



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Planning Commission

SUBJECT: SEE BELOW

DATE: October 29, 2009

COUNCIL DISTRICT: City-Wide
SNI AREA: All

SUBJECT: AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING SECTIONS 20.100.290 AND 20.100.300 OF CHAPTER 100 OF TITLE 20 OF THE SAN JOSE MUNICIPAL CODE RELATING TO RECORDATION OF LAND USE PERMITS, AND 20.120.510 OF CHAPTER 120 OF TITLE 20 OF THE SAN JOSE MUNICIPAL CODE RELATING TO ALTERNATIVE MEANS OF COMPLIANCE WITH GENERAL DEVELOPMENT PLANS

RECOMMENDATION

The Planning Commission voted 6-0-1, Commissioner Cahan absent, to recommend that the City Council approve the proposed ordinance amending Title 20 of the San Jose Municipal Code clarifying provisions for alternative means of compliance and amendments to General Development Plans, eliminating the requirement that permits be recorded prior to becoming effective, and clarifying the preconditions for an effective permit.

OUTCOME

Approval of the ordinance would (1) provide greater clarity regarding the requirements for General Development Plans in response to the Auditor's report entitled "A Review of the Department of Public Works' Oversight of The Foxworthy Bridge Project"; (2) streamline the development permit process by eliminating the requirement that permits be recorded prior to becoming effective and (3) clarify the preconditions for an effective permit.

BACKGROUND

On October 28, 2009, the Planning Commission held a public hearing to consider the proposed ordinance amendment. Staff gave a brief presentation and the Director of Planning, Building and Code Enforcement recommended approval of the proposed ordinance. No one spoke in favor of, or in opposition to the proposed Zoning Code amendment and the Commission closed the public hearing. There was no Commission discussion of the proposed ordinance.

October 29, 2009

Subject: General Development Plans and Recordation Ordinance

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The Planning Commission voted 6-0-1, Commissioner Cahan absent, to recommend approval of the proposed ordinance.

ANALYSIS

See analysis in the attached memorandum from Joseph Horwedel, Director of Planning Building and Code Enforcement, dated October 21, 2009.

POLICY ALTERNATIVE

See alternatives analysis in the attached memorandum from Joseph Horwedel, Director of Planning Building and Code Enforcement, dated October 21, 2009.

PUBLIC OUTREACH/INTEREST

- Criteria 1:** Requires Council action on the use of public funds equal to \$1 million or greater. **(Required: Website Posting)**
- **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. **(Required: E-mail and Website Posting)**
- 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. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

Public outreach for this proposal complies with the City Council's Public Outreach Policy. A public hearing notice for the proposed ordinance was published in the San Jose Mercury News and emailed to a list of business interests, neighborhood associations and community members. Staff has posted the hearing notice, staff report and draft ordinance on the Department's website and has been available to discuss the proposal with interested members of the public.

COORDINATION

Preparation of the proposed ordinance and this memorandum has been coordinated with the City Attorney's Office, the Department of Public Works, and the City Auditor's Office.

FISCAL/POLICY ALIGNMENT

The proposed ordinance furthers the goals of the San José 2020 General Plan for economic development and services and facilities by streamlining the process for finalizing a development permit and clarifying requirements for Planned Development Zonings.

HONORABLE MAYOR AND CITY COUNCIL

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COST SUMMARY/IMPLICATIONS

Not applicable.

BUDGET REFERENCE

Not applicable.

CEQA

Not a project.


JOSEPH HORWEDEL, SECRETARY
Planning Commission

For questions please contact Carol Hamilton at (408) 535-7837.

Attachment:

Planning Commission staff report from Joseph Horwedel, dated October 21, 2009



Memorandum

TO: PLANNING COMMISSION

FROM: Joseph Horwedel

SUBJECT: SEE BELOW

DATE: October 21, 2009

COUNCIL DISTRICT: City-Wide
SNI AREA: All

SUBJECT: AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING SECTIONS 20.100.290 AND 20.100.300 OF CHAPTER 100 OF TITLE 20 OF THE SAN JOSE MUNICIPAL CODE RELATING TO RECORDATION OF LAND USE PERMITS, AND 20.120.510 OF CHAPTER 120 OF TITLE 20 OF THE SAN JOSE MUNICIPAL CODE RELATING TO ALTERNATIVE MEANS OF COMPLIANCE WITH GENERAL DEVELOPMENT PLANS

RECOMMENDATION

It is recommended that the Planning Commission recommend that the City Council approve the proposed ordinance amending Title 20 of the San Jose Municipal Code clarifying provisions for alternative means of compliance and amendments to General Development Plans, eliminating the requirement that permits be recorded prior to becoming effective, and clarifying the preconditions for an effective permit.

OUTCOME

Approval of the ordinance would (1) provide greater clarity regarding the requirements for General Development Plans in response to the Auditor's report entitled "A Review of the Department of Public Works' Oversight of The Foxworthy Bridge Project"; (2) streamline the development permit process by eliminating the requirement that permits be recorded prior to becoming effective and (3) clarify the preconditions for an effective permit.

BACKGROUND

Foxworthy Audit

On August 8, 2008, the City Auditor submitted an audit report to the City Council, titled "A Review of the Department of Public Works' Oversight Of The Foxworthy Bridge Project", hereinafter known as "Foxworthy Audit." This report was prepared in accordance with the City Auditor's 2007-08 Audit Work Plan and was a follow-up effort to a 2007 audit of the City's efforts

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to secure additional Federal funds for bridge replacement. Highlighted within the Foxworthy Audit were specific findings and recommendations regarding the Department of Planning, Building and Code Enforcement's use of conditions of approval in General Development Plans. The proposed ordinance amends Title 20 of the San Jose Municipal Code, the Zoning Ordinance, to address the Auditor's recommendations.

