



Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Joseph Horwedel

SUBJECT: SEE BELOW

DATE: June 12, 2006

COUNCIL DISTRICT: 8
SNI Area: None

SUBJECT: PDC05-035. APPEAL OF THE PLANNING COMMISSION'S DECISION TO UPHOLD A NEGATIVE DECLARATION FOR A MITIGATED NEGATIVE DECLARATION FOR A PLANNED DEVELOPMENT REZONING FROM A-AGRICULTURE ZONING DISTRICT TO A(PD) PLANNED DEVELOPMENT TO A 22 SINGLE-FAMILY DETACHED RESIDENTIAL DEVELOPMENT ON AN APPROXIMATELY 18.0 GROSS ACRE SITE LOCATED ON THE NORTHEASTERLY SIDE OF SAN FELIPE ROAD, APPROXIMATELY 400 FEET NORTHWESTERLY OF SILVER CREEK ROAD.

RECOMMENDATION

Adoption of a resolution upholding the Mitigated Negative Declaration for a Planned Development Rezoning from A-Agriculture to A(PD) Planned Development to allow up to 22 single-family detached residences on an approximately 18.0 gross acre site located on the northeasterly side of San Felipe road, approximately 400 feet northwesterly of Silver Creek Road.

CEQA: Mitigated Negative Declaration (approved by the Director of Planning on March 8, 2006, upheld by the Planning Commission on May 24, 2006 and appealed to the City Council).

BACKGROUND

This memo addresses an appeal, filed on May 30, 2006, of the Planning Commission's decision (5-0-1, Commissioner Platten absent) May 24, 2006 to uphold the Mitigated Negative Declaration (MND) prepared for the above-described project as prepared in compliance with the California Environmental Quality Act (CEQA). As established in recently-approved revisions to Title 21, the Environmental Ordinance, the Planning Commission's action to uphold the MND granted by the Director of Planning for the proposed rezoning may be appealed to the City Council. Under the ordinance, the City Council is the final decision-making body regarding the adequacy of the environmental review conducted for the proposed amendment.

The action of the City Council in considering the appeal is limited to environmental issues. If the City Council finds that the project will not result in a significant impact on the environment and upholds the action of the Director and Planning Commission, the Negative Declaration becomes final and no further appeals on the matter may be considered, and the City Council may then take action on the project. A decision by the City Council to uphold the MND as prepared in compliance with CEQA does not constitute approval of the project.

ANALYSIS

Letters of Appeal. The appeal of the MND filed on May 30, 2006 chiefly discusses planning and environmental issues which were previously raised in the initial protest of the MND heard at Planning Commission, and to which Staff previously responded in a staff report dated March 13, 2006, which has been previously forwarded to the City Council. However, the appeal does raise several new environmental issues which were not previously addressed in the March 13th staff report. Therefore, this memo addresses these additional issues, as well as corrects an error depicted on the conceptual land use plan as it relates to the setback from Misery Creek for the cul-de-sac of proposed Public Street One. The appeal was filed by the following residents of the area:

Kathleen Helsing and George Holmes, 6349 Hematite Court
Michael Mace and Bonnie Gold-Mace, 5962 Valley Meadow Court
Polina Spivak & Max Spivak, 6298 Running Springs Road
Krzysztof Kozminski, 5932 Valley Meadow Court
Lawrence Cargnoni, 6277 Robin Ridge Court
Jan Bialkowski, 3623 Meadowlands Lane
Ewa Bialkowski, 3623 Meadowlands Lane
Rob Gelphman, 6267 Running Springs Road

Due Process. Krzysztof Kozminski's appeal letter argues that the Planning Commission hearing itself denied the appellants due process in that the Planning Commission combined both the MND protest and the rezoning project hearings without providing flexible speaking times to members of the audience wishing to address the Commission. Mr. Kozminski concludes that since the speakers were limited to two minutes to cover both agenda items, they were unable to voice their concerns regarding all relevant issues.

Response: Speakers are typically afforded two minutes to address the Planning Commission during public hearings. The Planning Commission commonly combines the public hearing for related agenda items dealing with the same project into a single public hearing, and then takes separate action on each agenda item. Combining these hearings also ensures that speakers are able to address any element of a project without having to worry whether or not they made their comments during the appropriate portion of the numerous hearings related to a project. Combining the related agenda items allows the Commission to hear all relevant concerns related to the project as a whole prior to taking action on any one item. The procedure to allow speakers two minutes for public testimony was printed on all agendas distributed at the hearing and posted online. For persons who believe that they have more information to impart to the Commission

than two minutes would allow, person are always free to submit written testimony of any length to the Commission for consideration advance of the hearing.

