



October 13, 2004

Members of the Board of Supervisors
and County Planning Commission
Santa Clara County
(408) 298-8460 fax (Board of Supervisors)
(408) 288-9198 fax (Planning Commission)

Dear County Supervisors and Planning Commissioners;

As you know, the Committee for Green Foothills is committed to sound land use planning and the protection of local open space for all citizens and future generations. We are also dedicated to ensuring that the land use planning process is fair and open to the public, especially so that it allows the public to learn about, and become involved in, issues that might pose environmental concerns.

For these reasons, the Committee would like to bring to your attention several problems in the County's planning process that we encountered recently. These problems exclude citizen review and bias decision-making in favor of development. At least one of these problems is likely to be illegal, and we urge you to end these policies and institute corrections like those suggested in this letter.

1. Developers' private access to working drafts excludes the public from the environmental review process, a likely violation of the Public Records Act.

The County has a policy that before it releases to the public its Draft Environmental Impact Report (DEIR) on a project involving a private applicant, it will create an "administrative draft" or "working draft" of the document and provide the draft to the project applicant, while prohibiting the public or other concerned parties from reviewing the draft. The applicant is then allowed to review the document and present its case to the County as to whether the document should be changed.

Apparently, significant delays can sometimes ensue, with the likely reason being that the applicant is being allowed to compile data to justify their argument. Only at the end of this process does the public see the released official draft document, without any idea of what effect the applicant had on the original.

We do not allege that the County is ceding actual control of the DEIR to applicants. However, this policy certainly suggests the appearance of undue influence; indeed, if the County defers unduly to the applicants' arguments, we find it extremely disturbing that the public has no way of knowing what happened. This policy completely obscures what should be governmental transparency in dealing with third parties.

Equally important, developers have a chance to influence the DEIR without a counterbalance from the public. The secret draft review procedures currently in place give applicants significantly more time to review and influence the process than the 30 to 45 days that the public has to comment on the DEIR. Further, having discussed a DEIR at length in private with applicants, staff will be less receptive to still more arguments and contrary perspectives offered by the public.

The County's position is almost certainly a violation of the Public Records Act. While under restricted circumstances, agencies may keep draft documents confidential from the public, under no circumstances can an agency choose to waive its right and disclose the document to one member of the public – in this case, the project applicant – and then refuse it to show it to anyone else. This violation alone requires the County to change its position, something we believe will also help provide a fair and transparent planning process.

To solve this problem, the County need only make the administrative drafts of DEIRs available to those who request them. If County staff are concerned about the effect of releasing preliminary drafts that may contain errors, the County need not publish administrative drafts far and wide -- only to those people who specifically request them.

Alternatively, the County could choose to keep all preliminary drafts confidential (to the extent allowed under the Public Records Act). Regardless of the solution, the County's current policy of providing drafts and negotiating privately with developers must be changed.¹

2. Allowing staff to make final decisions on certain EIRs and Negative Declarations is inappropriate.

Generally, Santa Clara County staff members prepare Negative Declarations and EIRs that are then reviewed by the appropriate overseeing body, such as the Planning Commission or Board of Supervisors. However, some decisions that are made exclusively by staff (without review) may sometimes involve the preparation of a Negative Declaration or EIR, without subsequent decision-making by an overseeing body. These situations present a problem: staff must then judge whether the public's criticism of the document they had just prepared is accurate. This places staff members in the untenable position of either being potentially defensive in the face of justified criticism, or unduly accepting of unjustified criticism in order to avoid appearing defensive. Staff supervisors would also be in an awkward position if they were to judge criticism of their employee's results.

The Committee for Green Foothills suggests that the County resolve this policy by requiring any decision involving a Negative Declaration or EIR to be made by a reviewing body like the Planning Commission or Board of Supervisors. Ministerial decisions that do not involve this level of environmental review could remain at the staff level. Alternatively, decisions over Negative Declarations and EIRs could remain at the staff level, except when those documents receive negative comments, in which case a reviewing body would make the final decision.

While this suggested policy revision would remove potentially damaging bias from the review process, the situation in which it poses a problem is presumably relatively infrequent, and the revision should not involve significant changes in day-to-day permit processing.

3. Imposing costs of environmental documents on the public is unduly burdensome; costs should be borne by project applicants.

It is generally accepted practice for project applicants to bear the costs of printing and distributing environmental review documents. For very large environmental documents like the Supplemental Draft EIR for the Stanford S1 Trail, the County has chosen not to distribute the document but to make it available on the web, where the public must download each component section of the document. While making the document available online certainly makes it easy for the public to access the reports, using electronic format as the sole means of distribution puts an undue burden on those seeking to review the document.

For example, to get the full S1 Supplemental EIR, the public has to download 17 separate files, one for each section. Because it is virtually impossible to work with documents in exclusively electronic formats, a reviewer then has to print out the documents. The effect of this process is to transfer the cost of printing from the developer, who should bear the cost of preparing EIRs, to the public. The County's current policy is inappropriate and inhibits public participation.

The Committee for Green Foothills suggests that the County instead follow the generally accepted policy of making all EIRs available without charging the public for paper versions. If the County would like to discourage those casual readers from requesting paper copies of particularly lengthy documents, the County could impose a nominal fee for paper copies of those reports. An exclusively-electronic format is not the appropriate solution, nor is it appropriate for the public to pay for all of the printing costs.

¹ In addition to the EIR documents discussed above, if the County has a similar practice of sharing preliminary drafts of other documents, it must also share those drafts with anyone else requesting them.

The Committee for Green Foothills urges the Board of Supervisors and Planning Commission to review these three policies, and undertake whatever steps are appropriate to institute solutions to these problems. We encourage you to consider our proposed simple solutions for making the planning process better, fairer, and more open to the public.

Thank you for your consideration. If you have any questions, please contact the Committee at (650) 968-7243.

Sincerely,

A handwritten signature in cursive script, appearing to read "Brian Schmidt".

Brian A. Schmidt
Legislative Advocate, Santa Clara County

cc: Michael Lopez
Lizanne Reynolds