Permit Recordation

Current Zoning Ordinance provisions require that the City record a notice of permit with the County Recorder prior to a development permit becoming effective. This recordation reflects the fact that land use permits "run with the land" and serves to notify subsequent owners and other interested parties that a land use permit has been issued for the site with certain entitlements and obligations. Based on current requirements, this recordation cannot occur until the appeal period has run, all precedent conditions included in the permit are met, and all recordation fees are paid. In order to implement the current provisions, the City is faced with the choice of allocating scarce staff resources to hand-carry individual notices of permit to the County Recorder's office for recordation as soon as the requirements for each permit are met or delaying the implementation of individual permits until they can be recorded in a batch at regular intervals. The proposed ordinance revises the process for recordation of a permit to address this issue.

ANALYSIS

General Development Plan-Conditions of Approval

The Zoning Ordinance specifies that the requirements of a Planned Development Zoning District be provided in a General Development Plan (GDP) which is adopted as part of the Planned Development Zoning. In the case of the Planned Development Zoning associated with the Foxworthy Audit, language was included in the GDP that allowed for alternative traffic improvements in addition to and/or instead of the requirement that the developer build a bridge. This new language was overly broad and did not specify what alternative traffic improvements the City expected the developer to provide. In response to the Foxworthy case, the Auditor recommended that the City "ensure that the language in the General Development Plan's conditions of approval is clear and sufficiently detailed as to what conditions have been approved by the City Council, and that significant changes are returned to the City Council." In order to address the Auditor's recommendation, this ordinance proposes to amend Section 20.120.510 of Title 20 to clarify that General Development Plans may include alternative means of compliance for a specific project impact so long as each of the alternatives adequately mitigates the impact and to specify that changes to the requirements of a General Development Plan require a new Planned Development Zoning application.

Permit Recordation

In regard to recordation, the proposed ordinance eliminates the requirement that a permit be recorded before it becomes effective, clarifies the preconditions for an effective permit, and specifies that the City record the permit within 30 days of its becoming effective. This streamlines the process for applicants by removing a potential delay in a permit becoming effective and streamlines the process

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for the City by providing a reasonable time period for permit recordation that allows permits to be recorded in batches without delaying project implementation. The ordinance also clarifies that all outstanding permit fees must be paid prior to a permit becoming effective.

Alternatives to the Proposed Ordinance

Alternative #1: Retain existing provisions regarding the requirements for General Development Plans.

Pros: None.

Cons: Not clarifying the requirements for General Development Plans could result in future project requirements that are not sufficiently clear to ensure that they adequately address the relevant project impact.

Reason for Not Selecting: Retaining the existing provisions would not address the Auditor's recommendations for General Development Plans.

Alternative # 2: Retain existing provisions regarding permit recordation.

Pros: None.

Cons: Continuing to require permit recordation prior to a permit becoming final would either delay implementation of permits or require the City to record permits in an inefficient manner that requires greater staff resources than are currently available.

Reason for Not Selecting: The current requirements result in delays to the development community getting effective permits. To remedy the situation under the current requirements would be staff intensive and costly to the City.

GENERAL PLAN CONFORMANCE

The proposed ordinance furthers the goals of the San José 2020 General Plan for economic development and services and facilities by streamlining the process for finalizing a development permit and clarifying requirements for Planned Development Zonings.

PUBLIC OUTREACH

- Criteria 1:** Requires Council action on the use of public funds equal to \$1 million or greater.
(Required: Website Posting)
- **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.

Public outreach for this proposal complies with the City Council's Public Outreach Policy. A public hearing notice for the proposed ordinance was published in the San Jose Mercury News and emailed to a list of business interests, neighborhood associations and community members. Staff has posted the hearing notice, staff report and draft ordinance on the Department's website and has been available to discuss the proposal with interested members of the public.

COORDINATION

Preparation of the proposed ordinance and this memorandum has been coordinated with the City Attorney's Office, the Department of Public Works, and the City Auditor's Office.

CEQA

Not a project.


JOSEPH HORWEDEL, Director
Department of Planning, Building and Code Enforcement

For more information please call Carol Hamilton at 408-535-7837.

Attachment:

Memorandum from Sharon W. Erickson, dated August 8, 2008
Draft Ordinance



Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Sharon W. Erickson,
City Auditor

SUBJECT: *A Review Of The Department Of
Public Works' Oversight Of The
Foxworthy Bridge Project*

DATE: August 8, 2008

SUMMARY

The Foxworthy Avenue Bridge Project was a challenging and complex project with multiple funders and stakeholders, including the City, a developer, Federal Highway Bridge Replacement and Rehabilitation (HBRR) Funds, and the Santa Clara Valley Water District. Our review of this project identified several concerns including: an overly broad General Development Plan; required off-site improvements for which findings were not clearly stated in the public record; and use of a City-Private Developer Agreement where a subdivision improvement agreement was more suitable. We also found that the public reporting requirements for City-Private Developer Agreements were not being met. We recommend that the Planning, Building and Code Enforcement Department, in cooperation with the Department of Public Works, ensure that conditions of approval in General Development Plans be sufficiently clear and detailed, that the nexus for public improvements be clearly stated in the public record, and that parameters and reporting requirements for the use of City-Private developer agreements be clarified.

INTRODUCTION

In accordance with the City Auditor's 2007-08 Audit Workplan, we have completed an audit of the Department of Public Works' oversight of the Foxworthy Avenue Bridge Project. This review is a follow-up report to *An Audit Of Department Of Transportation's Efforts To Secure Federal Highway Bridge Replacement And Rehabilitation (HBRR) Funds (2007)*, which found that the City could secure a significant amount of Federal funding and interest earnings on future City Bridge Replacement and Rehabilitation Projects. During that audit we noticed that one project, the Foxworthy Bridge, incurred significant costs even though the 1998-99 Capital Improvement Program indicated it would be built at no cost to the City. Therefore, this follow-up audit focused on the Foxworthy bridge project to understand the sequence of events that led to the City having to pay a portion of the cost of this bridge.

