

THE LETITIA BUILDING
70 S FIRST STREET
SAN JOSE CA 95113-2406

MAILING ADDRESS
P O BOX 1469
SAN JOSE CA 95109-1469



HOPKINS & CARLEY
A LAW CORPORATION

RECEIVED
San Jose City Clerk

TELEPHONE:
408.286.9800

FACSIMILE:
408 998.4790

www.hopkinscarley.com

NOV - 9 P 4: 23

November 9, 2006

JOAN R. GALLO
Of Counsel
jgallo@hopkinscarley.com
408-286-9800

**Agenda November 14, 2006
Item #11.2**

Mayor and San Jose City Council
200 E. Santa Clara Street
San Jose, CA. 95113

**Re: *Rancho San Vicente Tentative Map Application T06-051
Appeal of pre-CEQA Denial***

Dear Mayor and Councilmembers:

I am writing this letter of appeal on behalf of Rancho San Vicente LLC, the applicant for a subdivision map to create 16 lots on approximately 684 acres of land with each lot in excess of 40 acres. This appeal is based on the fact, as shown below, that the proposal is for a rural residential subdivision entirely consistent with its Non-Urban Hillside designation.

FACTS

Because staff has chosen to deny this tentative map without conducting the environmental analysis, the only question before you is whether the project conforms to the General Plan. The only relevant facts before you are that: this property is within the City of San Jose; the proposal is entirely consistent with the General Plan designation of Non-Urban Hillside; and it is entirely consistent with its zoning of R-1-1 which would allow a density of 1 dwelling unit to 5 acres. In fact, the proposal is much less dense, creating lots with only 1 dwelling unit per 40+ acres. It will provide its own sewer and water so there is no urban infrastructure expansion.

Staff would not like to see this property develop at all even though it is entirely consistent with its General Plan and zoning designations. Therefore, they have stretched credulity in their attempt to make findings that support the denial of the map.

LEGAL FRAMEWORK

The Subdivision Map Act (Government Code §§ 66410 et seq.) is that state law which controls the process of creating lots for sale or lease. It requires that a subdivider of property design the subdivision in conformity with applicable General Plan and any applicable Specific Plan, and construct public improvements in connection with the subdivision. *Hill v. City of Clovis*, (2000) 80 Cal.App.4th 438, 94 Cal.Rptr.2d 901.

The Council sets the density and use by General Plan designation and adoption of a zoning category. Once the project conforms to the General Plan and zoning designation, the focus is whether the particular design is consistent with the General Plan policies. Because the subdivision map function is so fundamentally technical in nature, the Council does not ordinarily review the Map, which deals only with issues of layout and infrastructure design requirements.¹ Instead, the Council has delegated the technical decision of approving subdivision maps to the Director of Planning. Council only considers Map applications if there is an appeal. Usually the nature of the appeal is whether or not the infrastructure requirements are reasonable. As your staff report points out, state law (§66474) provides the limited grounds upon which a Map can be denied. Since the Director has taken the extraordinary step of denying this project before any environmental review, the only possible grounds for denial would be that the design and proposed improvements lack conformity to the General Plan. This Map proposal is for a rural residential use, totally consistent with its Non-Urban Hillside designation.

As a legal matter, in considering this appeal, you need to take into account that you do not have the kind of legislative discretion that applies when a General Plan Amendment or zoning application is before you. The grant or denial of a subdivision map is a quasi-judicial, not a legislative, act. That means that you are required to base your findings on substantial evidence in the record and cannot just be arbitrary and capricious. Code of Civil Procedure §1094.5; *Greenebaum v. City of Los Angeles* (1984) 153 Cal.App.3d 391, 200 Cal.Rptr. 237.

General Plan conformity does not require absolute fealty to each and every policy in the Plan. If that were the case no project would ever be consistent with the General Plan. "The General Plan must always be considered in its entirety with no single policy, principle, standard or plan read and considered in isolation." (SJ 2020, 5) "Indeed, it is beyond cavil that no project could completely satisfy every policy stated in

