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December 5, 2019

VIA U.S. MAIL AND EMAIL

County of Lake
Community Development Department
Planning Division
Attn: Mark Roberts - Planner
255 N. Forbes Street
Lakeport, CA 95453
Tel: (707) 263-2221
Email: mark.roberts@lakecountyca.gov

Re: Record ID - AB 19-07: Appeal of the Valley Oaks Grocery Outlet Project; Response in Support of KIMCO Development, Inc. and Valley Oaks Land & Development, Inc. to the Appeal to the Board of Supervisors filed on or about October 31, 2019 by Appellant Lake County Local to the Approval of Major Use Permit UP 19-09;
Project: Valley Oaks Grocery Outlet, located at 18765 Hartmann Road and 18196 and 18426 Hwy 29, Middletown, California 95467;
Project Approval Date: October 24, 2019.

Dear Mr. Roberts:

Our office represents KIMCO Development, Inc. and Valley Oaks Land & Development, Inc. (collectively, "Owner") regarding approval of the specific subplan known as the Valley Oaks Grocery Outlet (the "Subproject"). We write in response to the Appeal to the Board of Supervisors filed on behalf of Lake County Local on or about October 31, 2019, regarding the decision by the Lake County Planning Commission pursuant to a noticed public hearing on October 24, 2019 to approve Major Use Permit UP 19-09 subject to conditions.

Introduction

Lake County Local ("Appellant") appeals the decision of the Lake County Planning Commission (the "Commission") for reasons relating to notice of hearing, community planning, and alleged environmental impacts of the Subproject. Many of Appellant's arguments relate to the Valley

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Oaks Planned Development Project (the "Project") as a whole, and not the specific Subproject, at issue in UP 19-09.

On June 25, 2015, the Commission recommended approval of the Project and certified the Final EIR for the Project (the "EIR"). The Lake County Board of Supervisors (the "Board") approved the Project by a 5-0 vote on August 25, 2015. The Commission subsequently approved the Specific Plan of Development, UP 07-05, with a Vesting Tentative Subdivision Map. The Project, as approved, proposed a Commercial Development Area of approximately 120,000 Sq. Ft., consisting of retail shops, grocery stores, etc. The Subproject, which concerns the development of a Grocery Outlet retail grocery store, is located within the Commercial Development Area of the Project which was specifically analyzed pursuant to UP 07-05. The Subproject is only "the 1st Specific Subplan of Development" for the Project. The Subproject is not a new project, merely the first phase in the Project and consistent with the Project analyzed by the EIR.

Appellants now inappropriately attempts to reopen the 2015 approval of the Project, UP 07-05, and the EIR through this appeal of the Subproject approval. As discussed below, the allegations and positions taken by Appellant are frivolous, lack merit, and do not apply to UP 19-09.

1. The Subproject is Not a Substantial Change from the Project Subject to the EIR and the Approval of UP 19-09 Complies with CEQA.

The Subproject is located within the footprint of the Commercial Development Area of the Project as approved by the Commission and the Board in 2015, to which was added 2.6 acres of adjacent land to be developed into an access road for the development. The only changes to the Project by virtue of the Subproject identified by Appellant relate to the very recent construction of a roundabout at the intersection of Highway 29 and Hartmann Road and the reconfiguration of Hartmann Road along the Commercial Development Area by Caltrans. The changes identified by Appellant are: (1) the construction of a new access road from Hartmann Road to the development and an associated left-turn lane for traffic mitigation purposes; (2) an amendment to Condition #33 of UP 07-05 regarding signage and which is specific to the Subproject; and (3) the increase of impervious surface area as a result of the access road.

The UP 19-09 Staff Report correctly considered these small deviations from the Project and determined that they do not constitute a "substantial change" as to require recirculation of, or revisions to, the EIR. The Staff Report also found that these changes were examined by the EIR and are appropriately addressed through the adopted Mitigation Measures as incorporated into the Conditions of Approval for UP 19-09. "As mitigated, the project will not result in any significant adverse environmental impacts" and "[a] mitigated negative declaration has been adopted." (*See* UP 19-09 Community Development Staff Report prepared by Byron Turner ("UP 19-09 Staff

Report").) The Commission agreed with the Staff Report and, accordingly, made a determination that the Subproject "will not result in any significant environmental impacts with the recommended mitigations incorporated" and adopted a "mitigated negative declaration." (Lake County Planning Department Action Sheet dated November 13, 2019 (the "Action Sheet").) The mitigated negative declaration adopted by the Commission complies with the requisite findings for approval of the Subproject under 14 CCR 15092(b).