We conducted this audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our finding and conclusions based on our audit objectives. We limited our work to those areas specified in the Objectives, Scope, and Methodology section of this report.

The City Auditor's Office thanks the Department of Transportation, the Department of Public Works, the Department of Planning, Building and Code Enforcement, and the City Attorney's Office for their time, information, insight, and cooperation during the audit process.

BACKGROUND

In February 1998, the City Council approved Ordinance No. 25508 rezoning certain real property situated on the northeast corner of Hillsdale Avenue and Old Almaden Road, and authorizing the Developer development project called the Rubino Residential Project (Rubino Project). The City Council's rezoning approval allowed the construction of 950 residential units.

According to the Environmental Impact Report (EIR) for the Rubino Project, the Project was expected to substantially increase traffic around the old Hillsdale Avenue Bridge. The EIR suggested the construction of a new four-lane bridge extending Pearl Avenue over the Guadalupe River to minimize congestion and enhance the traffic carrying capability of streets in the proximity of the development. The General Development Plan for the Rubino Project (GDP) anticipated construction of a new bridge over the Guadalupe River located at Foxworthy Avenue (the Foxworthy Avenue Bridge) that would connect Pearl Avenue¹ with Foxworthy Avenue. As discussed on page 5 this report, language was added to the GDP to allow similar improvements as an alternative to bridge construction. The Planned Development (PD) permit for the Rubino Project also required the Developer to demolish the old Hillsdale Avenue Bridge which was upstream from the new structure.

Meanwhile, the Santa Clara Valley Water District (SCVWD) wanted to widen the channel over the Guadalupe River to improve flood control. As a result, the proposed Foxworthy Avenue Bridge Project was expanded to accommodate the size of the future channel that would run under the new bridge. The new bridge was to be 56 feet longer than the bridge that the developer was originally obligated for. In March of 1998, the Federal Highway Administration determined that the proposed relocated Foxworthy Avenue Bridge served the same general traffic corridor as the existing Hillsdale Avenue Bridge and therefore qualified as a bridge replacement project.

¹ After the completion of the Foxworthy Avenue Bridge Project, part of Pearl Avenue starting east from the Guadalupe River was renamed Foxworthy Avenue.

The construction of the Foxworthy Avenue Bridge Project was completed in November 2002.² Exhibit 1 shows the fully constructed Foxworthy Avenue Bridge.

Exhibit 1
South Side Of Foxworthy Avenue Bridge³



As a result of these and other changes, the bridge ultimately cost over \$3.5 million, or \$1.25 million more than originally estimated.⁴ The City's share of the total was \$874,289. The Federal, City, SCVWD, and Developer contributions to the Project included:

- Federal Government HBRR contribution of \$1,680,000;
- City of San Jose contribution of \$874,289;
- SCVWD contribution of \$403,926; and
- Developer contribution of \$587,000 plus an undetermined but potentially substantial amount for the completion of plans, specifications and permits related to the construction of the Project

² It should be noted that City staff was involved with all phases of the Foxworthy Avenue Bridge Project from July 1997 to August 2006.

³ Part of the extra span is for a future SCVWD channel widening project. The Rubino Project residential development is shown in the background.

⁴ On May 4, 2007, the City Auditor issued *An Audit Of Department Of Transportation's Efforts To Secure Federal Highway Bridge Replacement And Rehabilitation (HBRR) Funds*, finding that the City could secure a significant amount of Federal funding through better estimating practices and revising the grant award amount.

OBJECTIVES, SCOPE, AND METHODOLOGY

The primary objective of our 2007 audit was to evaluate whether the City secured the optimum level of HBRR Program funds to reduce the City's cost of transportation projects completed during the five-year period from July 1998 through June 2003. During that period, the City had either received Federal authorization to proceed, was constructing, or had completed six HBRR-funded projects.⁵

The objective of this follow-up audit was to evaluate whether the City secured the optimum level of funding for the Foxworthy Avenue Bridge Project, and whether the City properly approved and disclosed the requirements it placed on the developer responsible for constructing the Foxworthy Bridge Project. To meet these objectives, we:

- Interviewed Department of Public Works (DPW), Department of Transportation (DOT), and Department of Planning, Building and Code Enforcement (PBCE) staff;
- Reviewed the work that DPW and PBCE staff performed to determine if the City was securing all Developer's contributions;
- Reviewed Federal and Municipal Code regulations; and
- Met with the City Attorney's Office to clarify regulatory requirements;
- Developed and analyzed cost and reimbursement information on the completed bridge replacement project which received Federal Highway Bridge Replacement and Rehabilitation (HBRR), Santa Clara Valley Water District (SCVWD), and developer funding;
- Determined the total cost of projects by obtaining annual project cost information from the Financial Management System (FMS); and
- Compared the anticipated reimbursements to the actual Federal reimbursement, actual SCVWD reimbursement, and actual developer contribution.

⁵ Another audit objective was to assess whether the City was billing the California Department of Transportation (CALTRANS) in a timely manner to ensure it maximized its cash flow and interest earnings. Furthermore, we calculated the amount of interest revenues the City would have received if it had billed CALTRANS in a more timely manner.

FINDING I: THE CITY-PRIVATE DEVELOPER AGREEMENT PROCESS CAN BE IMPROVED

The Foxworthy Avenue Bridge Project was a challenging and complex project with multiple funders and stakeholders, including the City, a developer, Federal Highway Bridge Replacement and Rehabilitation (HBRR) Funds, and the Santa Clara Valley Water District. Our review of this project identified several concerns including: an overly broad General Development Plan; required off-site improvements for which findings were not clearly stated in the public record; and use of a City-Private Developer Agreement where a subdivision improvement agreement was more suitable. We also found that the public reporting requirements for City-Private Developer Agreements were not being met. We recommend that the Planning, Building and Code Enforcement Department, in cooperation with the Department of Public Works (DPW), ensure that conditions of approval in General Development Plans be sufficiently clear and detailed, that the nexus for public improvements be clearly stated in the public record, and that parameters and reporting requirements for the use of City-Private developer agreements be clarified.

