising the associated traffic policies. Those revisions, however, were contingent upon the voters approving the successor measure amending Policy TC-Xa. Because the voters approved that successor measure, the additional revisions became effective. The primary effect of those revisions was to clarify the timing of the Capital Improvement Program and the traffic improvement concurrency requirements. Specifically, Policy TC-Xf was revised as follows:

At the time of approval of a tentative map for a single family residential subdivision of five or more parcels Prior to occupancy for development that worsens (defined as a project that triggers Policy TC-Xe [A] or [B] or [C]) traffic on the County road system, the developer County shall do one of the following: (1) condition the project to construct all road improvements necessary to regional and local roads needed to maintain or attain Level of Service standards detailed in this Transportation and Circulation Element based on existing traffic plus traffic generated from the development plus forecasted traffic growth at 10-years from project submittal; or (2) ensure adequate funding is identified and available the commencement of construction of for the necessary road improvements are included in the county’s 10 year CIP and those projects are programmed. The determination of compliance with this requirement shall be based on existing traffic plus traffic generated from the project and from other reasonably foreseeable projects.

By clarifying the concurrency requirements, current Policy TC-Xf provides two ways for a single-family residential project that worsens traffic to mitigate its impacts. First, the County can condition the project to construct all road improvements necessary to maintain or attain the specified level of service standards. Second, the County can ensure that construction of the necessary road improvements is in the 10-year CIP.⁴ In adopting the resolution authorizing those clarifications, the County recognized that allowing a project to rely on the 10-year CIP created the potential for short term increases in traffic (since, theoretically, the residential project could be completed in Year 1, but the road improvements might not be constructed until Year 10). It was determined, however, that any such impacts would be offset by the ability to use additional financial resources to pay for necessary projects and by policies requiring more frequent CIP review, which would allow the County to better prioritize improvements to minimize any short-term level of service deficiencies.

⁴ In contrast, the Board’s prior interpretation of this policy required that the construction be completed in a reasonable period of time.

ANALYSIS

Your Board was recently told by some members of the public that a segment of Highway 50 is at LOS F and there are no current plans to improve it. Thus, some argue that the County cannot approve *any* single-family residential subdivision until the level of service of Highway 50 is improved. Such an argument, however, fails to take into account that a project has two ways to mitigate its impacts in accordance with the General Plan.

As described above, if the County determines that a single-family residential project of five or more units will “worsen” traffic, it has two options to mitigate the impacts: (1) condition the project to construct the necessary road improvements or (2) ensure that construction of the necessary road improvements is in the 10-year CIP.⁵ Assuming that Highway 50 is at LOS F and there are no projects in the 10-year CIP that will address that, then the second mitigation option may not be available. However, the first option—condition the project to construct the necessary road improvements—remains available. Pursuant to that option, the County could approve the project by conditioning it to construct the necessary improvements.

There are, however, limits to the County’s ability to condition a project to construct improvements. One of the hallmark concepts in planning is the *Nollan-Dolan* two-part test, often referred to as “nexus.” This test, derived from two U.S. Supreme Court cases addressing the Fifth Amendment’s Takings Clause—*Nollan v. California Coastal Commission* (1987) 483 U.S. 825 and *Dolan v. City of Tigard* (1994) 512 U.S. 374—applies when a public agency requires a dedication (e.g., conveying property) or monetary exaction (e.g., payment of an in-lieu fee or funding public improvements) as a condition of approval. The first part of the test requires that there be an “essential nexus” between the burdens imposed by the project and the condition. (*Nollan, supra*, 512 U.S. at p.837.) Without such a nexus, the condition fails to “substantially advance” a “legitimate state interest.” (*Ibid.*) The second part of the test requires that there be a “rough proportionality” between the magnitude of the exaction/condition and the extent of the project’s impacts. (*Dolan, supra*, 512 U.S. at p.387.) “No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.” (*Id.* at p.391.) This two-part test is applicable not only when the public agency requires a dedication or exaction as a condition of approval, but also when it denies a project because the applicant refused to accept a proposed dedication or exaction. (*Koontz v. St. Johns River Water Management Dist.* (2013) 133 S.Ct. 2586, 2595.)

To illustrate how those constitutional requirements could limit the County’s ability to condition and/or approve a project, assume a very large subdivision project will result in LOS F on Highway 50. Further assume that the only way to mitigate that impact is to make interchange improvements with a cost in excess of \$25 million, but that improvement is not in the 10-year CIP and there is no desire to add it to the 10-year CIP. The County could still approve the project if, in accordance with Policy TC-Xf, it conditions the project to construct the interchange

⁵ Non-residential projects may be approved if the traffic mitigation measures are in the 20-year CIP.

improvement because the cost is “roughly proportional” to the magnitude of the development and its impacts.

If the scenario is changed to one involving a relatively small subdivision, the legal analysis would be much different. Though the project may have less of an impact, if there is no way to incrementally improve the affected interchange to mitigate the project’s impacts, the same costly interchange improvements described above will be required. In that case, the cost of the required improvements may not be roughly proportional to the relatively minor impacts from that small project. If so, the County might then have to deny the project.

Though the above scenarios are very basic and omit some possible options for spreading improvement costs over multiple projects,⁶ they illustrate the project-specific nature of the inquiry into the impacts of a project and the allowable conditions that can be imposed to mitigate those impacts. Indeed, documents from the original drafters of Measure Y, the Control Traffic Congestion Initiative Committee, reinforce the project-specific nature of the inquiry. In their July 27, 1998, memorandum, the Committee states, “One significant change from the current policy that is required as a result of this initiative is that ... if an existing road segment already operates below the County’s objective, the development project in question will be mitigated sufficiently to not worsen an existing LOS F condition.” Furthermore, the Committee states, “This is why we have said before that this initiative doesn’t dictate specific solutions, but rather sets policies that require that solutions be found before the County approves major residential projects.”

Accordingly, because the analysis required by the 1998 Measure Y and the they 2008 Measure Y can only be done on a project-by-project basis, it would be premature to simply declare that the County cannot approve any further single-family residential subdivisions. Rather, the County must evaluate each project to determine its impacts and whether feasible mitigation exists. It may be that no such feasible mitigation exists and the County is forced to deny projects on that basis, but that determination can only be made through project-level analysis.

CONCLUSION

The General Plan policies adopted in conjunction with the 1998 Measure Y and the 2008 successor to Measure Y allow two methods to mitigate a project’s traffic impacts. The argument that the existence of LOS F on one segment of Highway 50 precludes the County from approving any further development fails to recognize the mitigation options available to the County. The determination of whether the County can approve a project in compliance with the General Plan traffic policies can only be made on a project-by-project basis. In short, the County is not, on a program-wide basis, precluded from approving further development simply because one segment

⁶ For instance, assuming the County anticipates future development with a need for the improvement, it could approve the project on the condition that the project construct the improvement subject to reimbursement from future development and/or participation in an area of benefit. Though this option may address the takings issues, its viability still depends on the specific project at issue because requiring a small project to advance disproportionately high costs in hopes of future reimbursement may prove economically infeasible.

of roadway may be at LOS F. Additionally, the Board always has the option the voters gave it in the 1998 Measure Y to seek voter approval to add a segment of roadway to the list of roads that are allowed to operate at LOSF, or the additional option the voters gave the Board in the 2008 Measure Y to add that segment by a four-fifths vote of the Board.

Sincerely,

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