A subsequent EIR shall not be required unless substantial changes are proposed or will occur due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects as to require major revisions of the previous EIR. (14 CCR § 15162(a).) Where no substantial change has occurred to the project, the agency may prepare an addendum to the EIR to evaluate changes to the project. (14 CCR § 15164.) Here, the changes are analyzed by the Addendum to the EIR (the "Addendum"), which was approved by the Commission in conjunction with UP 19-09, and also set forth its findings in the Action Sheet in compliance with CEQA.

The approval of UP 19-09 by the Commission, and any approved variances therein, do not substantially change the larger Project analyzed by the EIR. Neither the zoning nor the character of the space is changed by UP 19-09. The Board approved the space for commercial retail, and it will be used for commercial retail. UP 19-09 does not contain a proposal to change any residential area to that of commercial. The EIR is comprehensive, and thoroughly analyzed the commercial development proposed by the Subproject. The Project, as analyzed by the EIR, was proposed as a "phased development" and took into consideration the cumulative impact of subsequent subprojects within the Project. (EIR 3.0-4, 4.0. 5.0, 7.0.) The Project objectives were formulated to permit design flexibility based on changes in the community and commercial needs. (EIR 3.0-2.) The EIR specifically contemplated the construction of on-site and *off-site* paved access roads, driveways, and supporting parking areas with a comprehensive analysis of the environmental impact and mitigation measures. (EIR 2.0, 3.0-4). While the access road will disturb approximately 2.6 acres of land "off-site" from what was proposed in the Project, the EIR contemplates this design flexibility. The development of the commercial parcels, and the phases of development, were also proposed to be dependent on market demand. (EIR 3.0-4.) Accordingly, any decision by Owner to develop the Commercial Development Area before development of the residential area does not constitute a "substantial change."

The implementing CEQA regulations, 15 CCR §§ 15161 et seq., limit the circumstances under which a subsequent or supplemental EIR must be prepared. "The event of a change in a project is not an occasion to revisit environmental concerns laid to rest in the original analysis." (*Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 949.) Great deference should be given to the determination of the local agency regarding the

environmental impact of changes to a project. (*Latinos Unidos de Napa v. City of Napa* (2013) 221 Cal.App.4th 192, 201-202.) The Addendum is the proper means to review and address the "changes" of the Subproject identified by Appellants. (*See e.g., Save Our Heritage Organisation v. City of San Diego* (2018) 28 Cal.App.5th 656, 663-670.) Requiring a subsequent or supplemental EIR for the Subproject due to the access road and left-turn lane in the Subproject would be contrary to the presumption of finality inherent in CEQA. The present circumstances are exactly the type that the addendum procedure authorized by Section 15164 was intended to address. (*See id.*)

The UP 19-09 Staff Report and the Addendum outline why the additional 2.6 acres disturbed by the access road does not constitute a "substantial change" as to trigger the need for a new EIR. Importantly, "[n]one of the changes to the project trigger significant environmental impacts that were not examined by the previous EIR." (UP 19-09 Staff Report.) It should also be noted that the EIR specifically analyzed a Hartmann Road connection in a similar location as the proposed access road. (EIR Figure 4.13-2.) Moreover, an environmental survey of the additional area was provided in 2019 and the parcel was already disturbed by the recent Caltrans construction on the roundabout and Hartmann Road. The resulting increase in the impervious surface area is also specifically addressed by the Conditions of Approval and the incorporated Mitigation Measures. The Mitigation Measures are significant and address and mitigate any potential environmental harm as a result of the access road and turn lane. (*See* UP 19-09 Conditions of Approval, Section C(2).)

