

Exhibit No. 1
Discussion

Carmel Rio Road, LLC
GPZ090004

Board of Supervisors
March 27, 2012



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DISCUSSION

I. BACKGROUND

An application to subdivide three parcels totaling 7.92 acres on Val Verde Drive in Carmel Valley was filed by Rio Road, LLC (Brian Clark) on September 3, 2009. The application was deemed complete as of December 9, 2010. Subdivision applications deemed complete after October 16, 2007 are subject to the 2010 General Plan (Policy LU-9.3).

The proposed project includes 31 Market Rate lots and one Inclusionary Housing lot containing 11 Inclusionary units (2 very low, 5 low and 4 moderate). Located at 15 and 26500 Val Verde Drive in Carmel Valley, the property is approximately 1.5 miles east of the mouth of the Carmel River and 0.25 miles north of the Carmel River channel. The property is relatively flat and drains toward the southwest corner. There is an existing house on one of the parcels and the other two are vacant and have been used for agricultural purposes. Access would be from Val Verde Drive, a non-exclusive privately held easement, which is adjacent to the eastern boundary of the site. Commercial buildings along Carmel Rancho Boulevard are to the west of the site.

From the point that the application was submitted, staff identified issues including conflicts with General Plan policies. Interim Ordinance 5171 (as modified and extended by Ordinance Nos. 5172 and 5193) establishes a process for determining General Plan consistency for discretionary projects pending the adoption of applicable programs and ordinances to implement the 2010 General Plan. In accordance with this ordinance, staff prepared a consistency analysis of the application and determined that the project is inconsistent with the General Plan.

Staff's interpretations were presented to the Planning Commission at a public hearing on November 9, 2011. The staff report noted that projects that are denied may be deemed to be statutorily exempt pursuant to Section 15270 (Projects Which Are Disapproved) of the California Environmental Quality Act (CEQA) Guidelines. At the November 9, 2011 Planning Commission hearing, the applicant submitted materials which he contended constituted a Draft EIR for the project. The Planning Commission agreed with staff's General Plan consistency determination and afforded the applicant 60 days to request a General Plan Amendment or revise the application to attain consistency. The applicant did not revise the application and waived the 60-day period in order to be heard as soon as possible by the Planning Commission.

On January 25, 2012, the Planning Commission denied the Combined Development Permit based on inconsistency with Policy C-3.6 (Proof of Access) in the 2010 General Plan (see **Exhibit 3**, Planning Commission Resolution No. 12-004 and **Exhibit 6**, Minutes of Planning Commission meeting of January 25, 2012). Staff reviewed the materials submitted as the purported "Draft EIR" and determined that they do not meet County standards for a Draft EIR and do not reflect the County's independent judgment.

On February 3, 2012, the applicant filed a timely appeal to the Planning Commission's denial of the Combined Development Permit (see **Exhibit 4**, Notice of Appeal). The appeal is brought on the basis that the application is consistent with General Plan Policy C-3.6 and that staff should be directed to do an independent judgment of the Draft EIR that was submitted on November 9, 2011.

On March 2, 2012, the applicant filed a lawsuit in the Superior Court of California seeking a judgment that the Val Verde Drive easement can be used to provide access to the proposed 42 lot subdivision or any other residential or commercial development on the site. On March 7, 2012, the applicant requested a six month continuance of the public hearing on the appeal because “*additional time is needed by the applicant in order to conform to the Planning Staff and Planning Commission’s requirement to seek a court judgment for the Val Verde easement*” (see **Exhibit No. 5**, Letter from Pamela Silkwood). Because the applicant is uncertain as to when he will receive a court judgment, he requests the option to have the County’s discretionary body hear the project sooner if the judgment is received before the six month period lapses.