The General Development Plan For The Rubino Project Was Overly Broad

In anticipation of securing additional funds for the Foxworthy Bridge Project, the DPW recommended adding the following new language, as underlined below, to the General Development Plan for the Rubino project (GDP) sometime after the Planning Commission recommendation for approval in January 1998, but before City Council approval in February 1998:

"Pearl Avenue Bridge. The applicant shall construct a four (4) lane bridge along Pearl Avenue across the Guadalupe River and/or a combination of alternative traffic improvements to the satisfaction of the Director of Public Works and the Santa Clara Valley Water District. Prior to the issuance of the building permit for the 701st unit, the Developer shall enter into a contract with the City of San Jose for the construction of the bridge. The developer shall be responsible for the preparation of plans, specifications and permits related to the construction of the bridge." (Emphasis added).

This new language did not specify the alternative traffic improvements that the City expected the developer to provide.

Initially, The Developer Had Been Expected To Pay For The Full Costs Of The Foxworthy Avenue Bridge Project, And The City Was Not Supposed To Incur Any Costs On The Project

The City of San Jose's 1998-99 Adopted Capital Budget shows the project as follows: *"Constructs new Pearl Avenue bridge over Guadalupe River. Supports new housing development project. Costs will be fully reimbursed by grants, SCVWD, and developer contributions."* (Emphasis added).

After the City Council approved the GDP in February 1998, the City was able to secure additional funding for the Foxworthy Avenue Bridge Project. Specifically, the Federal Government and the SCVWD agreed to provide funding. In July 1997, the City estimated the total cost of the Foxworthy Avenue Bridge Project at \$2.25 million.⁶ The HBRR share was expected to be \$1,680,000 and the SCVWD's share was expected to be \$176,400, while the developer's share would be \$393,600 or 17 percent of the total project cost. Since the Foxworthy Avenue Bridge Project ultimately cost over \$3.5 million one possibility would have been for the developer to cover the added cost. The supporting documentation for the GDP states, "*Construct a four-lane bridge along Pearl Avenue over existing Guadalupe River to the satisfaction of the Director of Public Works. ... Developer shall enter into a contract with the City of San Jose to construct the bridge. Developer is responsible for the preparation of plans & specifications and permits necessary to construct the bridge.*" (Emphasis added).

However, according to the DPW, this wording was not intended to support a scenario in which the developer would cover the difference between the \$3.5 million bridge and the \$2.25 million bridge that was originally proposed. According to the DPW, the intended requirement for the Developer was to build a bridge over the "existing" Guadalupe River. The City therefore cost shared with the SCVWD for the additional length required for the SCVWD's channel widening project.

Finally, according to the DPW, the City's effort to secure additional funding was not intended to relieve the Developer of liability for the Foxworthy Avenue Bridge Project (originally estimated at between \$850,000 to \$1 million). So the DPW recommended that the PD permit require the Developer to widen Hillsdale Avenue at an estimated cost of \$500,000, in addition to a \$210,000 cash contribution to the Foxworthy Avenue Bridge Project, the completion of the design and permitting for the bridge project, and an undetermined amount for approach work and signaling.

As The Scope And Available Funding For The Foxworthy Avenue Bridge Project Changed, Staff Used A PD Permit To Clarify The Developer's Financial Obligation

After securing Federal funding for the Foxworthy Avenue Bridge Project in June 1998, City staff established new financial terms with the Developer. Specifically, the City staff set the Developer's cost on the Foxworthy Avenue Bridge Project at \$210,000, plus the completion of plans, specifications and permits related to the construction of the bridge and an undetermined amount for the approach work and intersection signalization. In lieu of any additional cash contributions for the Foxworthy Avenue Bridge Project, the City staff required the Developer to widen a portion of Hillsdale Avenue to its ultimate configuration between Narvaez Avenue and Canoas Creek.

⁶ However, participating cost allowable for reimbursements from HBRR and SCVWD was estimated at \$2.1 million. HBRR share is 80 percent of participating cost and SCVWD is 42 percent of the remaining participating cost.

At the suggestion of DPW staff, the PBCE Director used the PD permit to administratively clarify the Developer's financial obligations on the Foxworthy Avenue Bridge Project from the obligation specified in the GDP and legislatively adopted by the City Council. The PD permit approved on July 2, 1998 specified the Developer's actual financial obligation for the Foxworthy Avenue Bridge Project. The PD permit (PD 98-03-020) condition 15, part m. states:

"Pearl Avenue Bridge⁷. The developer shall contribute \$200,000 toward the construction of Pearl Avenue bridge over Guadalupe River and \$10,000 toward the removal of existing Old Hillsdale Bridge deck prior to approval of the first final map."

The PD permit also required the Developer to improve Hillsdale Avenue to its ultimate configuration between Narvaez Avenue and Canoas Creek and required the Developer to pay an unspecified amount for construction costs for the Foxworthy Avenue Bridge Project for approach work (ultimately costing \$219,000) and contribute towards the design and construction of the traffic signal at the intersection of Old Almaden Road and Foxworthy Avenue (ultimately costing \$158,000). Including the PD permit-required payment of \$210,000, all Developer contributions relating to the Foxworthy Avenue Bridge Project totaled \$587,000. The Developer also paid an undetermined but potentially substantial amount for the completion of plans, specifications and permits related to the construction of the Foxworthy Avenue Bridge Project.

In our opinion, the DPW should not use overly broad language in the GDPs that is not clear on the scope of the improvement being agreed to by City Council. As stated in the PD permit, the DPW recommended the Developer perform additional work in addition to a cash contribution, effectively capping Developer contributions without anticipating the possibility of higher cost. In our opinion, a significant shift in the financial burden should not have been imposed without clearly and sufficiently detailing the conditions for City Council approval.

