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California land use & environmental law; urban and regional planning policy & advocacy for a just and sustainable future

March 20, 2013

Roger Trout, Director
El Dorado County Development Services Department
2850 Fairlane Court
Placerville, CA 95667

Re: San Stino EIR process

Dear Mr. Trout:

Please be advised that I represent the Shingle Springs Community Alliance and No San Stino, two grass-roots unincorporated associations of Shingle Springs residents. I have reviewed the letter dated March 8, 2013 from Pierre Rivas of your department and a letter dated March 13, 2013 from Joel Korotkin on behalf of San Stino, LP, which together raise significant questions regarding the legal sufficiency of the environmental review process for the San Stino project going forward. These questions are best resolved prior to the scoping meeting now scheduled for March 21, 2013, if possible – or if not, before the EIR preparation begins.

Mr. Rivas' letter to San Stino indicates that although the Board of Supervisors decided on February 26, 2013 not to contract with the developer and LSA Associates to prepare the Environmental Impact Report (EIR) for the project, the County would proceed with processing the San Stino project applications and conduct the scoping meeting as scheduled. Mr. Rivas stated that in light of the Board of Supervisors decision, the developer had three options: 1) to contract directly with LSA Associates for the preparation of the EIR, 2) select another consultant from the list of County-approved list of environmental consultants, or 3) amend the project so that the Board could consider a new consultant agreement for a different project. Has Mr. Korotkin responded, and if so, which of the three options did he select under which the County will be conducting the scoping meeting? Is there some mechanism for the County to recoup the cost of staff time involved with continuing to process the application by conducting the scoping meeting and taking in the comments received in response to the NOP in the absence of the contract rejected by the Board of Supervisors?

Mr. Korotkin's letter addressed to Supervisor Nutting did not specifically address the options put forward in Mr. Rivas' letter. Instead, Mr. Korotkin says that, "we felt that the

environmental review process was the place to address the remaining concerns [of the Shingle Springs community] . . . [h]owever, after listening to community comments and after meetings with community members, it is clear that we need to take a step back." He does not explain what "stepping back" means. Mr. Korotkin goes on to outline the developer's intention to evaluate the comments received in response to the Notice of Preparation after the March 29 deadline for submission, and then conduct an outreach effort to meet with the community to determine the best way to move forward with the San Stino project.

Mr. Korotkin's position reveals a fundamental misunderstanding and potential misapplication of the CEQA environmental review process. CEQA does not contemplate that the EIR process will accommodate planning charrettes to alter the design of a proposed project. The essential starting point for meaningful environmental review is an accurate, comprehensive and reasonably detailed project description that remains consistent throughout.

> "An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR. . . . [a] curtailed, enigmatic or unstable project description draws a red herring across the path of public input." (*County of Inyo v. City of Los Angeles* (3rd Dist. 1977) 71 Cal.App.3d 185, 193.

It is not possible to evaluate a moving target, where the project is one thing today and another tomorrow after the developer redesigns the project or continues to add elements to the project to accommodate or appease one particular interest group or another. If Mr. Korotkin truly intends to significantly change the project as a result of additional community input, he should complete that process first and then re-start the EIR process with a new project description.

There is room for the CEQA process to result in project revisions to reduce the severity of environmental effects through,

> ". . . an interactive process of assessment of environmental impacts and responsive project modifications which must be genuine. It must be open to the public, premised upon a full and meaningful disclosure of the scope, purposes and effect of a *consistently described project*, with flexibility to respond to unforeseen insights that emerge from the process. In short, a project must be open for public discussion and subject to agency modification during the CEQA process." (*Concerned Citizens of Costa Mesa, Inc. v 32nd District Agricultural Association* (1986) 42 Cal.3d. 929, 936.)

In short, a project description is not a straight-jacket that will prevent a project from evolving in the course of the EIR process, but it is a touchstone on which the entire process is built.