Rather than grant the requested six month continuance (to September 27, 2012), staff recommends that the Board: 1) provide direction on interpretation of the 2010 General Plan as it applies to the subject application; 2) continue to a date uncertain the Public Hearing on the appeal, with direction to prepare an Environmental Impact Report (EIR) for the project in accordance with the County’s EIR consultant selection policy and to address General Plan consistency and density issues; 3) remand the application to the Planning Commission for a recommendation on the application following the completion of an EIR; and 4) direct staff to set a Public Hearing on the application and appeal before the Board of Supervisors following a recommendation by the Planning Commission. This will allow the applicant to make revisions required to address the issues outlined below and allow the EIR process to proceed while the court considers the lawsuit that has been filed regarding the access easement.

II. ANALYSIS

Issues to be considered on the appeal include General Plan consistency, the proposed project density, lot sizes and environmental review under CEQA.

A. General Plan Consistency

1. Proof of Access (Policy C-3.6)

General Plan Policy C-3.6 states:

“The County shall establish regulations for new development that would intensify use of a private road or access easement. Proof of access shall be required as part of any development application when the proposed use is not identified in the provisions of the applicable agreement.”

To demonstrate consistency with this policy, documentation is required, such as an agreement among all of the easement holders or a final determination by a court, that the easement allows the addition of new lots on Val Verde Drive beyond the density that was allowed when the easement was created. The applicant provided an easement document showing a non-exclusive, private easement for access and utilities. The ability to use the easement for access to a development that exceeds the LDR/1 density has been contested by other parties to the easement. The Planning Commission denied the application on the basis of inconsistency with this policy. We note that when the Gamboa project, now Cottages of Carmel (which also was going to rely on the Val Verde Drive easement) was processed in 2004, the County drafted a condition that required resolution via an agreement or court order. In that case, the applicant opted instead to obtain an easement via the Brinton’s parking lot.

Since the Planning Commission denied the application, the applicant has filed a lawsuit to seek a judicial determination as to the use of the Val Verde easement. A court order could resolve the issue of whether the easement provides access to the proposed use and thus whether the Val Verde Drive easement provides proof of access per Policy C-3.6.

2. Proof of Long Term Sustainable Water Supply (PS-3.1, 3.2, 3.9 and 3.13 and CV 3.20)

This project requires a water system with two water sources that meet all of the required regulations. Although there are two existing wells on the property, one of the wells (Travers) does not meet the well control zone requirements due to the lack of an easement with the neighboring property and the sewer main location in Val Verde Drive. When the project was reviewed by the Planning Commission on November 9, 2011, the applicant had not applied for the replacement well and staff found the project to be inconsistent with these policies.

On January 6, 2012, the applicant submitted a well permit application to the Environmental Health Bureau to replace the Travers well. Staff of the Environmental Health Bureau and Resource Management Agency reviewed the proposed well in accordance with Policies PS-3.3 and CV-3.20 of the 2010 General Plan. On March 3, 2012, the Environmental Health Bureau issued a permit for the replacement well. Due to the location of the replacement well, the tentative map will need to be revised to either create a well lot or provide a 100 foot by 100 foot easement around the well. In addition, the replacement well will need to be drilled and tested to provide the required information in regard to “*production capacity, production capability and any adverse effect on the economic extraction of water or other effect on wells in the immediate vicinity*” in order to determine consistency with General Plan Policies PS-3.1, 3.2, 3.9 and 3.13 and CV 3.20.

B. Proposed Density and Lot Sizes

The underlying zoning of the site is LDR/1-D-S-RAZ which allows one unit per acre. The project requests consideration of an increase in the density pursuant to Policy CV-1.10 of the Carmel Valley Master Plan (CVMP) plus a separate and additional density bonus pursuant to Section 65915 of the California Government Code (State Density Bonus Provisions). Policy CV-1.10 states:

“The Val Verde Drive area is planned for residential use at a basic density of one (1) unit per acre. With suitable clustering, up to two (2) units per acre may be allowed. However, a density of up to four (4) units per acre may be allowed provided that at least 25% of the units are developed for individuals of low and moderate income or for workforce housing. This policy is independent from Policy CV-1.11, and not counted in conjunction with the density bonus identified in that policy.”