Therefore, we recommend that in the future the Planning, Building and Code Enforcement Department, in cooperation with the Department of Public Works:

Recommendation #1

Ensure that the language in the General Development Plans conditions of approval is clear and sufficiently detailed as to what conditions have been approved by the City Council, and that significant changes are returned to the City Council. (Priority 2)

⁷ The Foxworthy Avenue Bridge Project was originally called the Pearl Avenue Bridge Project.

Findings For Requiring Off-Site Improvements Should Be Clearly Stated In The Public Record

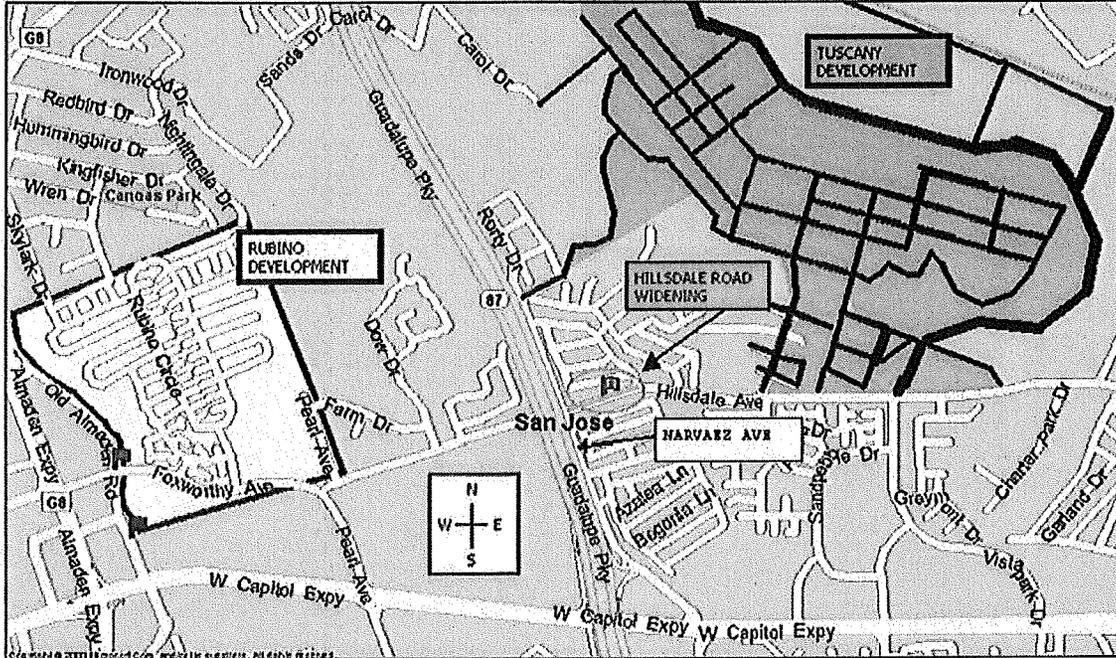
Our review of project documentation revealed that the City did not publicly state the findings for requiring the Developer to widen Hillsdale Avenue east of Narvaez Avenue as a condition in the Rubino Project PD permit. By law, the Developer is required to mitigate impacts resulting from or having a nexus to its project. State Government Code Section 66001 Section (a) part 4 states the City shall, *"Determine how there is a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed."* In other words, there must be a connection (a nexus) between the impact created by the specific project, and the conditions in the land use permits to address that impact. In this case, we were unable to find documentation addressing or requiring the widening of Hillsdale Avenue.⁸

In our opinion, the Developer may not have objected to the requirement to widen Hillsdale Avenue because that widening ultimately benefited one of their future projects. About 16 months after the City issued a PD permit for the Rubino Project, the same Developer filed a PD permit application for another otherwise unrelated project called the Tuscany Project.⁹ Exhibit 3 below shows the proximity of the Hillsdale Avenue widening to the Tuscany Project and the distance from the Rubino Project.

⁸ The Rubino Project EIR did require a traffic signal at the intersection of Hillsdale and Narvaez because the intersection is used for northbound traffic accessing Highway 87 from the Rubino Project. However, the Rubino Project EIR did not identify any traffic impacts from the Rubino Project to the east of this intersection that needed to be mitigated.

⁹ The Tuscany Project was developed in accordance with the Communications Hill Specific Plan, which the City Council had adopted in 1992. The EIR for the Tuscany Project identified Hillsdale Avenue as the primary access to the project. The Tuscany Project Supplemental EIR which was completed in 2000 and was certified by the City Council in March 2001, specifically mentioned the upcoming Rubino Project residential development requirements that were necessary and pertinent to the Tuscany Project. The EIR for the Tuscany Project stated *"as part of the Rubino residential development, the section of Hillsdale Avenue from SR 87 to Canoas Creek will be widened to four lanes and sidewalks will be constructed."*

Exhibit 2
Hillsdale Widening Project Between The Developer's Rubino And Tuscany
Developments¹⁰