The amendment to Condition #33 of UP 07-05 regarding commercial signage also does not constituted a "substantial change" as to require a new EIR. The "change" is with respect to this Subproject and permits signs, not billboards, that are visible from Highway 29. The Commission acknowledged at the October 24 hearing that Owner will have difficulty finding commercial tenants if signage is not visible from Highway 29. The Commission will also consider subsequent requests to amend Condition #33 of UP 07-07 in the context of subsequent development and/or subprojects. The Conditions of Approval mandate extensive Mitigation Measures to address this amendment as applied to the Subproject. Condition D(6) requires that a "Signage Plan" be submitted and approved before the issuance of a building permit. As discussed above, it would be contrary to California law to now require a subsequent or supplemental EIR. The Board should confirm the decision of the Commission to approve UP 19-09 and to certify the Addendum.

2. The Subproject Implements Required Mitigation Measures.

Appellant incorrectly presumes that the Subproject will have additional "significant environmental effects" not contemplated by the EIR as to implicate Cal. Pub. Resources Code § 21002. "As mitigated," the Subproject "will not result in any significant adverse environmental

impacts." (UP 19-09 Staff Report.) The EIR also contains a comprehensive analysis of potential environmental impacts of the Project and the subsequent development and provides the appropriate mitigation measure which "shall" be implemented. (EIR 2.0.) The Mitigation Measures incorporated into the Conditions of Approval for UP 19-09 specifically address the "changes" stemming from the Subproject. Through an analysis of the EIR, the Addendum, and the Mitigation Measures incorporated into the Conditions of Approval, it is clear that the Commission made the requisite findings pursuant to 14 CCR § 15091 to approve UP 19-09. Appellant fails to identify any specific activity and/or aspect of the Subproject which is not properly mitigated by the Conditions of Approval or how said activity may result in environmental harm.

As mentioned above, the Conditions of Approval mandate extensive measures to mitigate potential environmental harms resulting from the increase in impervious surface area, such as, measures addressing storm water runoff, cultural and biological resources, traffic and transportation related facilities, air quality and noise (specifically addressing the burning of on-site biomass and dust generated by soil disruption), geology, soils, hydrology, water quality and public health. Appellant seems to contend that the prior agricultural and equestrian use of the development area which "may have deposited toxins into the soil that may be disturbed." First, there is nothing unique about the Subproject area from that of the Project area analyzed by the EIR. The entire Project area is aptly known as the "Arabian Horse Ranch Area." The EIR thoroughly analyzed the prior equestrian use of this land and underlying soil in the context of future development. Potential environmental impacts of the Subproject related to soil have also been mitigated to insignificant levels through the Mitigation Measures of the Conditions of Approval. (UP 19-09 Staff Report; *See* Conditions of Approval to UP 19-09 Section G.) The Conditions of Approval for UP 19-09 make clear that significant mitigations measures are in place to address the concerns of Appellant. Appellant fails to provide a cognizable reason why the Mitigation Measures incorporated into the Conditions of Approval are inadequate.

3. The Subproject is Consistent with the Middletown Area Plan.

Appellant's conclusory statement that the Subproject is inconsistent with the Middletown Area Plan as applied to Coyote Valley is incorrect. In fact, the Commission discussed this aspect in the October 24 hearing and noted on the record that the Subproject is not in "downtown Middletown," and thus, similar considerations do not apply to the Subproject as would apply to Middletown proper. The specific section of the Middletown Area Plan referring to Coyote Valley is "extensively covered" by the Conditions of Approval for the Project. (Lake County Planning Commission Minutes, October 24, 2019.) Moreover, the EIR specifically analyzed the commercial development of the same parcel proposed to be developed through the Subproject. The EIR specifically found that commercial development of this area is consistent with the

Middletown Area Plan. (EIR 4.9-7.) The UP 19-09 Staff Report and the Action Sheet reached the same conclusion.

4. The Subproject is Annexed into HVL CSD.

Hidden Valley Lake Community Services District ("CSD") annexed the Subproject into its water and sewer District. The allegations of Appellant that the Subproject was "put on hold indefinitely" by CSD under the unsubstantiated assumption that the project lacks access to water or sewer is wrong. Annexation to the CSD must be approved and adopted through the LAFCO process. CSD can only annex an area into its District after approval is completed through the LAFCO process. The "hold" complained of by Appellants was a result of the LAFCO process. LAFCO approved annexation of the Subproject area into CSD, and in turn, CSD annexed the area into its water and sewer District. The UP 19-09 Staff Report and Action Sheet specifically found that there are "adequate services to serve the project." The "doomsday" type hypotheticals interposed by Appellant cannot form the basis for reversal of the Commission's approval of UP 19-09.

