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CITY OF SCOTTS VALLEY

VIA EMAIL AND U.S. MAIL

Taylor Bateman, Principal Planner
City of Scotts Valley, Planning Department
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Re: Comments on Mitigated Negative Declaration for The Terrace at Scotts Valley
Planned Development

Dear Mr. Bateman:

This law firm represents Bill and Sherilyn Jager regarding the above referenced project. The Jagers have multiple concerns about the proposed approval of the Mitigated Negative Declaration for The Terrace at Scotts Valley ("Proposed Project"). The Initial Study found that while the Proposed Project could have a significant effect on the environment, all significant and potentially significant effects have been mitigated. (Pg. 43 of the Initial Study).

As a preliminary matter, the California Environmental Quality Act ("CEQA") is designed to favor the preparation of an Environmental Impact Report ("EIR"). Specifically, preparation of an EIR rather than a negative declaration is required if there is "substantial evidence" in the record of proceedings that supports a "fair argument" that a project "may" have a significant effect on the environment. (See, Pub. Resources Code §§ 21082.2(a), 21100, 21151; 14 Cal. Code Regs. § 15064(f)(1); *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75; *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 111-12).

"May" in this context means a reasonable possibility. (See, *League for Protection of Oakland's Architectural and Historic Resources v. City of Oakland* ("City of Oakland") (1997) 52 Cal.App.4th 896, 904-905; *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 309). And significant effect "on the environment means a substantial, or potentially substantial adverse change in the environment." (*Laurel Heights Improvement Association v. Regents of the University of California* (1993) 6 Cal.4th 1112, 1123-26).

Courts have repeatedly affirmed that the fair argument standard is a "low threshold test." (*The Pocket Protectors v. City of Sacramento* ("Pocket Protectors") (2004) 124 Cal.App.4th 903,

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928). Evidence supporting a fair argument of any single potentially significant environmental impact triggers preparation of an EIR regardless of whether the record contains contrary evidence in support of an agency's decision. (*See, City of Oakland, supra*, 52 Cal.App.4th 896).

As demonstrated below, there is substantial evidence in the Initial Study to support a fair argument that the Proposed Project may have a significant effect on the environment. The Initial Study identifies several environmental features that may be significantly affected by the Proposed Project. It purports to address these issues through proposed mitigation measures to justify its request for a Mitigated Negative Declaration Approval. However, even with the mitigation measures proposed there is nonetheless still a reasonable possibility that the Proposed Project will have a significant effect on the environment. As such, preparation of an EIR, rather than a Negative Declaration, is required.

I. Air Quality

The Initial Study discussed that “[c]onstruction of the project, as proposed, requires excavation over 90% of the site. According to project plans cut grading will total 7,951 cubic yards and 1,606 cubic yards of this material will be used for fill grading. This grading will occur as close as 24 feet from the rear yards of the Oak Creek Estates residential neighborhood to the east and about 95 feet from middle school and commercial uses to the west. Grading activities could cause substantial dust accumulation in this area. Similarly, airborne dust could reduce visual abilities of motorists, bicyclists and pedestrians using the proximate segment of Scotts Valley Drive and create safety problems. The amount of dust generation from project construction may cause air quality impacts to surrounding areas. This impact can be mitigated by implementing standard best management practices during grading to minimize dust generation from vehicular equipment and wind.” (Pg. 11 of the Initial Study).

However, in its mitigation discussion for this issue, the Initial Study simply requires “the grading contractor to implement best management practices for dust control, including watering down exposed earth surface each non-rainfall day at intervals that attenuate dust problems.” (Pg. 11 of the Initial Study). Absent a thorough discussion of what best management practices entail, it is unclear what practices the Initial Study envisions to mitigate dust generation to a level that would be less than significant. Simply utilizing the phrase “best management practices” does not by itself provide the public with a sufficient discussion of what these practices are and how they best achieve mitigation goals.

II. Biological Resources

The Initial Study also identifies the significant impact the Proposed Project would have on (1) Special Statute Species-birds: raptors and migratory passerines; (2) several mammals listed as “species of special concern” by the California Department of Fish and Wildlife; and, (3) an

endangered species as designated by the U.S. Fish and Wildlife Service. In addition, the Proposed Project will remove 56 trees that are considered a protected tree under Scotts Valley's Municipal Code concerning Tree Protection.