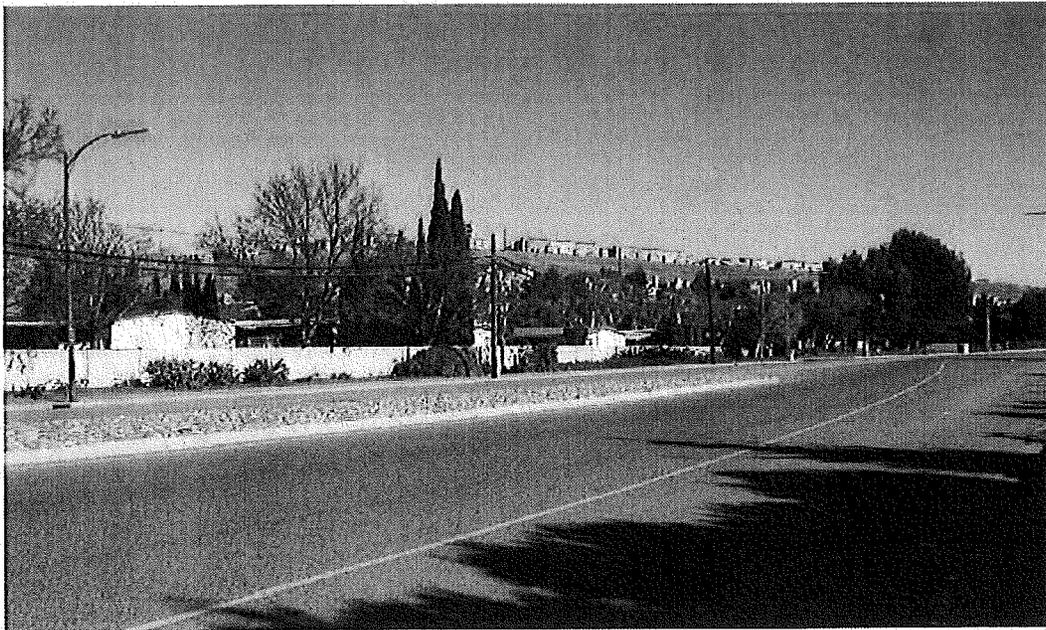


- FOXWORTHY AVENUE BRIDGE
- HILLSDALE WIDENING BETWEEN NARVAEZ AND CANOAS
- SITE OF OLD HILLSDALE AVENUE BRIDGE

¹⁰ This map is a composite from source information provided by DPW and was prepared by the City Auditor's Office.

Exhibit 4 shows the completed Hillsdale Road widening between Navarez and Canoas Creek as required in the PD permit for the Rubino Project.

Exhibit 3
**In-Lieu-Of Work: Hillsdale Road Widening Between Narvaez And Canoas Creek
With Tuscany Hills Development In Background**



In our opinion, the City should have affirmatively stated the findings requiring the widening of Hillsdale Road.

We recommend that in the future the Planning, Building and Code Enforcement Department:

Recommendation #2

Affirmatively state findings for required off-site improvements (“exactions”) when the substitution of improvements or mitigation is included in the permit. Furthermore, such findings should show a reasonable connection (“nexus”) between the impact caused by the project and the exaction. This may require the City Council to revise Title 20 of the Municipal Code. (Priority 2)

The DPW Inappropriately Used A City-Private Developer Agreement Instead Of A Subdivision Improvement Agreement To Require Certain Improvements

Section 14.04.330 of the Municipal Code authorizes the Director of Public Works to enter into an agreement with a private developer, using a "City-Private Development Agreement", to make limited public improvements incidental to the development project subject to all of the following three conditions:

- "1. The work to be done for the city under such contract or contracts is to be done by the contracting subdivider, developer, or owner in connection with the subdivision or development of any real property; and*
- 2. In the opinion of the director such work can be best or better performed, or more efficiently or expeditiously performed, or performed with less inconvenience to the public by such subdivider, developer, or owner than by the city or its contractor; and*
- 3. In the opinion of the director, the cost to the city of having the work done by such subdivider, developer, or owner will not be greater than what would have been the cost if the work was done by the city or its contractor."*

Section 14.04.390 of the Municipal Code states that work contemplated should be in the City's budget or other appropriation ordinance approved by the City Council. Also, Section 14.04.400 says there must be funds available sufficient for reimbursements to the developer. And finally, Section 14.04.500 states that the Director of Public Works shall solicit informal bids for the work to be done, to ensure the City is getting a good deal.¹¹

In our opinion, the DPW inappropriately used the City-Private developer agreement format beyond the scope authorized in the San Jose Municipal Code.¹² Specifically, the DPW used a City-Private developer agreement to contract with the Developer for the widening of Hillsdale Avenue and for the required traffic signaling, even though the Developer was required to make these improvements as a condition of the development per the Rubino Project PD permits, and therefore a subdivision improvement agreement should have been used. Title 14 of the Municipal Code states that a City-Private developer agreement should not be used as a condition of a development.¹³

¹¹ The Municipal Code authorizes the Director of Public Works to execute City-Private developer agreements on behalf of the City under certain specified conditions without going through the public bidding process. Title 14 Public Works and Improvements of the San Jose Municipal Code defines the term "City-Private developer contract" and when these contracts can and cannot be used.

¹² These contracts are commonly known in the City as 3-Dash agreements. In this review, we will refer to them as City-Private developer agreements. According to DPW management, DPW project managers occasionally use City-Private Developer Agreements when the developer or subdivider wants to construct the public improvements, or some discrete portion of the public improvements, prior to the approval of the final subdivision map even though those improvements might be of the same type that would be constructed under a subdivision improvement agreement.

¹³ Specifically, the Municipal Code reads "...that said type of contract shall not be deemed to include any contract entered into between the city and any subdivider of land whereby the subdivider, as a condition of approval of his subdivision map, is required at his own cost to make certain improvements and, upon completion, to dedicate or otherwise turn them over to the city as public improvements." (Emphasis added).

The subdivision of property, the approval process, and the agreements and bonds for related public improvements are governed by the Subdivision Map Act and Title 19 of the Municipal Code. Thus, the appropriate format for requiring those improvements is a subdivision improvement agreement as specified in Title 19 of the Municipal Code.¹⁴

We recommend that the Department of Public Works:

Recommendation # 3

Use Title 19 procedures to require off-site improvements, and develop procedures that limit use of City-Private developer agreements to insure consistency and conformity with: (1) the requirements of the land use approvals for the project and (2) all the requirements needed for Council authorization for such agreements under the circumstances specified in Title 14 of the Municipal Code. (Priority 3)

Reporting Requirements For City-Private Developer Agreements Should Be Streamlined

Title 14 of the Municipal Code includes other requirements on the use of City-Private developer agreements. Specifically, Section 14.04.490 of the Municipal Code requires the Director of Public Works to file copies of the contract with the Department of Finance within five days of executing the contract, and Section 14.04.510 of the Municipal Code requires the Director of Public Works to file a quarterly report with the City Council that includes all City-Private developer agreements.