The Planning Commission determined that the project did not qualify as a clustered development. There are three components to this project:

1. Land Use Designation. There is an underlying allowed land use of one unit per acre (LDR/1). For the subject project, that would allow a maximum of seven (7) units.
2. 2010 General Plan. Policy CV-1.10 states that up to four units per acre *may be allowed* if at least 25% of the units are for individuals of low and moderate income or for workforce housing. Staff interprets the *italic* language as being at the discretion

of the County – not an allowed use. If the County wishes to permit this density bonus, up to 28 units would be the total number of units permissible under existing zoning provided at least 25% of the units qualify by design (vs deed restriction) for individuals of low and moderate income or for workforce housing.

3. State Density Bonus. Section 65915 of the State Government Code allows for an increase in density above what would normally be allowed with existing zoning and general plan designations, without requiring a re-zoning and/or General Plan amendment, for qualified projects. In order to qualify for a density bonus under Section 65915, the project must supply certain levels of very low and low income housing (or moderate income in specific circumstances) within the proposed development. The amount of increased density allowed is based on a sliding scale ranging from 20% to 35% above what would normally be permitted, depending on the percentage of units that are at the different affordability levels.
4. Title 21 (Zoning Ordinance). Pursuant to Section 21.14.060.A of the Zoning Ordinance, the minimum lot size in the LDR District is one acre unless otherwise approved as part of a clustered development. Since the proposed project is not clustered, it does not meet the minimum lot size requirement in the LDR District. Proposed sizes of the single family lots range from 0.14 acre (6,098 square feet) to 0.37 acre (16,117 square feet).

To apply a density bonus in addition to CV-1.10 requires an interpretation that the four units per acre (if at least 25% affordable) allowed under Policy CV-1.10 is the maximum allowed density. At that point, a State Density Bonus could be calculated based on the 31.68 units allowed. In order for the project to qualify for the maximum 35% State Density Bonus, appropriate amounts of affordable housing must be provided. This would result in a total of 42.77 (rounded down to 42) units being allowed. The amounts of affordable housing required under the State Density Bonus law under this combined scenario would be: 2 very low income, 5 low income, and 1 moderate income unit. This was the interpretation of the Office of Redevelopment and Housing.

Planning Staff has a different interpretation of Policy CV-1.10 and is seeking Board of Supervisor's direction. Policy CV-1.10 came from Policy 27.3.8B (CV) and Policy 27.3.9 (CV). Planning staff has interpreted these policies to mean that the increased density allowed is not meant to be used in conjunction, or stacked, with other density bonuses such as the State Density Bonus provisions. The allowance of four units per acre is discretionary, not an allowed use, and per the last sentence of the policy is meant as an alternative to other available density bonuses. If the Board agrees with this interpretation of Policy CV-1.10, then the Density Bonus would only apply to the base land use designation of one unit per acre (7 units). In other words, depending on the affordability of the units, the applicant would be entitled to 35% more density, or up to 9 units.

If the Board agrees with staff's interpretation of Policy CV-1.10, the applicant's options under the existing zoning and land use designation of the site are as follows: 1) up to 7 units with no density bonus or clustering; 2) up to 9 units applying the State Density Bonus provisions with appropriate affordability (e.g., seven one acre minimum single family lots with one lot containing three units); 3) up to 15 units applying the density bonus allowed under Policy CV-1.10 (2 units/acre with suitable clustering); or 4) up to 28 units applying the density bonus allowed under Policy CV-1.10 (4 units/acre provided at least 25% of the units for individuals of low and moderate income or for workforce housing) and designed as one acre (minimum) lots with a maximum of 4 units/lot pursuant to Section 21.14.050.A. Continuing the hearing would

allow the applicant the opportunity to redesign the subdivision to address the land use and density issues.