While inclusion of project alternatives is a required and effective analytical component of an EIR, it is not intended as a Chinese menu approach to project planning, with an ever changing project description comprised of one from column (or project alternative) A and one from column B. Evaluation of the feasibility of project alternatives is based to a significant degree on the extent to which they achieve the developer-defined project objectives. It is also true that a project with a given project description may be significantly altered as the result of identifying significant environmental effects of the project as described, and developing mitigation measures intended to reduce those effects to a less than significant level.

However, CEQA does not guarantee that measures to avoid or mitigate environmental effects will ultimately be accepted by the developer or imposed as conditions of approval by the Board of Supervisors because of the potential for the project to be approved substantially as proposed. The Board may ultimately find that the avoidance or mitigation measures are not feasible, or that there are social or economic overriding considerations which justify project approval notwithstanding significant unavoidable or unmitigated environmental effects – once again measured in large part by the developer-defined project objectives.

The only way that my clients and the rest of the Shingle Springs community can be assured that the project as currently proposed will not go forward substantially as currently proposed is if the developer withdraws the current application, or the Board of Supervisors acts on my clients' request to immediately deny the project. Why should the community invest its time and resources in a process that ultimately proves meaningless because the developer can line up three votes for approval regardless of the project's impacts? In order to restore trust in the planning and environmental review process it would be best to start with a clean slate.

Events have reached the current impasse because the developer elected to pursue a community involvement strategy that was selective and secretive – rather than being broadly inclusive and transparent. Promises have been made in closed-door negotiations with factions of homeowners' associations that may not be legally possible to keep (such as gating a community when the covenants, conditions and restrictions for that community may not provide for limiting access). The result is divisive, creating controversy and dissention within the existing community that did not exist before the project proponents began to negotiate with selective representatives who have no authority to bind other residents within the community, in exchange for promises not to oppose the project as proposed.

A road design is proposed for Via Livenza's extension north of Mother Lode Road to connect with Shingle Springs Road that incorporates a private road, Maggie Lane, without adequate notice and agreement by all of the property owners who collectively own at least an easement right to Maggie Lane – raising the distinct probability that the only means to implement the proposed design will be by the County's exercise of its eminent domain powers. Rather than continue to aggravate the dissention within the community by encouraging the developer to continue with its perhaps well-meaning but ill-advised approach to community involvement, the County should restore the integrity of the process by recommending that the developer start over. If the developer will not voluntarily follow this advice, the Board of Supervisors has the power to require the developer to do so by voting now to deny the project.

Mr. Korotkin's letter outlines the developer's reliance on a substantial list of prior studies of the project site. The LSA Associates scope of work includes additional studies needed to validate the previous studies that have not been vetted by the public through the EIR process. Among the items not included on the list are legally-required essential baseline studies delineating oak woodlands on the site and the state-mandated long-term water supply study for residential projects of over 500 units.

I understand that the El Dorado Irrigation District (EID) estimates that it has capacity to provide only 2,000 Equivalent Dwelling Units for the entire western slope of El Dorado County other than El Dorado Hills. EID does not commit to provide connections until the building permit stage, and does so on a first-come, first-served basis. Does the County believe it is prudent or desirable to consider a project that would either consume over half of the available public water supply for most of the County, or create a huge draw-down of ground water if on-site wells were used to make up any deficiency in the public supply? Should either of these sources prove inadequate, the project will die of thirst, perhaps only partially completed. Water supply is not just a project effect, but a critical component of the project itself. A detailed description of the water supply plan for the project is missing – without which the EIR will be inadequate.

I understand from speaking with Supervisor Nutting that County Counsel has expressed concern about potential litigation by the developer or the project landowners if the Board acted preemptively to deny the project without fully exhausting the normal project review process. While I do not presume to offer legal advice to the Board in place of County Counsel, perhaps I can offer an additional perspective for County Counsel's and your consideration.