DPW management informed us that neither of these requirements is being followed. According to the DPW staff, the City Council already receives information on all City contracts over \$100,000, and that the sheer number of City-Private Developer Agreements less than \$100,000 (including miscellaneous utility improvements, etc.) would make reporting voluminous and burdensome. In addition, the Finance Department informed us that they already have a process in place that captures the information that it needs concerning these transactions.

¹⁴ Title 19 of the San Jose Municipal Code, addresses subdivision improvement agreements. These agreements are the means by which the City contracts with developers to construct required public improvements for the project, and the agreement is required to be approved before the final subdivision map can be approved and recorded.

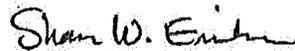
Therefore, we recommend that the Department of Public Works:

Recommendation # 4

Propose revisions to Municipal Code Sections 14.04.490 and 14.04.510 to streamline the quarterly reporting requirements for City-Private Developer Agreements, and to delete the requirement for DPW to file the City-Private developer agreements with the Department of Finance within five days of executing the agreements. (Priority 3)

CONCLUSION

Although the Foxworthy Avenue Bridge Project was constructed in November 2002, lessons learned from the handling of that project can help improve future operations by ensuring that conditions of approval be sufficiently clear and detailed, that the nexus for public improvements be clearly stated in the public record, and that parameters and reporting requirements for the use of City-Private developer agreements are clarified.



Sharon W. Erickson
City Auditor

SE:bh
0677M

cc: Katy Allen
Debra Figone
Christine Shippey
Deanna Santana
Timm Borden
Joseph Horwedel
Mike Enderby
Scott P. Johnson
Vera Todorov

Memorandum

TO: Sharon W. Erickson
City Auditor

FROM: Katy Allen

**SUBJECT: RESPONSE TO FINAL
DRAFT AUDIT OF FOXWORTHY
BRIDGE PROJECT**

DATE: July 31, 2008

Approved

Christin J. Shipley

Date

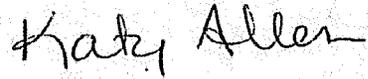
8-4-08

Thank you for the final draft report of *An Audit of the Department of Public Works' Oversight of the Foxworthy Avenue Bridge Project*. We appreciate your willingness to continue to collect relevant information and to discuss the background on this complex project. We also appreciate that you have clearly understood the one-of-a-kind complexities associated with this project that ultimately had a very successful outcome for the City, the developer, and the surrounding neighborhoods. Your recommendations for changes to our procedures are acceptable and add clarity for benefit of the Council, the developer, and the public. We concur with the summary and are providing minor additional comments to add clarity to the facts included in the report:

1. Page 8, Last paragraph and Footnote 9 – The Communication Hill Specific Plan had been discussed for many years, and as far as staff knew, the implementation could have easily drawn out at least another five or ten years, and the Hillsdale Avenue widening (an improvement desired by the community and the Council Office) would have languished. The fact that the same developer ultimately built the Tuscany development seems irrelevant and without merit as a useful lesson-learned in this report.
2. Page 11 - The Municipal Code language quoted relates to situations where the City is reimbursing the developer for improvements with City funds. This was not applicable to the Rubino project. However, we do agree with the recommendation, and in fact we have begun working with the City Attorney's Office to amend the Municipal Code to allow discreet improvements to be completed by agreement prior to the recordation of the Final Subdivision Map as secured by the subdivision improvement agreement per Title 19 of the Code.
3. Recommendations #1-3 - We agree with these recommendations
4. Page 13, Recommendation #4 - We agree with the recommendation and we intend to streamline the quarterly reports by only reporting on agreements that include City-Private Developer Agreements that include reimbursements to the developer from the City, which would also necessitate a clarification in Title 14 of the Municipal Code.

Sharon W. Erickson
RESPONSE TO FINAL DRAFT FOXWORTHY BRIDGE AUDIT
July 31, 2008
Page 2 of 2

If you have any questions regarding this memo please contact me at (408) 535-8444.



Katy Allen
Director, Public Works Department

cc Debra Figone
Christine Shippey
Joseph Horwedel
Scott P. Johnson
Mike Enderby
Vera Todorov
Timm Borden

APPENDIX A

DEFINITIONS OF PRIORITY 1, 2, AND 3 AUDIT RECOMMENDATIONS

The City of San Jose's City Policy Manual (6.1.2) defines the classification scheme applicable to audit recommendations and the appropriate corrective actions as follows:

Priority Class ¹	Description	Implementation Category	Implementation Action ³
1	Fraud or serious violations are being committed, significant fiscal or equivalent non-fiscal losses are occurring. ²	Priority	Immediate
2	A potential for incurring significant fiscal or equivalent fiscal or equivalent non-fiscal losses exists. ²	Priority	Within 60 days
3	Operation or administrative process will be improved.	General	60 days to one year

¹ The City Auditor is responsible for assigning audit recommendation priority class numbers. A recommendation which clearly fits the description for more than one priority class shall be assigned the higher number.

² For an audit recommendation to be considered related to a significant fiscal loss, it will usually be necessary for an actual loss of \$50,000 or more to be involved or for a potential loss (including unrealized revenue increases) of \$100,000 to be involved. Equivalent non-fiscal losses would include, but not be limited to, omission or commission of acts by or on behalf of the City which would be likely to expose the City to adverse criticism in the eyes of its citizens.

³ The implementation time frame indicated for each priority class is intended as a guideline for establishing implementation target dates. While prioritizing recommendations is the responsibility of the City Auditor, determining implementation dates is the responsibility of the City Administration.

ORDINANCE NO.

AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING SECTIONS 20.100.290 AND 20.100.300 OF CHAPTER 100 OF TITLE 20 OF THE SAN JOSE MUNICIPAL CODE RELATING TO RECORDATION OF LAND USE PERMITS, AND 20.120.510 OF CHAPTER 120 OF TITLE 20 OF THE SAN JOSE MUNICIPAL CODE RELATING TO ALTERNATIVE MEANS OF COMPLIANCE WITH GENERAL DEVELOPMENT PLANS

WHEREAS, pursuant to the provisions of Title 21 of the San Jose Municipal Code, the Director of Planning, Building and Code Enforcement has determined that the provisions of this ordinance do not constitute a project under the provisions of the California Environmental Quality Act of 1970, as amended.

