

Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Joseph Horwedel

SUBJECT: SEE BELOW

DATE: November 28, 2006

Approved

Kay Wines

Date

11/30/06

COUNCIL DISTRICT: 3
SNI AREA: None

SUBJECT: PUBLIC HEARING ON AN APPEAL OF THE PLANNING COMMISSION'S CERTIFICATION OF THE FINAL ENVIRONMENTAL IMPACT REPORT (FEIR) FOR THE DOBBIN DRIVE RESIDENTIAL GENERAL PLAN AMENDMENT TO CHANGE THE GENERAL PLAN LAND USE/TRANSPORTATION DIAGRAM DESIGNATION FROM LIGHT INDUSTRIAL TO TRANSIT CORRIDOR RESIDENTIAL (20+ DU/AC) WITH A FLOATING PARK DESIGNATION ON AN APPROXIMATELY 24.8-ACRE SITE ON THE NORTHEAST CORNER OF NORTH KING ROAD AND DOBBIN DRIVE.

RECOMMENDATION

The Director of Planning, Building and Code Enforcement recommends the City Council adopt a resolution to certify:

1. The City Council has read and considered the Final EIR;
2. The Final EIR has been completed in compliance with the California Environmental Quality Act (CEQA); and
3. The Final EIR reflects the independent judgment and analysis of the City of San Jose.

The Director of Planning, Building and Code Enforcement shall transmit copies of the Final EIR to the Applicant and to any other decision-making body of the City of San José for the project.

OUTCOMES

Rejection of the appeal and certification of the EIR will allow the City Council to consider the proposed General Plan Amendment (File No. GP06-03-01).

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EXECUTIVE SUMMARY

The Director of Planning, Building and Code Enforcement prepared an EIR for the proposed Dobbin Drive General Plan Amendment (GPA) at the northwest corner of King Road and Dobbin Drive. The Final EIR was certified by the Planning Commission on November 13, 2006. The Alum Rock Union School District (School District) appealed the Planning Commission's decision to certify the EIR. The decision of the City Council regarding the EIR's adequacy is final.

The School District argues the EIR failed to adequately consider impacts to school facilities that would result from residential development allowed under the Dobbin Drive GPA, and failed to identify mitigation measures. The School District requests application of higher student generation rates than previously provided by the School District at time of EIR preparation, and that the EIR include mitigation options other than payment of state-mandated school impact fees, such as dedication of school sites and/or developer-constructed school facilities.

The EIR analyzed the proposed GPA, and not a specific housing proposal, and appropriately used the average student generation rate for attached dwelling units. Using the average student generation rate, the EIR discloses the need for an additional elementary school to accommodate the anticipated number of students generated by future residential development on the site under the proposed GPA. The EIR identifies the statutory school impact fee would be paid to the School District, and that state law directs that payment of the statutory school impact fee is considered complete mitigation for purposes of considering mitigation of school impacts under CEQA. A legal interpretation by a recognized authority in the field of CEQA case law supports this conclusion, and the School District provides no evidence in its appeal to support an interpretation to the contrary.

Should the City Council certify the EIR, the Council may then consider and take action on the proposed Dobbin Drive GPA. If the Council determines the EIR is inadequate, the EIR would need to be revised to address the inadequacies identified by Council, and re-circulated for public comment and brought back to Planning Commission for certification. The EIR re-circulation process would require additional applicant and staff resources and 4-6 months, and the Council's consideration of the Dobbin Drive GPA would be delayed accordingly.

The Director of Planning, Building and Code Enforcement has determined and the Planning Commission has found the EIR is complete and in compliance with CEQA, and that the issues raised in the EIR appeal are limited by state law, as described previously in this memo, such that the EIR is adequate. Therefore, the Planning Director recommends the City Council reject the appeal and certify the EIR prepared for the Dobbin Drive GPA.

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BACKGROUND

CEQA Requirements for Certification of an EIR

The California Environmental Quality Act (CEQA) Guideline §15090 requires, prior to approving a project, the lead agency to certify that (1) the Final EIR has been completed in compliance with CEQA, (2) the final EIR was presented to the decision-making body of the lead agency and the decision-making body reviewed and considered the information contained in the Final EIR before approving the project, and (3) the Final EIR reflects the independent judgement and analysis of the lead agency.

