



OFFICE OF COUNTY COUNSEL  
INTER-DEPARTMENT MEMORANDUM

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**TO:** Board of Supervisors  
**FROM:** Bre Moebius, Deputy County Counsel BMM  
**DATE:** July 10, 2020  
**RE:** Diamond Springs Parkway Project, Phase 1B  
7/14/20 Board Agenda - Agenda Item 28 - Legistar No. 20-0828

**I. Introduction**

This memorandum is limited to discussions of Phase 1B of the Diamond Springs Parkway Project, which is the construction of a new four-lane road that would provide parallel capacity for State Route 49 (“SR-49”) between Missouri Flat Road and SR-49. El Dorado County has been working toward the completion of the Diamond Springs Parkway for more than two decades. Initially, funding for two lanes of the Diamond Springs Parkway was included in Phase I of the Missouri Flat Area Master Circulation and Funding Plan (“MC&FP”), and the Board of Supervisors (“Board”) certified the Final Environmental Impact Report for MC&FP Phase I on December 15, 1998. The Board then certified the Final Environmental Impact Report for the Diamond Springs Parkway Project on May 24, 2011. This memorandum provides an overview of the inclusion of the Diamond Springs Parkway in the General Plan, the reliance on its future construction when traffic conditions were or are analyzed for public and private projects, and the contractual commitments the County made regarding its funding in a development agreement. It then assesses whether the County would face legal exposure if the Board limits discretionary funds programed for the Diamond Springs Parkway and thereby delays its construction.<sup>1</sup>

**II. Analysis**

**A. The General Plan anticipates construction of the Diamond Springs Parkway.**

The General Plan contemplates the Diamond Springs Parkway as a future improvement, but does not provide a deadline by which construction must occur. Specifically, the Circulation Map for the El Dorado County General Plan (Figure TC-1) identifies Diamond Springs Parkway as a future 4-lane divided road with an established alignment. The County’s Capital Improvement Program (“CIP”) also includes construction of the Diamond Springs Parkway.

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<sup>1</sup> A public commenter also inquired whether any agreement with Caltrans obligates the County to construct the Diamond Springs Parkway on a particular schedule. The Department of Transportation has reviewed its agreements with Caltrans and confirmed that no such obligation exists.

With respect to funding, Policy TC-1n provides the following prioritization for discretionary road funds:

The County shall generally base expenditure of discretionary road funds for road uses on the following sequence of priorities:

- A. Maintenance, rehabilitation, reconstruction, and operation of the existing County-maintained road system;
- B. Safety improvements where physical modifications or capital improvements would reduce the number and/or severity of crashes; and
- C. Capital improvements to expand capacity or reduce congestion on roadways at or below County level of service standards, and to expand the roadway network, consistent with other policies of this General Plan.

Policy 2.2.7.3 of the Land Use Element and Policy 10.2.7.2 of the Economic Development Element provide the following objective: “Establish a joint County/City task force to develop complementary land use designations, zoning, transportation, and funding plans to protect existing and to encourage new commercial, industrial, and research and development projects in the Missouri Flat-Placerville Drive areas.” Policy 10.2.7.3 of the Economic Development Element also provides: “Missouri Flat Road Corridor Area: The County shall commit to the comprehensive development of the needed road circulation plan for this area immediately following adoption of the General Plan. This plan shall also include the identification and development of a specific funding mechanism that overcomes existing deficiencies and accommodates future traffic demands to the year 2015.”

Given the inclusion of the Diamond Springs Parkway as a future roadway in the General Plan, other long-term planning documents assume the construction of the Parkway. For example, the Western El Dorado County Short-Range and Long-Range Transit Plan Study anticipates revised routes when the Parkway is completed and the Diamond Springs / El Dorado Area Mobility and Livable Community Plan anticipates sidewalks along the Parkway completing pedestrian connectivity along Missouri Flat Road. (Legistar 19-1509, attachment 2A, page 330.)

**B. Reliance on the future construction of the Diamond Springs Parkway does not invalidate certified environmental documents, but could affect consideration of a subsequent discretionary approval for those projects.**

Because the General Plan and CIP include the Diamond Springs Parkway, the County relies on its anticipated completion when analyzing traffic impacts for public and private projects that will utilize the new roadway. While this list may not be exhaustive, the primary approved projects relying on the construction of the Diamond Springs Parkway include the Public Safety Facility, Piedmont Oaks Estates, and Creekside Plaza.