Segmentation. This rezoning proposal is set up so that the proposed 22 units can either be clustered as shown on the conceptual site plan or more evenly distributed over the entire site, including the far side of Misery Creek. The appeal argues the MND has not adequately addressed potential future development that may be proposed on the eastern portion of the site, on the far side of Misery Creek, in the event the 22 units are clustered, and therefore the environmental analysis conducted for the project has been segmented to avoid consideration of a 'larger' project that may ultimately be planned for the site. However, additional development beyond the proposed 22 units in the pending application would necessitate a General Plan Amendment and subsequent Planned Development Rezoning.

The CEQA Guidelines indicate that argument, speculation, unsubstantiated opinion or narrative do not constitute substantial evidence in support of a fair argument that the project, with identified mitigation, would result in a significant environmental impact that would warrant preparation of an EIR. Staff believes that claims that the project represents part of a larger, as yet un-analyzed, development plan for the site are no more than argument and speculation in that any future development would require applications for both a General Plan Amendment and Planned Development rezoning.

Staff believes that, in the context of the environmental analysis for the pending application for 22 units, to attempt to analyze potential future development on the site would require speculation discouraged by CEQA. Courts have recognized that an agency is required to forecast only to the extent that an activity could be reasonably expected under the circumstances. In this case the circumstances preclude additional development beyond 22 units. An agency cannot be expected to predict the future course of governmental regulation. In this case, staff would be forced to predict that the outcome of the pending Evergreen-East Hills Vision Strategy would result in additional unit allocation for the property, and predict the nature and disposition of a future unspecified General Plan Amendment and rezoning to allow an increase in residential density. This would be an exercise in speculation, and courts have also noted that where future development is unspecified and uncertain (both true in this case), no purpose can be served by requiring an EIR to engage in sheer speculation as to future environmental consequences.

The fact that staff did not speculate about a future residential project that is not on file, but might be applied for in the future, depending upon the uncertain outcome of future regulatory land use planning decisions, is consistent with the City's CEQA processing on other projects. If the project site is developed in a clustered manner that retains portions of the site available for potential future development, and if the Evergreen-East Hills Vision Strategy is approved and results in available unit allocation for the site, the City would then fully analyze the particular General Plan Amendment and Planned Development Rezoning project actually applied for to inform the decision-makers and the public.

Walnut trees. One comment in the letter of protest authored by Krzysztof Kozminski indicates that the the walnut trees on-site may be the rare species *Juglans californica*, Southern California Black Walnut, or *Juglans californica* var. *hindsii*, Northern California Black Walnut.

Response: The attached letter provided by Live Oak and Associates confirms that the site does not support any special status species and that trees on the site include a mixture of the commonly cultivated native black walnut and the English walnut, both of which are common throughout the area.

Location of cul-de-sac for proposed Street One. Staff would like to clarify at this time the location of the cul-de-sac for proposed Street One. The location of the cul-de-sac for proposed Street One is incorrectly depicted on the plan set. Staff has added language in the General Development Notes so that prior to the issuance of a Planned Development Permit, the location of the proposed Street One shall setback a minimum of 50 feet from the Misery Creek riparian line to the satisfaction of the Director of Planning, Building, and Code Enforcement.

ALTERNATIVES

The alternatives available to the City Council are to (1) uphold the Mitigated Negative Declaration for the proposed project; (2) order revision, and, if required, recirculation of the Mitigated Negative Declaration; or (3) require the preparation of an EIR. Environmental clearance is not needed in the event the City Council decides to deny the proposed rezoning.

PUBLIC OUTREACH

A notice of the public hearing was distributed to owners and tenants of all properties located within 1000 feet of the project location. This staff report was made available on the Planning Department's website one week prior to the Planning Commission hearing. Staff has been available to discuss the project with interested members of the public.

A community meeting was noticed to residents within 1000 feet of the project site and was held at the Silver Oak Elementary School on February 13, 2006. Twenty-four residents attended. Issues raised were concerns regarding traffic, park land dedication onsite, provisions for affected schools due to population growth from the development, and accessibility issues during the construction of the project for a school bus stop as well as for bicyclists and pedestrians on San Felipe Road.

Notices of the public hearing before the Planning Commission and City Council were published, posted on the City of San Jose web site and distributed to the owners and tenants of all properties located within 1,000 feet of the project site. A notice indicating the public review period of Draft Mitigated Negative Declaration (MND) for the project was also mailed to property owners and tenants within 1,000 feet of the project site. Both the MND and copies of the staff report and supplemental staff reports were posted on the City web site. Staff has been available to discuss the project with members of the public.

COORDINATION

Preparation of the Initial Study and Mitigated Negative Declaration was coordinated with the Department of Public Works, Fire Department, Police Department, Environmental Services Department and the City Attorney's Office.

COST IMPLICATIONS

Not Applicable

BUDGET REFERENCE

Not Applicable

CEQA

CEQA: Mitigated Negative Declaration (approved by the Director of Planning on March 29, 2006, upheld by the Planning Commission on May 24, 2006 and appealed to the City Council).

ju *Joseph Horwedel*
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Planning, Building and Code Enforcement