On November 13, 2006, the Planning Commission held a public hearing on the Final EIR for the Dobbin Drive Residential General Plan Amendment (GP06-03-01). After public testimony and discussion, the Planning Commission (6-0-1, Pham absent) certified the Final EIR.

Appeal of an EIR

When an EIR is certified by a non-elected, decision-making body with the local lead agency, that certification may be appealed to the local lead agency's elected decision-making body. On November 16, 2006, the Alum Rock Union Elementary School District filed a timely appeal.

San José Municipal Code (SJMC) Chapter 21.07 requires the Director of Planning, Building and Code Enforcement to schedule a noticed public hearing on a timely appeal of the Commission's certification of the Final EIR before the City Council. The certification appeal hearing of the City Council is *de novo*, which means that the Council is required to hear the matter in its entirety as though it was not heard before. The City Council may hear the appeal of the certification concurrently with the project.

Upon conclusion of the certification appeal hearing, the City Council may find that the Final EIR has been completed in compliance with the requirements of CEQA. If the City Council makes such a finding, it shall uphold the Commission's certification of the Final EIR and it may then immediately act on the project associated with the Final EIR. If the City Council finds that the Final EIR has not completed in compliance with CEQA, the Council must require the Final EIR to be revised and it may not take any action on the project. All decisions of the City Council are final.

ANALYSIS

The attached letter, received from the Alum Rock Union School District, constitutes a formal appeal of the Planning Commission's certification on November 13, 2006 of the Final EIR for the Dobbin Drive Residential General Plan Amendment (GP06-03-01). The appeal and the City of San José's response are discussed below.

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Alum Rock Union School District, dated November 16, 2006.

RESPONSE TO APPEAL OF EIR: The School District's appeal letter raises no new issues, but rather restates the School District's comments previously provided on the Draft EIR. The following is the response to the School District appeal, which questions the validity of the Dobbin Drive Residential General Plan Amendment Final EIR. The School District argues the EIR is based on an inadequate consideration of the General Plan Amendment's impact to district facilities and provides inadequate identification of mitigation measures to address the impact.

Comment 1: The EIR has not properly considered the impact of the Project on the District's school facilities.

Response 1: As stated in Section 4.3.2 of the Draft EIR, and as reiterated in Response D-2 of the First Amendment, the projection of students generated by future redevelopment of the site under the proposed land use designation was based on rates provided to the City by the School District at the time the Draft EIR was prepared. Different types of residential units are associated with varying per-unit student generation rates. No specific development project is currently being proposed.

For the purposes of this program-level EIR, it is anticipated that the future residential development on the site will consist of attached units. However, the specific number and types of residential units to be built (e.g., townhouses vs. condominiums, affordable units vs. market-rate pricing) is not presently known. Therefore, the average rate (0.6 students per unit) for an attached unit was used to estimate the proposed General Plan Amendment's impacts on school availability. The rate used in the EIR was identified, in the per-unit student generation table provided by the district, as the average rate for the various types of attached residential units. The district's table identified a range from 0.22 to 0.96 students per attached unit.

The analysis in the Draft EIR concluded that residential redevelopment of the site with a number of units in the proposed density range would result in a need for additional new school facilities. The Draft EIR concluded, based on the average student generation rate for attached residential units provided by the district, that the district will require one new elementary school. As noted in Response D-1 of the First Amendment, if the proposed General Plan Amendment is approved then a subsequent environmental review will be required when a specific development project is proposed in the future.

The subsequent environmental document will address the development proposal's impacts on school availability based on its final unit count and the types of proposed units, and will undergo public review and comment. However, as stated in the Draft EIR and the First Amendment to the Draft EIR, future residential redevelopment of the site within the anticipated density range will likely result in the need for additional elementary school facilities regardless of the student generation rate used in the subsequent project-specific analysis. Therefore, the EIR serves its purpose as an informational document by disclosing the anticipated need for additional

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elementary school facilities to accommodate the students that would be generated by a future residential project on the subject site.

Comment 2: The EIR has not properly considered what mitigation measures would be necessary to address the impacts on District facilities.