## **1. Projects Approved in Reliance on the Diamond Springs Parkway**

### Public Safety Facility

On March 8, 2016, the Board certified the Public Safety Facility Draft Environmental Impact Report (“PSF DEIR”). (Resolution 2016-043.) The PSF DEIR assumed completion of the Diamond Springs Parkway by 2025, and the Parkway project is discussed at length in the PSF DEIR. (Legistar 14-0133, attachment 6A, page 4.10-25.) The 2025 and 2035 Plus Project Analyses for the PSF DEIR attribute significant trip counts to the Missouri Flat Road / Diamond Springs Parkway intersection and the 2025 and 2035 level of service (“LOS”) calculations are based on attributing 10% of Sheriff Patrol trips and 13% of Office Staff trips to the Diamond Springs Parkway. (See generally Legistar 14-0133, attachment 6A, Tables 4.10-5, 4.10-7 to 4.10-11.)

### Piedmont Oak Estates

On March 20, 2018, the Board adopted the Fourth Revised Initial Study / Mitigated Negative Declaration for Piedmont Oak Estates (“Piedmont”). As approved, Piedmont involved rezoning of four different parcels in Diamond Springs and a tentative subdivision map allowing for 75 residential lots and one commercial lot as part of a Planned Development. The 2017 updated traffic study for the project assumed that the Diamond Springs Parkway would be completed by 2027 and also relied on roadway improvements provided through the PSF DEIR. (Legistar 18-0367, attachment J, page 2.) The traffic study was also based on a four-lane configuration and described the lane configurations at the Missouri Flat Road / Diamond Springs Parkway intersection, Diamond Drive / Diamond Springs Parkway intersection, and Diamond Springs Parkway / Throwita Way intersection. The near term (2027) and 2035 traffic forecasts analyses relied on these improvements in predicting LOS and concluding that the intersections will operate within the County’s LOS thresholds. (Legistar 18-0367, attachment J, page 28.) Piedmont was also conditioned to construct an intersection onto SR-49 that was required to be coordinated with the Diamond Springs Parkway. (Piedmont Condition of Approval 19.)

### Creekside Plaza

On December 17, 2019, the Board certified the Revised Final Environmental Impact Report for the Creekside Plaza project. (Resolution 233-2019.) The Creekside Plaza project is a Planned Development commercial project with three buildings totaling 30,560 square feet of commercial space. (Legistar 19-1783, attachment H, page 1.) The traffic analysis for that project assumed that the four-lane Diamond Springs Parkway would be completed by 2035. (Legistar 19-1509, attachment 2A, page 311.) Under existing conditions, 20% of trips were assumed to travel south along Pleasant Valley Road and, by 2035, 14% of those trips were assumed to travel east on the new Diamond Spring Parkway. (Legistar 19-1509, attachment 2A, page 337.) Intersection LOS for 2035 was analyzed based on the assumption that the Parkway would be complete. Lastly, for the Missouri Flat Road / China intersection, the County required a right-in, right-out reconfiguration of the intersection once Diamond Springs Parkway is completed. (Legistar 19-1509, attachment 2A, pages 308-309.)

## 2. California Environmental Quality Act Analysis for Approved Projects

That the County might have relied on reasonable assumptions at the time of certifying an environmental document and subsequent changes reveal that those assumptions may no longer be accurate does not, in itself, violate the California Environmental Quality Act (“CEQA”) or invalidate the environmental document. Instead, CEQA Guidelines section 15162 establishes that any error of those assumptions becomes relevant only if the County is required to consider a subsequent discretionary approval for the project:

Once a project has been approved, the lead agency’s role in project approval is completed, *unless further discretionary approval on that project is required*. Information appearing after an approval does not require reopening of that approval. If after the project is approved, any of the conditions described in subdivision (a) occurs, a subsequent EIR or negative declaration shall only be prepared by the public agency which grants the next discretionary approval for the project, if any.

(CEQA Guidelines, § 15162, subd. (a); accord Pub. Resources Code, § 21166; see also *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 956 [emphasizing that environmental documents “are entitled to a presumption of finality once adopted” and that subsequent review “comes into play precisely because in-depth review of the project has already occurred, the time for challenging the sufficiency of the original CEQA document has long since expired, and the question before the agency is whether circumstances have changed enough to justify repeating a substantial portion of the process”].)