¹ Section 66418. defines design as "(1) street alignments, grades and widths; (2) drainage and sanitary facilities and utilities, including alignments and grades thereof; (3) location and size of all required easements and rights-of-way; (4) fire roads and firebreaks; (5) lot size and configuration; (6) traffic access; (7) grading; (8) land to be dedicated for park or recreational purposes; and (9) other specific physical requirements in the plan and configuration of the entire subdivision that are necessary to ensure consistency with, or implementation of, the general plan or any applicable specific plan as required pursuant to Section 66473.5. Under § 66419 (a) "Improvement" refers to any street work and utilities to be installed, or agreed to be installed, by the subdivider on the land to be used for public or private streets, highways, ways, and easements, as are necessary for the general use of the lot owners in the subdivision and local neighborhood traffic and drainage needs as a condition precedent to the approval and acceptance of the final map thereof." and (b) "Improvement" also refers to any other specific improvements or types of improvements, the installation of which, either by the subdivider, by public agencies, by private utilities, by any other entity approved by the local agency, or by a combination thereof, is necessary to ensure consistency with, or implementation of, the general plan or any applicable specific plan.

the (Oakland general plan), and that state law does not impose such a requirement. *Sequoyah Hills Homeowners Assn. v. City of Oakland*, (1993) 23 Cal.App.4th 704, 29 Cal.Rptr.2d 182. However, In this case, staff has not identified any policy with which, based on a reasonable fair minded analysis, could be found inconsistent. The project clearly meets the standards for rural development.

Moreover, this property is not economically viable for any agricultural or private recreational use. The current grazing lease revenue is approximately \$10,000 per year and does not even pay for the taxes on the property. You should be mindful that relevant considerations in determining whether your action is a taking are the economic impact of the regulation and, particularly, the extent to which the regulation has interfered with distinct investment backed expectations, as well as character of the action. *Penn Central v. City of New York*, (1978) 438 U.S. 104, 98 S.Ct. 2646.

ISSUES

1. No Expansion of Urban Services

Under the proposal, the project would provide its own sewer and water as is traditionally the case in rural development. Staff has no basis for questioning the feasibility of this aspect of the proposal. The property is in the City and therefore already receives police and fire services. Thus, no expansion of the Urban Service Boundary is requested or needed

2. Rural v. Urban

Staff justifies concluding that the Rancho San Vincente project is "urban" in large part because they mistakenly assumed that there would be an extension of urban services. This project cannot be considered urban as defined by the General Plan and therefore it fully conforms to the General Plan.

The key concept in the General Plan is that outside of the Greenline/UGB/USA, development should not be "urban" but should remain "rural" in character. The Green Line / Urban Growth Boundary define the City's ultimate limits to **urban** expansion. One of its purposes is to preserve valuable open space. (SJ2020, 47) This project with its 40+ acre lots is clearly rural in character and permanently preserves most of the land as private open space.

An "Urban Land Use" is specifically defined in the General Plan (SJ2020, 301) as "Residential land uses considered urban have existing or planned development of 1 DU/AC or greater." While a "Non-urban Land Use" is defined as a "Land use that is generally not within one of the three major categories: residential, commercial or industrial. The Rural Residential land use designation is, however, considered non-

urban". (SJ2020, 300) Therefore, by General Plan definition, this project must be considered "rural in character" and non-urban.

The allowable land use for any given parcel of land is determined by referring to the Land Use/ Transportation Diagram. This project is designated by the General Plan as Non-Urban Hillside. Non-urban Hillside is proposed for most hillside areas above the 15% slope line. Very low intensity uses, such as grazing, tree farming or **very large lot residential estates**, are permissible uses under this category. (SJ2020, 241) The maximum residential density on the property with a non-urban hillside designation is determined by the hillside slope density formula which defines minimum lot sizes. (SJ2020, 242) The attached exhibit shows that this project is literally surrounded by rural residential development which is much more dense.

Moreover, the General Plan points out that by discouraging expansion of urban services, particularly sanitary sewers, the Green Line/ UGB and USA policies development pressures beyond the Green Line/ UGB are reduced. "Allowable development as defined by the Non-Urban Hillside land use designation and the Hillside Slope Density Formula, further supports the open space preservation strategy by promoting low intensity and non-urban uses for lands beyond the Green Line/ Urban Growth Boundary." (SJ2020, 48) This is a low intensity project which meets the designation and slope density formula of the General Plan.

The purpose of the Hillside Development Policies is to guide the development of hillside areas and to minimize the exposure of people and property to environmental hazards and to insure that the potential damage to the hillside is minimized. (SJ2020, 241) These concerns need to be analyzed through the CEQA process and a determination made of how any concerns specific to the site can be mitigated.