Response 2: As explained in the Response D-2 (see page 13 of the First Amendment), in 1998 California voters passed Proposition 1A, a \$9.2 billion statewide school bond measure that was also linked to legislation enacted in 1998 that significantly limited the application of CEQA with regard to the treatment of schools impacts and mitigation. Specifically, the legislation, codified as California Government Code Sections 65995-65998, sets forth provisions for the payment of school impact fees by new development as the exclusive means of “considering and mitigating impacts on school facilities that occur or might occur as a result of any legislative or adjudicative act, or both, by any state or local agency involving, but not limited to, the planning, use, or development of real property.” [§65996(a)]. The legislation goes on to say that the payment of school impact fees “are hereby deemed to provide full and complete school facilities mitigation” under CEQA. [§65996(b)].

As further explanation, the following excerpt from “Practice under the California Environmental Quality Act,” a manual published for the State Bar of California, is provided:

The statutes also significantly limit the application of CEQA to school facilities impact issues. The fees set forth in Govt C §65996 constitute the exclusive means of both “considering” and “mitigation” school facilities impacts of projects. Govt C §65996(a). The provisions of the 1998 legislation are “deemed to provide full and complete schools facilities mitigation.” Govt C §65996(b).

In the authors’ view, because the statute states that the statutory fees are the exclusive means of considering as well as mitigating school impacts, it does not just limit the mitigation that may be required, but also limits the scope of review and the findings to be adopted for school impacts. Consistent with this view:

- Once the statutory fee is imposed, the impact should be determined to be mitigated because of the provision that the statutory fees constitute full and complete mitigation. Govt C §65995(b).
- It should not be necessary to adopt a statement of overriding considerations for school facilities impacts when the statutory fee is assessed, because the impact is deemed as a matter of law to be adequately mitigated. Govt C §65995(b).

The appellants cite no case law or other evidence that would support an alternate interpretation or application of this legislation.

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It should be noted that in November 2006, California voters approved Proposition 1D, which authorizes \$1.9 billion for new K-12 school construction among other school funding through approval of this bond measure. Although the Alum Rock Union School District has not provided an estimate of anticipated school impact fee revenue anticipated to result from the future residential development that would be built on the subject site, it will be several millions of dollars.

Finally, the City notes that the appellants' protest letters specifically acknowledge the above-described legislation. The letters then proceed to cite other sections of the CEQA Guidelines to bolster their argument that the payment of school impact fees is inadequate mitigation. However, the referenced sections are not applicable to the subject of school facilities impacts because they have been superceded by Government Code Sections 65995-65998.

Comment 3: The City has failed to provide for adoption of a statement of overriding considerations for the City's approval of the Project despite significant unmitigated effects.

Response 3: In cases where a project would result in significant and unavoidable impacts and no feasible alternatives are found to exist, the City Council must adopt a statement of overriding considerations if the Council opts to approve the project. However, as elaborated in Response 2, above, the proposed General Plan Amendment's impacts on school availability have been determined to be less-than-significant for purposes of CEQA after payment of the statutory school impact fee. Therefore, CEQA does not require the City Council to adopt such a statement in connection with the approval of the proposed Dobbin Drive GPA.

POLICY ALTERNATIVES

- | | |
|-----------------|---|
| Alternative #1: | If the Council does not uphold the Certification of this EIR, then Council would need to indicate the specific analysis needed to complete the EIR. This analysis would need to be completed, the EIR re-circulated, and considered by Planning Commission prior to any Council consideration of the Dobbin Drive GPA (GP06-03-01). |
| Pros: | The EIR would be revised and re-circulated to address the specific issues (if any) the Council found were inadequately covered in the EIR. |
| Cons: | Substantial time and resources have been devoted to complete the EIR, and additional time and resources would be needed to revise and re-circulate the EIR, delaying by approximately 4-6 months the Council's consideration of the proposed General Plan Amendment. |

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Reasons for not recommending: The Planning Director has determined and the Planning Commission has found the EIR is complete and in compliance with CEQA, and that the issues raised in the EIR appeal are limited by state law, as described previously in this memo, such that the EIR is adequate.

PUBLIC OUTREACH/INTEREST

- Criteria 1:** Requires Council action on the use of public funds equal to \$1 million or greater.
- Criteria 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City.
- Criteria 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach.

Although this item does not meet any of the above criteria, staff followed Council Policy 6-30: Public Outreach Policy for Pending Land Use and Development Proposals.