Assuming a subsequent discretionary approval comes before the Board for any approved project, section 15162 provides three avenues that could require further environmental review. (See CEQA Guidelines, § 15162.) If one of the avenues is triggered, the agency must either (1) prepare a subsequent EIR; or (2) prepare a supplemental EIR under section 15163 if “only minor additions or changes would be necessary to make the previous EIR adequately apply to the project in the changed situation.” (CEQA Guidelines, §§ 15162, 15163.) If subsequent review is not required under section 15162, an addendum may be prepared to a previously certified EIR “if some changes or additions are necessary” so long as the addendum is limited to “minor technical changes or additions.” (CEQA Guidelines, § 15164, subs. (a)-(b).)

For approved projects seeking a subsequent discretionary approval, the County would have to consider whether the assumptions about the completion date of the Diamond Springs Parkway remained realistic and, if not, whether removal of the future roadway from the traffic analysis results in “substantial changes” with respect to the “circumstances under which the project is undertaken which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects.” (CEQA Guidelines, § 15162, subd. (a)(2), emphasis added.) A factual finding that substantial changes has occurred must be based on “substantial

evidence in light of the whole record.” (CEQA Guidelines, § 15162, subd. (a); accord Pub. Resources Code, § 21166, subd. (a).)

Thus, any decision of the Board regarding funding for Diamond Springs Parkway that may have the consequence of delaying its construction beyond assumed completion dates in previously certified environmental documents will not directly expose the County to liability under CEQA. If any of those projects seek a subsequent discretionary approval, such as an amendment to the Planned Development or tentative map, the delay in funding to construct the Diamond Springs Parkway could require subsequent environmental review to reevaluate traffic impacts without the inclusion of that new roadway. The impact of removing the new roadway from the traffic analysis for a particular project will of course depend on the particular project.

An added wrinkle in this analysis is the fact that traffic studies for each of the approved projects evaluated traffic based on LOS and CEQA now provides that vehicle miles traveled, not LOS, is the appropriate traffic metric to analyze the environmental impacts of a project. (Pub. Resources Code, § 21099, subd. (b)(2); CEQA Guidelines, § 15064.3.) Nonetheless, regardless of the change in CEQA traffic analysis, a subsequent discretionary approval would still require a finding of consistency with the General Plan, including that the project will not result in an unacceptable LOS. A project opponent can challenge the reasonableness of the County’s finding of General Plan consistency in an action for writ of mandate. (See *Pfeiffer v. City of Sunnyvale City Council* (2011) 200 Cal.App.4th 1552, 1563 [for a claim of General Plan inconsistency, the challenger has the burden of proof and must “show why, based on all of the evidence in the record, the determination was unreasonable”].)

**C. Relying on the future construction of the Diamond Springs Parkway when approving new projects must be based on reasonable assumptions, including a realistic completion date in light of funding decisions.**

In certifying an environmental document and approving a project, CEQA requires that conclusions about the environmental impacts from traffic be based on substantial evidence. Substantial evidence “include[s] facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.” (CEQA Guidelines, § 15384, subd. (b).) A traffic study relies on numerous assumptions, including the completion date of future roadway improvements. It is unlikely the County can continue to rely on the assumption that the Diamond Springs Parkway will be completed by a certain date in the absence of facts from which it can be reasonably assumed that the County will have sufficient funding to complete the Parkway by that date.

While removing the ability to rely on the future construction of Diamond Springs Parkway from a traffic analysis for a particular project may not have as severe as a CEQA consequence now that LOS is no longer the metric to analyze traffic under CEQA, the Board will also be required to find that approval of any project complies with the County General Plan Traffic and Circulation policies and the LOS thresholds therein. If the anticipated construction of Diamond Springs Parkway is necessary to maintain the mandatory General Plan LOS thresholds, the Board may find it difficult to approve future projects in the absence of a reasonable assumption that the Diamond

Springs Parkway will be completed by a particular date. (See *Families Unafraid to Uphold Rural El Dorado County v. El Dorado County Bd. of Supervisors* (1998) 62 Cal.App.4th 1332, 1338 [petitioner must show that “a reasonable person could not have reached the same conclusion” when challenging a finding of General Plan consistency].)