C. Environmental Review (CEQA)

The second issue raised by the applicant is in regard to CEQA. The applicant submitted a document at the November 9, 2011 Planning Commission meeting which he claims is sufficient to function as a Draft EIR and requests that the County utilize the document and that he contract with an EIR consultant on the County's list to provide an independent review.

CEQA allows the lead agency to choose one of several arrangements for the preparation of a Draft EIR. One option is to accept "*a draft prepared by the applicant, a consultant retained by the applicant or any other person*" (CEQA Guidelines Section 15084(d)(3)). However, CEQA requires that "*[b]efore using a draft prepared by another person, the lead agency shall subject the draft to the agency's own review and analysis*" (CEQA Guidelines Section 15084(e)). The Draft EIR that is circulated to the public "*must reflect the independent judgment of the lead agency*" and "*the lead agency is responsible for the adequacy and objectivity of the Draft EIR.*" (Ibid.)

Staff review of the document submitted by the applicant at the November 9, 2011 Planning Commission meeting found that it does not meet Monterey County standards for a Draft EIR, and it does not reflect the County's independent judgment. Essentially, the document consists of a compilation and summary of technical reports that have been previously submitted by the applicant, and these reports were prepared for the applicant by consultants without consultation with County staff. The Initial Study in the Appendix does not identify any potentially significant impacts and concludes that a Mitigated Negative Declaration (not an EIR) is required. Furthermore, the information contained in the document is not clearly referenced. Rather, several references are listed at the end of each chapter so the source of the specific information that is summarized in each chapter is unclear. Furthermore, much of the information that CEQA requires to be contained in a Draft EIR is absent from the document such as an analysis of the alternatives that are identified and the identification of the "Environmentally Superior Alternative."

To satisfy the requirement of exercising its independent judgment and analysis, County practice has been to contract directly with an EIR consultant on the County's list and enter into a separate agreement with the applicant to reimburse the County for the cost of the EIR consultant. The Board of Supervisors has adopted a resolution (see **Exhibit 11**, Resolution No. 07-428) setting forth the process for selection of EIR consultants. Staff proposes that the Planning Department prepare a Request for Proposals (RFP), send it to three firms on the County's list (the applicant may remove one of the firms) and then select a consultant based upon the proposals that are submitted. The County would then enter into a contract with the EIR consultant and enter into a reimbursement agreement with the applicant. The EIR consultant could use as much of the applicant's materials as is feasible in the preparation of the Draft EIR.

D. Conclusion

Staff recommends that the Board continue the public hearing to allow for the preparation of an Environmental Impact Report (EIR) for the project and to resolve General Plan consistency, density and lot size issues. In particular, it will allow time for the applicant to: 1) revise the tentative map to either create a well lot or provide a 100 foot by 100 foot easement around the replacement well; 2) redesign the project to meet the density and lot size provisions as discussed above; and 3) obtain a judicial determination which could resolve the issue of whether the easement provides access to the proposed use. This will also allow the application to be referred back to the Planning Commission for a recommendation following project revisions and the completion of an EIR.

Staff further recommends that the Board reject the applicant's proposal to contract with an EIR consultant and instead proposes that the County's EIR process be followed. This would involve the County contracting with the EIR consultant to perform an independent review of the applicant's document, determine what is usable from it and complete the preparation of the Draft EIR with reimbursement by the applicant.

E. Other Options

There are two other options available to the Board. One option would be to continue the public hearing for six months as requested by the applicant. This would allow time for potential resolution of the court case regarding Val Verde Drive. Because the applicant is uncertain as to when he will receive a court judgment, he requests the option to have the County's discretionary body hear the project sooner if the judgment is received before the six month period lapses.

Another option would be for the Board to direct staff to prepare a resolution rejecting the appeal and denying the application. If the application is denied, the project is exempt pursuant to Public Resources Code Section 21080(b)(5) and Section 15270 (Projects Which Are Disapproved) of the California Environmental Quality Act (CEQA) Guidelines.