On August 11, 2006, the Director of Planning, Building and Code Enforcement caused a Notice of Availability (NOA) for the Draft EIR to be published in the San Jose Mercury News, posted for review with the County Clerk, was mailed to property owners and residents within 1,000 feet of the project site, and posted on the Planning, Building, and Code Enforcement website.

As required by Pub. Res. Code secs. 21092(b), 21092.6; CEQA Guidelines secs. 15087, 15105, the NOA contains (1) a project description and location, (2) identification of significant environmental impacts, (3) specification of the review period, (4) identification of the public hearing date, time, and place, (5) information about where the Draft EIR is available, (6) and whether the project site is a listed toxic site.

The Director filed a Notice of Completion (NOC) with the State Clearinghouse to coordinate the systematic review of the Draft EIR with State Agencies such as the Department of Transportation. CEQA requires State Clearinghouse review of an EIR when a project, such as the Dobbin Drive Residential General Plan Amendment, is of "statewide, regional, or area significance".

The Draft EIR was circulated for public review for 45 days, beginning on August 18, 2006 and ending on October 2, 2006, as required by Pub. Res. Code sec. 21091 and CEQA Guidelines 15087 and 15105. The Draft EIR was available for review in the Department of Planning, Building and Code Enforcement, at the Martin Luther King Junior Main Library and the Educational Park Branch Library, and online on the Department's web site. In addition, the Draft EIR was mailed to Federal and State Agencies, Regional and Local Agencies, and private organizations and individuals listed in Section 1 of the First Amendment to the Draft EIR.

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COORDINATION

Preparation of the responses in this memo responding to the EIR appeal has been coordinated with the City Attorney's Office.

CONCLUSION

The Dobbin Drive General Plan Amendment Final EIR meets the requirements of CEQA by disclosing the significant environmental effects of the project, identifying feasible ways to mitigate the significant effects, and describing reasonable alternatives to the project. The Final EIR complies with the substantive and procedural requirements of the CEQA guidelines for projects of regional significance. The Final EIR has been completed in compliance with the requirements of CEQA. It also represents the independent judgment and analysis of the City of San José.

COST IMPLICATIONS

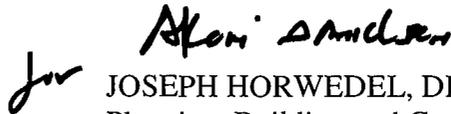
Not applicable.

BUDGET REFERENCE

Not applicable.

CEQA

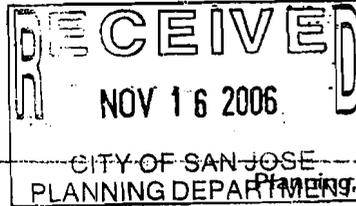
Resolution to be adopted.


JOSEPH HORWEDEL, DIRECTOR
Planning, Building and Code Enforcement

c: Appellant and their Representative

Attachments:

1. Appeals, including attachments, filed by Alum Rock Union Elementary School District.



CITY OF SAN JOSE
 Building and Code Enforcement
 200 East Santa Clara Street
 San José, CA 95113-1905
 tel (408) 535-3555 fax (408) 292-6055
 Website: www.sanjoseca.gov/planning

NOTICE OF EIR APPEAL

TO BE COMPLETED BY PLANNING STAFF			
FILE NUMBER	RECEIPT # _____		
NAME OF EIR	AMOUNT _____		
	DATE _____		
	BY _____		
TO BE COMPLETED BY PERSON FILING APPEAL			
PLEASE REFER TO EIR APPEAL INSTRUCTIONS BEFORE COMPLETING THIS PAGE.			
THE UNDERSIGNED RESPECTFULLY REQUESTS AN APPEAL FOR THE FOLLOWING EIR: ENVIRONMENTAL IMPACT REPORT, DOBBIN DRIVE RESIDENTIAL GENERAL PLAN AMENDMENT, GP06-03-01.			
REASON(S) FOR APPEAL (For additional comments, please attach a separate sheet.):			
PLEASE SEE ATTACHED			
PERSON FILING APPEAL			
NAME CHAD J. GRAFF	DAYTIME TELEPHONE (415) 543-4111		
ADDRESS 71 STEVENSON ST., 19TH FLOOR	CITY SAN FRANCISCO	STATE CA	ZIP CODE 94105
SIGNATURE 	DATE 11-16-06		
CONTACT PERSON (IF DIFFERENT FROM PERSON FILING APPEAL)			
NAME LINDA LATASA, ASSISTANT SUPERINTENDENT			
ADDRESS 2930 GAY AVENUE	CITY SAN JOSE	STATE CA	ZIP CODE 95127
DAYTIME TELEPHONE (408) 928-8647	FAX NUMBER (408) 928-6445	E-MAIL ADDRESS linda.latasa@arusd.org	