3. Environmental Concerns Are Premature

It would be entirely arbitrary to deny the project based on a litany of environmental concerns ranging from landslides to endangered species before you know if there is any basis in fact for believing that those conditions exist on this property and, if they exist, that they cannot be mitigated. Our consultants are confident that the environmental constraints can be effectively mitigated through the CEQA process.

CONCLUSION

A point by point rebuttal to the Director's Findings for Denial is attached. In essence, however, what is before you is a project that proposes to develop in a way that is consistent with its General Plan designation and with its zoning. The project will be

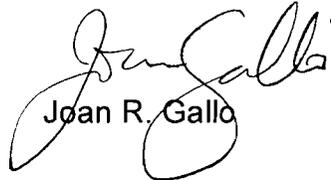
rural in nature, with lots that are more than 40 acres. It will provide its own urban service infrastructure. It will mean that the hillside will remain primarily private open space with very large lot residential estates which are minimal visibility from the valley floor. The environmental review process will assure you that all environmental constraints have been adequately mitigated.

To deny this property owner the right to subdivide the property in accordance with its General Plan and zoning designation under the circumstances before you is both a violation of the property owner's constitutional rights and a violation of the Map Act.

The project should be allowed to proceed forward so we can demonstrate to you how any environmental constraints can be mitigated and how the viewshed can be protected.

Sincerely,

HOPKINS & CARLEY
A Law Corporation



Joan R. Gallo

JRG/bm

cc: Joe Horwedel
Tom Deregt
Tom Armstrong

REBUTTAL OF FINDINGS

Applicant's Response

FINDINGS

The Director of Planning concludes and finds, based on an analysis of the above facts, that:

1. The proposed map is not consistent with applicable general and specific plans as specified in Section 65451 in that:
 - a. The project does not further the Growth Management Major Strategy which encourages infill development within urbanized areas as an important means of controlling service costs through increased efficiency. ***This policy has never been interpreted to preclude rural use, including rural residential use within the outlying areas. Indeed, the General plan specifically allows for rural residential in Non-urbanized areas.***
 - b. The project does not respect the Greenline/Urban Growth Boundary which defines the City's ultimate limits to urban expansion. ***This project is not proposing urban expansion. It proposes rural residential development with no expansion of the urban service infrastructure.***
 - c. The project would encourage more costly development at the edge of the City inconsistent with the Greenline/Urban Growth Boundary and Urban Service Area policies. ***Staff does not explain how this project could be growth inducing. It will provide 40 acre lots hidden out of sight without an extension of urban services and it will preclude further development on this hillside. Thus subdivision of the land and private open space will prevent urban growth into this area.***
 - d. The project would extend urban services in a rural area outside of the Urban Growth Boundary and Urban Service Area inconsistent with the Greenline/Urban Growth Boundary Major Strategy, Goal, and policies. ***There is no extension of urban services involved. The project will provide its own sewer and water. It does not involve annexation since it is already in the City and already receives City police and fire services.***

- e. The project would locate urban development on an undeveloped rural site located in an area with geologic hazards and important biological resources inconsistent with the General Plan Hillside Development policies. ***It is not reasonable, nor is there precedent in this city to consider 40+ acre sites providing their own infrastructure, largely tucked out of view, as "urban development". Any issues relating to geological hazards and biological resources need to be addressed through environmental review. At this point they are sheer speculation.***
2. The proposed map is not consistent with applicable general and specific plans as specified in Government Code Section 65451 in that:
 - a. The project does not further the Growth Management Major Strategy which encourages infill development within urbanized areas as an important means of controlling service costs through increased efficiency. ***This project does not detract from the infill policy. It is rural in nature and thereby consistent.***
 - b. The project does not respect the Greenline/Urban Growth Boundary which defines the City's ultimate limits to urban expansion. ***This project is not proposing urban expansion. It proposes rural residential development with no expansion of the service infrastructure.***
 - c. The project would encourage more costly development at the edge of the City inconsistent with the Greenline/Urban Growth Boundary and Urban Service Area policies. ***It is incomprehensible how this project, with its 40+ acre lots would encourage any other development.***
 - d. The project would extend urban services in a rural area outside of the Urban Growth Boundary and Urban Service Area inconsistent with the Greenline/Urban Growth Boundary Major Strategy, Goal, and policies. ***No expansion of urban services is proposed. The project is in the City and receives police and fire services today.***
 - e. The project would locate urban development on an undeveloped rural site located in an area with geologic hazards and important biological resources inconsistent with the General Plan Hillside Development policies. ***These issues need to be studied and addressed in the CEQA process. At this point they are sheer speculation.***
 2. The design or improvement of the proposed subdivision is not consistent with applicable general and specific plans in that:

- a. The project proposes a large-lot, low-density design which is inconsistent with the Hillside Development Policies that encourage clustering residential development in order to minimize exposure of development to environmental hazards and maximize the preservation of natural resources in the hillsides. ***The provision permits, but does not require, clustering. It actually reads; "Clustering of the allowable density is an appropriate means to encourage open space preservation and reduce impacts associated with on-site grading necessary for development and roadways." Clustering would create the urban feel which is avoided by this proposal. Open space is permanently protected by the 40+ acres lots.***
 - b. The project and related improvements including, but not limited to, grading, vegetation removal, and construction of the road, bridge, and infrastructure is inconsistent with the Hillside Development Goal and Policies because it would not preserve valuable natural resources of the hillsides, minimize exposure of the public to potential environmental hazards, and maximize resource conservation. ***These issues need to be studied and addressed in the CEQA process. At this point they are sheer speculation.***
 - c. The project is inconsistent with the Hillside Development Policies because it would locate public improvements in hillside areas with identified geologic hazards. ***It is not clear what public improvements are referenced. Any such issue needs to be studied and addressed in the CEQA process. At this point they are sheer speculation.***
 - d. The project is inconsistent with the Hillside Development Policies because it does not consider the potential for any extraordinary expenditure of public resources to provide emergency services in the event of a natural or man-made disaster. ***This project is in the City and already receives police and fire services. There are only 16 lots proposed and they are consistent with the rural residential designation.***
3. The site is not physically suitable for the type of development in that:
- a. The subject site contains a landslide and is located in a Geologic Hazard area. ***These issues need to be studied and addressed in the CEQA process. At this point they are sheer speculation.***
 - b. The subject site is characterized by steep hillside terrain comprised of oak woodland, grassland and scrub habitat which contains Special Status species and habitat. ***These issues need to be studied and addressed in the CEQA process. At this point they are sheer speculation.***

- c. The proposed project will require significant grading and vegetation disturbance to construct road, bridge, water system, and sanitary sewer improvements. ***These issues need to be studied and addressed in the CEQA process. At this point they are sheer speculation.***
 - d. The project proposes 16 lots consisting of approximately 40 acres each requiring the road and infrastructure improvements be extended throughout the entire hillside area. ***Any effect relate to design and improvements needs to be studied and addressed in the CEQA process. At this point they are sheer speculation.***
4. The design of the subdivision or the proposed improvements are likely to cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat because:
- a. The project is located in an area of Santa Clara County that may provide suitable habitat for several threatened and endangered species listed by the United States Fish and Wildlife Service and the California Department of Fish and Game. ***These issues need to be studied and addressed in the CEQA process. At this point they are sheer speculation.***
 - b. The subject site is located in a Geologic Hazards area that contains a landslide. ***These issues need to be studied and addressed in the CEQA process. At this point they are sheer speculation.***
 - c. The project would require urban services and improvements that have the potential to substantially reduce the habitat of a wildlife species, and to substantially reduce the number or restrict the range of an endangered, rare or threatened species. ***This project does not require urban service infrastructure. Environmental issues need to be studied and addressed in the CEQA process. At this point they are sheer speculation.***

Finally, the Director of Planning concludes and finds, based on an analysis of the above facts and findings, that:

5. Pursuant to Section 15270 of the California Environmental Quality Act (CEQA) Guidelines, CEQA does not apply to projects which a public agency rejects or disapproves. ***Disapproval under these circumstances would be arbitrary and capricious.***
6. The proposed map is not consistent with applicable general and specific plans as specified in Section 65451. ***This project is consistent with the General Plan***

which envisions rural residential development in property designated Non-urban Hillside. There is no specific plan for the area.

7. The design or improvement of the proposed subdivision is not consistent with applicable general and specific plans. ***This project is consistent with the General Plan which envisions rural residential development in property designated Non-urban Hillsides. There is no specific plan for the area. Any design issues would be studied in the CEQA process.***
8. The site is not physically suitable for the type of development. ***These issues need to be studied and addressed in the CEQA process. At this point they are sheer speculation.***
9. The design of the subdivision or the proposed improvements are likely to cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat. ***These issues need to be studied and addressed in the CEQA process. At this point they are sheer speculation.***