5. The Grocery Store Usage Does Not Present a Fire Hazard.

Appellants misstate the proposal of Owner regarding the burning of biowaste by Grocery Outlet and ignore the resolution of the Commission. Owner proposed to burn "on-site originated material only" which results from removal for development. (UP 19-09 Staff Report, Section IV.) Moreover, Section G(2) of the Conditions of Approval of UP 19-09 state that vegetation removed for development must be chipped and spread for erosion control where feasible as an alternative to burning. Notably, Battalion Chief Mike Wink of Cal Fire and South Lake County Fire did not have comment on the Subproject as proposed by Owner. Accordingly, Appellant's assertion that the "grocery store usage presents an unreasonable fire hazard" is meritless and represents an inappropriate attempt by Appellant to take advantage of fire related community trauma to promote its own commercial interests.

6. Notice of Hearing on UP 19-09 Was Proper.

Ordinance 57.3 requires that notice of hearing be given by placing an advertisement in a newspaper of general circulation at least 10 days prior to the hearing. Notice of the October 24, 2019 hearing was properly advertised in Lake County News on October 14, 2019. Appellant does not dispute that the notice provided complies with the Ordinance. Appellant claims that notice was improper because "several" of its members did not have actual notice of the hearing or conversely that the hearing time and location were restrictive.

First, Ordinance 57.5 specifically states that "failure of any person or entity to receive notice given pursuant to this Article shall not constitute grounds for any court to invalidate the actions of County for which the notice was given." Thus, failure of "several" members of Lake County Local to receive actual notice of the hearing does not form a valid basis for the Appeal. Also, it would be extremely abnormal to hold a Commission meeting in the evening at a location in the Hidden Valley Lake area, as suggested by Appellant. Commission and Board meetings regarding the approval of major use permits and land use generally are routinely held during business hours at the Lake County Courthouse. Notably, CSD held a public meeting regarding the Valley Oaks Project at its office on Hartmann Road on February 27, 2018. No member of Appellant appeared for comment at that meeting.

The identity of Appellant ("Lake County Local") should also be noted. The *only* signatory to the Amended Appeal, which was filed on or about November 5, 2019, is Lamont Kucer. No other "member" of Lake County Local has been identified. Mr. Kucer is the Manager of Foods Etc., IGA, a grocery store located in Clearlake and a direct competitor of Grocery Outlet. The only identifiable public presence of Lake County Local is its Facebook page. Lake County Local describes itself as follows: "Lake County Local supports local businesses, the backbone of our economy. By shopping at these stores instead of large national chains, we keep our money here in Lake County." Additionally, one of the few "posts" on the Lake County Local page amounts to an advertisement for Foods Etc. In light of "who" Lake County Local is, the motivations behind the instant appeal are highly suspect.

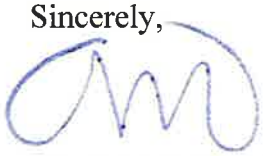
7. Appellant Lacks Standing to Bring the Instant Appeal.

Only an "interested person" may appeal a decision of the Commission to the Board. An Appeal must be appropriately filed within seven days of the decision. (Ordinance 58.31(a)(2).) While the initial Appeal was filed on October 31, 2019, it was not signed by a "interested person" at all but submitted by a Los Angeles law firm. It was not until November 5, 2019 that the Amended Appeal signed by Mr. Kucer was filed with the Clerk of the Board. Failure of an interested person to file the appeal within seven days of the decision makes it untimely. Additionally, either comment or attendance at the hearing on UP 19-09 is a prerequisite to being classified as an "interested person" in the Commission's approval of the permit. Therefore, neither Lake County Local nor any of its members are an "interested person" entitled to bring the instant appeal.

Conclusion

The approval of UP 19-09 by the Commission is CEQA compliant and otherwise proper under California law. Therefore, KIMCO Development, Inc. and Valley Oaks Land & Development, Inc. respectfully request that the Board confirm the determinations and findings of the Commission and certify the Addendum and approve UP 19-09 without further delay.

Sincerely,



George MacDonald

GM:krl