PLEASE SUBMIT THIS APPLICATION IN PERSON TO THE DEVELOPMENT SERVICES CENTER, CITY HALL.

CHAD J. GRAFF
ATTORNEY AT LAW
cgraff@mbdlaw.com

SAN FRANCISCO



November 16, 2006

City of San Jose
Planning, Building and Code Enforcement
Attn: Joseph Horwedel, Darren McBain
200 East Santa Clara Street
San Jose, CA 95113-1905

Re: Alum Rock Union Elementary School District Appeal of Certification of Environmental Impact Report, Dobbin Drive Residential General Plan Amendment, GP06-03-01;
Our File 1105.10106

Dear Mr. Horwedel and Mr. McBain:

The Alum Rock Union Elementary School District ("District") hereby appeals the Planning Commission's Certification of the Environmental Impact Report ("EIR") for the proposed Dobbin Drive Residential General Plan Amendment, GP06-03-01 ("Project").

As set forth in the attached written comments filed with the City on behalf of the District on July 7, 2006, and October 2, 2006, and in the follow-up comments provided at the Planning Commission Meeting on November 13, 2006, the District contends that the Draft EIR and First Amendment to the Draft EIR have failed to meet the requirements of the California Environmental Quality Act ("CEQA") in that: 1) they have not properly considered the impacts of the Project on the District's school facilities; 2) they have not properly considered what mitigation measures would be necessary to address those impacts; and 3) they have failed to provide for adoption of a statement of overriding considerations for the City's approval of the Project despite significant unmitigated effects. (See Pub. Resources Code, §§ 21002.1, 21100; Cal. Code Regs., tit. 14, §§ 15091, 15093, 15126, 15126.2, 15126.4, 15126.6 "CEQA Guidelines.")

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City of San Jose
Planning, Building and Code Enforcement
Attn: Joseph Horwedel, Darren McBain
November 16, 2006
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Attached please find a completed Notice of EIR Appeal and filing fee. The District further requests that the filing fee for this appeal be waived pursuant to Government Code section 6103. Please do not hesitate to contact us with any questions. Thank you.

Very truly yours,

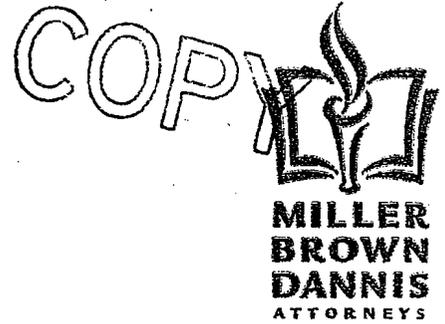
MILLER BROWN & DANNIS



Chad J. Graff
CJG/psg

Attachments

cc: Norma Martinez, Superintendent
Linda S. Latasa, Assistant Superintendent of Business Services



CHAD J. GRAFF
ATTORNEY AT LAW
cgraff@mbdlaw.com

SAN FRANCISCO

October 2, 2006

VIA E-MAIL AND U.S. MAIL

Darren McBain
Department of Planning, Building & Code Enforcement
200 E. Santa Clara Street
San Jose, CA 95113

Re: Draft Environmental Impact Report, Dobbin Drive Residential General Plan Amendment (GP06-03-01); Comments by Alum Rock Union Elementary School District; Our File 1105.10106

Dear Mr. McBain:

The Alum Rock Union Elementary School District ("District") appreciates the opportunity to submit comments on the Draft Environmental Impact Report ("EIR") prepared for the proposed Dobbin Drive Residential General Plan Amendment (GP06-03-01). As you know, the District and your office exchanged preliminary information on the preparation of the Draft EIR on this matter during the summer, including written comments provided on July 7, 2006. (See attached.) For the District's comments on the Draft EIR, the District resubmits its written comments of July 7, 2006, and provides the additional comments included herein.