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:

SECTION 1. Section 20.100.290 of Chapter 100 of Title 20 of the San José Municipal Code is amended to read as follows:

20.100.290 Acceptance

- A. After the time for any appeal has expired and no appeal has been filed by a qualified appellant, the Permit or other approval issued shall be deemed final, subject to the provisions of Subsection 20.100.290.D below.
- B. If the applicant fails to file a timely and valid appeal of the Permit or other approval within the applicable appeal period, such inaction by the applicant shall be deemed to constitute all of the following on behalf of the applicant:
 - 1. Acceptance of the Permit or approval by the applicant; and
 - 2. Agreement by the applicant to be bound by, to comply with, and to do all things required of or by the applicant pursuant to all of the terms, provisions,

and conditions of the Permit or other approval and the provisions of this Title applicable to such Permit or other approval.

- C. If the applicant is a qualified tenant, such tenant shall, and it shall be the responsibility of such tenant to, inform the property owner(s) of the issuance of the Permit or other approval, together with the terms, conditions and provisions of such Permit or other approval, including without limitation provisions contained in such Permit or approval that require dedication of land, restrictive covenants or other commitments beyond the scope of a tenancy.
- D. No Permit or other approval shall have any force or effect prior to, and a Permit shall be deemed effective on, the date that all of the following have occurred:
1. The elapse of the appeal period applicable to that Permit; and
 2. The fulfillment of all conditions precedent to the effectiveness of that Permit as set forth in the Permit; and
 3. The payment to City in full of all fees applicable to that Permit.

SECTION 2. Section 20.100.300 of Chapter 100 of Title 20 of the San José Municipal Code is amended to read as follows:

20.100.300 Recordation

- A. Within 30 days of the Permit or other approval becoming effective, in accordance with the provisions of Section 20.100.290, fulfillment of all conditions precedent to release pursuant to this Chapter and the payment of fees, a certificate identifying the Permit or other approval shall be recorded by the City. The Permit or other approval and the rights and restrictions therein shall run with the land to the fullest extent allowed by law.
- B. If any Permit or other approval is revoked after a hearing on an Order to Show Cause pursuant to this Chapter, a Certificate of Revocation shall be recorded with the County Recorder's Office.

SECTION 3. Section 20.120.510 of Chapter 120 of Title 20 of the San José Municipal Code is amended to read as follows:

20.120.510 General development plan requirements.

- A. The planned development district shall be individually designed to meet the needs of the territory so zoned. The uses and requirements of the planned development district shall be reflected in the general development plan which is adopted as part of the planned development zoning ordinance. The general development plan shall include, when applicable:
1. All public and private use areas appropriately mapped, clearly identified, and shaded, including:
 - a. All permitted land uses, including unit type (single-family detached, single-family attached, multiple-family, etc.) and size for residential uses.
 - b. Landscape areas, common open space, private open space, and public open space.
 - c. All public streets, private streets and driveways within the proposed PD zone, labeled "public street," "private street," or "driveway" with total right-of-way width dimensioned.
 - d. All public and private streets adjacent to the proposed planned development zone, labeled "public" or "private" and showing dimension from street centerline to ultimate right-of-way edge.
 - e. All public and private easements, including parking, access, utility, and pedestrian easements showing purpose and beneficiary of each easement.
 2. Zoning regulations which include and specify:
 - a. Permitted, conditional, and special use allowances.
 - b. Development standards, including:
 - i. All setbacks,
 - ii. Building heights (stories and feet),
 - iii. Parking (number of spaces and ratios),
 - iv. Minimum lot size and dimensions, if applicable.
 - c. Where landscaping is to serve a particular function, such as a screen or buffer, the particular function and landscape concept shall be

identified. Where landscaping is proposed in the public right-of-way, the maintenance responsibility shall be specified.

- d. Clear descriptions of any required off-site work, including street and infrastructure improvements.
 - e. Noise attenuation requirements, if any.
 - f. Environmental mitigation as required by the environmental clearance.
 - g. Any other appropriate conditions of approval.
3. Additional graphic (i.e. mapped) information as applicable, including:
- a. The location of the closest buildings, both existing and approved, on adjacent properties.
 - b. All existing structures which are to be retained.
 - c. All significant existing natural features, including:
 - d. "Ordinance size" trees (18" diameter or larger) and any smaller trees which are significant by virtue of their species, location and/or significance to the site due to the limited amount of existing vegetation.
 - e. Creeks and waterways.
 - f. Rock outcroppings.
 - g. The location and required height of sound walls.
 - h. Topography shown, sufficient to describe terrain, including top of bank, where site is adjacent to creek or has an existing overall slope of more than two percent.
 - i. Proposed grading if any cut or fill slope exceeds eighteen (18) inches.
4. Building elevations which illustrate the intended architectural style and character and the size, shape, materials and general detailing of buildings.

B. The director and the planning commission may recommend and/or the city council may adopt conditions of approval that include alternative means of compliance for a specific project impact where each alternative adequately addresses the same specific project impact.

BC. Nothing herein shall preclude the director, the planning commission or the city council from requiring any additional information to be shown on the general development plan.

RD:VMT
10/16/2009

D. Any change to an adopted general development plan shall require the filing and consideration of a petition in accordance with the provisions of this chapter 20.120.

PASSED FOR PUBLICATION of title this _____ day of _____, 2009, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

CHUCK REED
Mayor

ATTEST:

LEE PRICE, MMC
City Clerk

T-12464.0011597028

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Council Agenda:
Item Number:

DRAFT--Contact the Office of the City Clerk at (408)535-1260 or CityClerk@sanjoseca.gov for final document.