The mitigation measure proposes to compensate for the loss of about two acres of habitat for the federally endangered Mt. Hermon June beetle by "complet[ing] the HCP [Habitat Conservation Plan]/Incidental Take Permit process with the USFWS as specified by Section 10 of the Endangered Species Act and continue to employ a qualified entomologist to implement the approved HCP." (Pg. 15 of the Initial Study). Completing the HCP/Incidental Take Permit is a requirement of Section 10 of the Endangered Species Act where an action that harms a federally endangered species is set to occur, as it is here. However, it is the applicant that drives the development of the HCP. As such, absent any description in the Initial Study regarding what the HCP actually entails, it is impossible for our clients, and the public, to discern whether the HCP will in fact mitigate the loss of habitat for the Mt. Hermon June Beetle.

Finally, the Proposed Project unequivocally conflicts with local policies which aim to protect biological resources, especially protected trees, as defined in the Scotts Valley Municipal Code. The Initial Study acknowledges that "[t]he Majority of the Parcel is forest habitat. Part of the forest is dominated by Ponderosa pine (*Pinus ponderosa*) and a larger part dominated by coast live oak (*Quercus agrifolia*)." (Pg. 15 of the Initial Study). The tree resource evaluation/construction impact assessment prepared by City arborist James P. Allen & Associates "states that a total of 71 trees/tree groups will be removed by the project. Of this total, 56 trees that meet the criteria as trees protected by the [Scotts Valley Municipal Code] will be removed." (*Id.*).

Section 17.44.080 of the Scotts Valley Municipal Code (Tree Protection Code) explicitly acknowledges that Scotts Valley "is forested with several varieties of native and significant trees which contribute greatly to the value of the land in the city and the preservation of which is necessary for the health, safety and welfare of the citizens of the city." (Municipal Code § 17.44.080(A)). Further, the Tree Protection Code affirmatively requires preservation of "significant, healthy trees when development of property is proposed." (*Id.*) Specifically, when there is a request to remove protected trees as part of a development application, such as in this instance, the Tree Protection Code directs the development review process to "preserve significantly sized trees that are important to the overall landscape of an area." (Municipal Code § 17.44.080(E)(4)).

The Proposed Project does the opposite. The Proposed Project aims to cut down 71 trees, of which 56 are protected under the Tree Protection Code. The main mitigation measure proposed to compensate for this tremendous loss of protected trees is to plant new trees on-site or at another site. In the first instance, it is difficult to fathom that when the Proposed Project itself aims to remove 71 trees total for the purposes of development, there would be any identifiable area remaining on site to plant new trees at a ratio that would mitigate the loss.

Further, this proposal does not mitigate the proposed loss of this particular protected class of trees. The mitigation measure proposes to plant new trees, however, the majority of the trees to be removed by the Proposed Project are protected trees, many of which are mature trees with trunk diameters of “8 inches or greater and other trees with 8 inch or greater trunk diameters located on a hillside with a slope exceeding 20%.” (Pg. 15 of the Initial Study). This is an inadequate mitigation for the loss of protected and mature trees. Moreover, the Mitigated Negative Declaration’s failure to address the Proposed Project’s inconsistency with the Tree Protection Code is a direct violation of CEQA. (*Pocket Protectors* (2004) 124 Cal.App.4th 903, 929-31).

III. Geology

The Initial Study identifies that the Proposed Project requires grading over “most of the 2.6 acre site area.” (Pg. 19 of the Initial Study). As such, this will generate a high likelihood for accelerated erosion to occur, resulting “in the loss of valuable top soil and damage projects improvement.” (*Id.*) The Initial Study’s proposed mitigation measure is to have a qualified professional prepare an erosion control plan for review and approval prior to the approval of the final subdivision map. (Pg. 21 of the Initial Study). According to the proposed chronology of the Initial Study, the way to mitigate the high likelihood for accelerated erosion is to accept the fact that this accelerated erosion will occur, but to manage the situation from the back end, right before the approval of the final subdivision map, but after the Proposed Project is already set in motion. This violates CEQA. The significance of environmental impacts may not be deferred to a later date. (*Sundstrom v. County of Mendocino, supra*, (1988) 202 Cal.App.3d 307). By deferring environmental assessment to a future date, the conditions run counter to that policy of CEQA which requires environmental review at the earliest feasible stage in the planning process. (*Id.*; *see also*, Pub. Resources Code § 21003.1; *No Oil, Inc. v. City of Los Angeles, supra*, 13 Cal.3d 68, 84).