The District remains extremely concerned about the potential severe impacts of the General Plan Amendment and proposed project, and the cumulative impacts of other projects referenced in the Draft EIR, on the District. The District found that the draft EIR was cursory in its analysis of potential impacts on the District and mitigation thereof, that it contained misleading and/or incorrect statements regarding District information and the potential impacts, and that it did not meet statutory requirements for environmental review under the California Environmental Quality Act ("CEQA").

As discussed in the District's July 7, 2006 letter, the student generation rate identified by the City of .60 students appears to be low in relation to a study obtained by the District prior to this process. Nonetheless, the .60 student generation rate provides that the General Plan Amendment and proposed project would generate 818 additional students for which the District has inadequate facilities. These students would include approximately 578 new elementary school students, a number which

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exceeds the current student population of a District elementary school, and 240 new middle school students.

When the General Plan Amendment and proposed project are combined with other forthcoming projects, the cumulative impacts are even more severe. In its review of the cumulative impacts (again using the .60 student generation rate), the Draft EIR finds that 2009 additional residential units will be created within District boundaries with approximately 1205 new students to be served by the District. Assuming that 29 percent of these students attend middle school, this low estimate means that the cumulative projects would result in 976 new elementary school students and 229 new middle school students. The number of new elementary school students is nearly double the average size of a current District elementary school and will require new facilities. As discussed in the District's July 7, 2006 letter, statutory developer fees will be inadequate to fund necessary new facilities.

Student Generation Rate

The Draft EIR incorrectly asserted that "[t]he [District] has identified a rate of .60 students per dwelling unit for attached residences." (Draft EIR, p. 128.) As the attached letter of July 7, 2006, provides, the District obtained a demographic study for student generation rates for the District for areas west of Capitol Avenue/Expressway before this General Plan Amendment and proposed project were introduced. A table with the results of this study is provided on page two of the District's July 7, 2006 letter, and it identifies student generation rates for particular types of housing, including .75 students for Intermediate Attached: Market Rate units and .65 students for Intermediate Attached: Section 8 units. The rates identified in this study exceed the rate of .6 used in the preparation of the Draft EIR and indicate that the actual impacts will exceed what has been projected in the Draft EIR. The District requests that the City use the rates identified in the District's study as it provides the best source of information for estimating what the actual number of students generated will be.

The Draft EIR also used student generation rates of the San Jose Unified School District ("SJUSD") as a basis for comparison without identifying any appropriate basis for doing so. SJUSD differs remarkably from the District with regard to the demographics of its population and the range and diversity of its territory. In no way is a student generation rate of SJUSD an appropriate basis for comparison with the District. It presents misleading information and conflicts with the public purposes of the EIR. The study referenced above and in the District's July 7, 2006 letter was prepared with particular attention to the District's territory and in advance of the introduction of the General Plan Amendment and proposed project. It represents the best source of available information for the number of students that would be generated by the proposed project and cumulative projects.

Methods for Accommodating Students

The Draft EIR lists methods for accommodating increased numbers of students that apparently "would not require the building of new schools." (Draft EIR, p. 128.) The methods identified, however, are listed with little regard for the District's jurisdiction over its educational program and for the quality of facilities and educational opportunities for existing and incoming District

students. Methods such as “the provision of portable or relocatable classrooms” and “the busing of students to schools with surplus capacity” potentially sacrifice the quality of educational programs and facilities for existing and incoming District students and also require significant funding and other resources to be available. A method such as “the conversion to year-round schools with a four-track schedule,” like other identified measures, requires the District to make significant program determinations and to consider the input of District families and staff members. Moreover, none of the methods listed would be fully funded by developer fees.

Review of Mitigation Measures

The Draft EIR references California Government Code sections 65995-65998 and sets forth “payment of school fees by new development as the exclusive means of ‘considering and mitigating impacts on school facilities that occur or might occur as a result of any legislative or adjudicative act, or both, by any state or local agency involving, but not limited to the planning, use, or development of real property.’” (Draft EIR, p. 128.) If, however, payment of developer fees will not fully mitigate the environmental impacts of the General Plan Amendment and potential project on the District, as the District provided in its July 7, 2006 letter and as the City recognized in stating that “school impact fees. . . would partially offset project-related increases in student enrollment,” then CEQA requires additional action by the City.