**D. The County has contractual obligations with respect to the MC&FP Phase I funds, but those obligations do not affect the Board’s discretion to limit the use of other funding sources for the Diamond Springs Parkway.**

In January 1999, the County and Wal-Mart Stores, Inc., executed a development agreement (“Wal-Mart DA”). The establishment of the MC&FP to fund necessary improvements to facilitate the development of Wal-Mart and other projects was a central component of Wal-Mart DA. The MC&FP improvements addressed in the Wal-Mart DA were limited to Phase I of the MC&FP.<sup>2</sup> (Wal-Mart DA section 1.I.9 [citing page 3-25 of the MC&FP Draft EIR].) The MC&FP Draft EIR includes the Diamond Springs Parkway, which it describes as a two-lane connector road from Missouri Flat Road to Pleasant Valley Road, as a Phase I improvement that is anticipated to be completed between 1999 and 2005. On the following page, the Draft EIR identifies the widening of that “Interconnector” road from two lanes to four lanes, which was expected to occur between 2005 and 2015.

In the Wal-Mart DA, the County did not commit to construct any of the Phase I improvements on an established schedule. Instead, the agreement repeatedly memorialized the parties’ understanding that the timing of construction of the Phase I improvements would depend on the growth of new commercial development and the revenue generated from that development:

The parties further acknowledge that the MC&FP sets forth a proposed schedule for funding and completing MC&FP Improvements. However, the MC&FP is intended to provide flexibility in the timing, phasing and sequencing of the MC&FP Improvements in order to accommodate financing and other needs. In particular, it is an underlying tenet of the MC&FP that construction of the MC&FP Improvements and the issuance of bonded indebtedness to finance such improvements shall only occur when sufficient funds, or funding sources, identified in the MC&FP exist.

(Wal-Mart DA section 6.A.c; see also, e.g., Wal-Mart DA section 2.B [“Success of the Property in generating Tax Increment Revenues will affect the financing plan and the timing of the MC&FP Improvements.”].)

In funding the improvements, the Wal-Mart DA anticipated that approximately 52% would be funded or financed from a portion of the Total Tax Increment generated by the Missouri Flat

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<sup>2</sup> The Wal-Mart DA also provides: “Although for planning and study purposes, specific improvements have been identified as MC&FP Improvements and, in some cases, specific improvement design has been considered, the actual MC&FP Improvements may be those specifically identified *or those which are functionally equivalent improvements and design.*” (Wal-Mart DA section 1I.9, emphasis added.)

Area Development and the remaining funds would be obtained through TIM fees. (Wal-Mart DA section 6.B.) To “satisfy” this “commitment,” the County agreed to annually “commit a sum equal to eighty-five (85%) of the Total Tax Increment generated by the Missouri Flat Area Development in that year to funding MC&FP Improvements.” (Wal-Mart DA section 6.B; see also Wal-Mart DA section 1.I.21 [“Total Tax Increment is used as a basis for determining the amount of the County’s obligation. However, the County’s obligations under this Development Agreement, and the use of terms such as Total Tax Increment and Tax Increment Revenues, is not intended to be a pledge of that particular revenue source.”].) Until all MC&FP Phase I improvements are completed or fully funded, including at least two lanes of the Diamond Springs Parkway, the Wal-Mart DA obligates the County to continue to commit 85% of the Total Tax Increment generated by the Missouri Flat Area Development Agreement to the MC&FP Phase I Improvements.

At the same time, the Wal-Mart DA expressly limited the County’s financial obligations to the 85% of the annual Total Tax Increment:

The County’s obligations under this Section 6.B are to be funded exclusively by the Tax Increment Revenues. No other source of County funds is being obligated by this Development Agreement. In no event shall the County’s obligations to fund MC&FP Improvements exceed in any year eighty five percent (85%) of the Total Tax Increment received in that year from the Missouri Flat Area Development.

(Wal-Mart DA section 6.B.) Provided that the County has complied with the 85% Total Tax Increment commitment, the Board retains discretion as to whether to commit TIM fee revenue or other general discretionary funds, such as Tribe funds, to the MC&FP Phase I improvements and the County is not in breach of the Wal-Mart DA if those funding decisions delay construction of the Diamond Springs Parkway. (See Wal-Mart DA section 6.A.c [“No delay in performance of the County’s obligations hereunder as a result of the absence of such funds or funding sources shall be a breach of this Development Agreement.”].)

### **III. Conclusion**

Provided that the County fulfils its contractual commitment to set aside 85% of the Total Tax Increment in the MC&FP until all Phase I projects are completed or fully funded, it is unlikely the Board’s decision to limit the use of other discretionary funds for the Diamond Springs Parkway would expose the County to legal risks. The likely delay in construction that could result from such a decision could limit the Board’s ability to make the necessary finding of consistency with the General Plan for discretionary approvals for public and private projects in the Missouri Flat Area if those projects would need to utilize the future construction of the Diamond Springs Parkway in order to maintain the LOS thresholds required in the General Plan.