IV. Hydrology and Water Quality

The Proposed Project’s “site coverage of at least 42,227 square feet (.97) acre with structures and surfaced areas for access and parking and related improvements will substantially reduce the area available for groundwater recharge on the property.” (Pgs. 26-27 of the Initial Study). The Initial Study concludes that “[t]his is a significant cumulative impact on the Santa Margarita aquifer and the City’s water supply.” (*Id.*) The mitigation measure proposes to compensate for the loss of groundwater recharge area, by having the project applicant install drainage design to promote infiltration of collected surface drainage. However, this measure would only be successful with proper maintenance and funding for maintenance. While the measure proposes a homeowners maintenance agreement and homeowners funding agreement to be presented to the City for review and approval, it is uncertain whether the City would have any authority to enforce the provisions of the homeowners agreement requiring drainage maintenance, monitoring, and

adequate funding. As such, the mitigation measure is too attenuated to ensure that the significant effect on the environment, loss of groundwater recharge, will in fact be mitigated as written.

V. Transportation and Traffic

As part of the Initial Study, a Traffic Analysis Report was prepared by W-Trans. The W-Trans Report concludes the Proposed Project will generate “139 average daily trips to Scotts Valley Drive and connecting streets. In addition, the project will add trips during peak traffic periods as follows: 11 new trips during A.M. peak time (7-9A.M.); and 12 new trips during the P.M. peak time (4:00 – 6:00P.M.).” (Pg. 37 of the Initial Study). Given that an estimated 139 trips will be added daily to Scotts Valley Drive, how the Report concluded that only 23 additional peak hour trips would be added, eludes us.

Furthermore, the Initial Study concludes that “[i]t is anticipated the project will generate an average of 139 vehicle trips/day which is the normal trip generation for a residential project of this size. As such, the impacts will not be significant.” (Pg. 10 of the Initial Study). This statement mischaracterizes the standard against which an environmental impact should be measured. An Initial Study should identify a Project’s potential for significant effects on the environment, not assess whether a Project’s impacts are standard for a project of its size. Given this erroneous framework, it is difficult to discern whether the Project’s Traffic Analysis does in fact have a significant effect on existing traffic patterns.

The Initial Study has flagged many environmental issues of concern. As explained above, many of the mitigation measures proposed for the issues which could have a significant effect on the environment lack substance. Proposals to implement “best management practices” or “Habitat Conservation Plans” without descriptions of what these practices or Plans entail are mere *ipse dixit* and should not be considered as sufficient mitigation measures. Furthermore, the Initial Study approves of demolishing 56 trees that are protected under Scotts Valley’s own municipal code as long as new trees are planted elsewhere to make up for it. But the very reason why Scotts Valley has a law protecting specific category of trees, such as the 56 slated for removal under the Proposed Project, is because the City recognizes the need to preserve native and significant trees even in the context of construction of new development projects. This tree removal provision of the Initial Study by itself is enough to trigger potential significant environmental impact.

In conclusion, there is a “fair argument” that the Project Proposal has several potential significant environmental impacts. The mitigation measures identified for these potential impacts are not adequate for the aforementioned reasons. As such, the Planning Department for the City of Scotts Valley should not approve the Mitigated Negative Declaration and instead prepare a full EIR, as is required under CEQA.

Pursuant to Public Resources Code section 21167(f), I am requesting that the City forward a Notice of Determination to me if and when the Project is finally approved. That section provides:

If a person has made a written request to the public agency for a copy of the notice specified in Section 21108 or 21152 prior to the date on which the agency approves or determines to carry out the project, then not later than five days from the date of the agency's action, the public agency shall deposit a written copy of the notice addressed to that person in the United States mail, first class postage prepaid.

Thank you for your consideration of these comments.

Very truly yours,
WITTWER PARKIN LLP

William P. Parkin by *Jonathan Wittwer*
William P. Parkin

cc: clients