First, CEQA requires a full discussion of mitigation measures. Section 21002.1 of the Public Resources Code provides in part that “[t]he purpose of an environmental impact report is to identify the significant effects on the environment of a project, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided. Each public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so.” (See also Pub. Resources Code, § 21100; Cal Code Regs., tit. 14, §§ 15126, 15126.2, 15126.6.) Certainly, measures in addition to the payment of developer fees are available to mitigate the impacts of the proposed General Plan Amendment and the project on the District. Possible measures include dedication of land for a new school site, a developer-built school, and additional funding mechanisms for school facilities that may include cooperation by the developer in the formation of a community facilities district. These measures, or combinations thereof, can result in the full mitigation of impacts on the District and create a situation that benefits the developer, the City, the District, and new and existing District families and students by providing adequate school facilities and educational programs. Such measures would help avoid a disastrous situation where the District has inadequate or no facilities for large numbers of new students. Accordingly, the EIR should include discussion of other available mitigation measures that are available to fully offset the impacts on the District.

Second, if the City may not legally require adoption of mitigation measures in addition to the payment of developer fees, then CEQA provides additional requirements for adoption of the EIR. CEQA provides in part that “[i]f economic, social or other conditions make it infeasible to mitigate one or more significant effects on the environment of a project, the project may nonetheless be carried out or approved at the discretion of the a public agency if the project is otherwise permissible under applicable laws and regulations.” (Pub. Resources Code, § 21002.1.) If mitigation measures are infeasible, the lead agency is required to make findings and

adopt a statement of overriding considerations if the lead agency proceeds with approval of such a project. Applicable regulations provide that:

[n]o public agency shall approve or carry out a project for which an EIR has been certified which identifies one or more significant environmental effects of the project unless the public agency makes one or more written findings for each of those significant effects, accompanied by a brief explanation of the rationale for each finding. The possible findings are: . . . (3) Specific economic, legal, social, technological, or other considerations . . . make infeasible the mitigation measures or project alternatives identified in the final EIR.

(Cal Code Regs., tit. 14, § 15091.)

Additional applicable regulations provide that:

CEQA requires the decision-making agency to balance, as applicable, the economic, legal, social, technological, or other benefits of a proposed project against its unavoidable environmental risks when determining whether to approve the project. If the specific economic, legal, social, technological, or other benefits of a proposed project outweigh the unavoidable adverse environmental effects, the adverse environmental effects may be considered 'acceptable.' When the lead agency approves a project which will result in the occurrence of significant effects which are identified in the final EIR but are not avoided or substantially lessened, the agency shall state in writing the specific reasons to support its action based on the final EIR and/or other information in the record. The statement of overriding considerations shall be supported by substantial evidence in the record.

(Cal Code Regs., tit. 14, § 15093.)

Accordingly, if the City finds that it may not legally require measures to mitigate fully the impacts on the District but that benefits of the project outweigh environmental risks, then CEQA provides for adoption of a statement of overriding considerations.

Conclusion

The District faces overwhelming impacts from the General Plan Amendment, proposed project, and other forthcoming projects considered in the Draft EIR. Using a low student generation rate, these projects will result in approximately 1205 new students to be served by the District, including approximately 976 new elementary school students and 229 new middle school students. The District does not have adequate educational facilities for these students. The

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number of new elementary school students is nearly double the average size of a District elementary school and current elementary schools are already at 85 percent capacity. Statutory developer fees will be inadequate to fund necessary new facilities for the students generated.

The District finds the Draft EIR to be inadequate in its review and analysis of project impacts on the District. The District believes that the Draft EIR must use the best available information on student generation rates previously provided by the District. Further, the EIR must contain a full discussion of mitigation measures to address the impacts on the District. If the City finds that it is restricted in the mitigation measures that it may legally require, then CEQA requires adoption of a statement of overriding considerations for project approval.

The District appreciates the City's consideration of these comments. Please do not hesitate to contact the District directly or us if you have any questions regarding these comments.

Sincerely,

MILLER BROWN & DANNIS



Chad J. Graff

CJG/psg

Attachment

cc: Linda Latasa, Assistant Superintendent