Our justice system allows filing of non-meritorious claims and trusts that the litigation process will sort the wheat from the chaff, although not without considerable expense and diversion of staff and elected time in exhausting that process. The risk of non-meritorious but costly litigation must be measured not in a vacuum, but against the expense and waste of the community's, your staff's and elected officials' time in continuing to process an application that should have little or no hope of being approved as proposed. The California Supreme Court has explicitly recognized the authority under CEQA for governing bodies to intervene at an early stage and short-circuit the process. (Sunset Sky Ranch Pilots Association v. County of Sacramento (2009) 47 Cal.4th 902). By not acting to deny the project as proposed, the Board sends a message to the developer and to the community that there is hope for the developer and an ongoing threat to the community that the project may be approved substantially as proposed. Is that the message that your department and ultimately the Board of Supervisors wish to send?

It must be noted that the San Stino project application is predicated on both a general plan amendment and a zoning ordinance amendment before the tentative subdivision map application can be considered. In land use law, the adoption or amendment of a general plan and the amendment of a zoning ordinance are classified as legislative acts to which the courts grant great deference and broad discretion to governing bodies as to how those decisions are made, so long as statutory procedural and content element requirements are met. (*Consolidated Rock Products Co. v. City of Los Angeles* (1962) 57 Cal.2d 515, 522-523; *Associated Home Builders, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 601; *Yost v. Thomas* (1984) 36 Cal.3d 561, 570; *Santa Monica Beach, Ltd. v. Superior* Court (1999) 19 Cal.4th 952, 962-963). Legislative officials are also absolutely immune from Federal Civil Rights Act (42 U.S.C. § 1983) liability for actions taken in their legislative capacity. (*Tenney v. Brandhove* (1951) 341 U.S. 367, 376-377; *Bogan v. Scott-Harris* (1998 523 U.S. 44, 54; *Cinevision Corp. v. City of Burbank* (9th Cir. 1984) 745 F.2d 560, 577.) As a leading treatise on California land use law[1] summarizes:

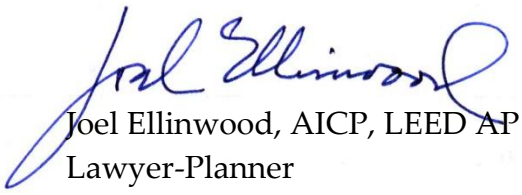
> "Courts grant a high degree of deference to the local agency and allow decision makers to vote based on predispositions, campaign promises made before the matter has come to the agency and *ex parte* communicatons and information. This is because great leeway is required when a [governing body] is establishing local policy and addressing political issues."

[1] Cecily Talbert Barclay, *Curtin's California Land Use and Planning Law* (Solano Press, 29th ed. 2009) p. 554.

In contrast, in considering a tentative map application that is consistent with the adopted general plan and zoning ordinance, the Board of Supervisors acts in a "quasi-adjudicatory" capacity to which higher standards of impartiality and other elements of due process laid out in the statutes and decisional law will apply, explicitly including "a fair hearing". (*Topanga Ass'n for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514; *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612; California Code of Civil Procedure § 1094.5 (b).) Thus, the Board of Supervisors is in the strongest position to defend litigation by the applicants (and pre-empt litigation by project opponents after the project is ultimately approved in some form) by exercising its legislative authority before this project goes any further in the environmental review process. On behalf of my clients I reiterate their request that the Board of Supervisors take the necessary steps to bring the EIR process for the San Stino project to an early end by immediately acting to deny the general plan and zoning ordinance amendments for the project as currently proposed.

If the developer wishes to then follow its stated intention to consult with the community and redesign the project to address community concerns, it would certainly be free to do so. For their part, my clients would be much more willing to meet and work with the developer as part of a broad, inclusive public planning process to craft a development plan for the Scheiber, Zweick and White properties that is consistent with the current general plan that the community can accept. In such an event, I recommend that your department strongly encourage the developer to seek the assistance of a competent and experienced land planning firms with demonstrated expertise in community involvement in the planning process before the developer embarks on that exercise. I can personally recommend for the developer's consideration several that I have worked with on highly controversial projects in the past and that are highly regarded by other jurisdictions in the region.

Very truly yours,



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cc: Joel Korotkin, San Stino Limited Partnership
Members of the El Dorado County Board of Supervisors
Edward Knapp, County Counsel