

## Appeal of the Preserve at San Marcos

### *I. Lack of Consistency with Plans and Policies*

#### **General Plan Policies:**

- Land Use Element Planned Development Policies 1 and 3: Failure to cluster to avoid sensitive resources and open space to the maximum extent feasible. Per attached letters and Moss report, further clustering of units is feasible.<sup>1</sup>
- Land Use Element Planned Development Policy 3: The project fails to protect the scenic qualities of the site due to the scale of development proposed on the West Mesa and limitations on the ability to screen structures because of fire hazards and related vegetation clearance requirements. Further clustering of development with less obtrusive homes would provide more protection of biological resources that are impacted by fire safety vegetation modification requirements. Sensitive habitat areas have not been avoided to the maximum extent feasible. The lot layout on the West Mesa does not maximize clustering and preservation of open space. Per attached letters and Moss report, further clustering of units is feasible.
- Land Use Element Planned Development Policy 2: Failure to plan property as a unit (i.e., with Designated Remainder (“DR”)). The DR is part of the property under the applicant’s control and should have been planned as a unit; however, it was artificially segregated from the project and was not given proper environmental review and planning under this policy as required.
- Conservation Element: Failure to avoid native grasslands to the maximum extent feasible. The native grasslands were improperly identified in the EIR, substantially underestimating their presence on the property and corrupting the baseline for purposes of assessing impacts. Per attached letters, it is feasible to avoid more native grasslands.
- Scenic Highways Element: Revised Alternative 4 fails to protect views from Highway 154 as required by the goals and measures in this Element. The large estates on Lots 2 and 3 would be visible from Highway 154 S/B, and combined with Lots 1-5 and 12 - 14 will degrade the scenic view from

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<sup>1</sup> The attached letters do not include exhibits or expert reports (including the Moss Report), which as part of the administrative record are hereby incorporated by reference.

Highway 154 N/B. Moreover, Revised Alternative 4 will be more visible from Highway 154 than the Project and all the other EIR alternatives. These impacts could be feasibly avoided by clustering and lot relocation. Per attached letters and Moss report, further clustering and relocation of units is feasible.

- Land Use Element Other Open Lands Policy 3: Recreational uses in mitigation wetland and grasshopper sparrow breeding habitat results in more than “minimal environmental degradation.” These uses contribute to several Class I biological impacts according to the EIR.
- Land Use Element Hillside and Watershed Protection Policies 1 and 2: It is feasible to carry out an economically viable project with less alteration of the natural terrain, natural vegetation and natural landforms such as the boulder fields, West Mesa, coastal sage and native grasslands through redesign and clustering per attached letters and Moss report.
- ERME Category C: Specific conditions to preserve areas of significant biological value, such as boulder fields, native grasslands and grasshopper sparrow breeding habitats, have not been imposed. Instead the conditions seek to replace rather than preserve such areas, and do not adequately replace areas of biological value.
- Land Use Element Visual Resources Policy 3: With respect to Visual Resources Policy 3, the proposed scale of development is not in conformance with the scale and character of the existing community, nor is it clustered to the maximum extent feasible.

#### **County Code:**

- SBC Code § 29-10(b): County code prohibits use of drywells when leach lines may be used and are feasible. Drywells are only allowed after an affirmative showing by a registered engineer that leach lines are not feasible. (“A determination of leach line infeasibility shall include a certified written statement by the engineer which specifies the unfavorable conditions which render leach line disposal infeasible.”) There is no certified statement indicating the soil and other conditions on lots 1-5 render leach lines infeasible.
- SBC Code, Article III, Chapter 35: Condition 7 states that all structures on Lot 2 must not exceed 22 feet in height to comply with Article III, Chapter 35 of the County Code by minimizing view impacts from Highway 154. Therefore, all structures on the West Mesa should be restricted to a height not to exceed 22 feet to conform to County Code and minimize view impacts.

#### **Zoning Ordinance**

- The PRD Zone District requires clustering to the maximum extent feasible. Per attached letters and Moss report, further clustering of units is feasible.

- § 35-212: The zoning ordinance requires new structures to conform to the scale and character of the existing community. Substantial evidence illustrates that the proposed homes are substantially larger and out of scale with the existing homes in the surrounding community.
- § 35-215: The zoning ordinance states that urbanization should be prohibited on lands subject to “significant habitats and/or prime examples of common ecological communities” except in relatively few instances. The project includes urbanization and development on significant habitats as identified in the FEIR and does not qualify as an appropriate instance.
- § 35-292b.3(a): The zoning ordinance prohibits structures over 25 feet tall in urban areas where the topography falls 16 feet over 100 horizontal feet in any direction from a planned structure site. All lots and proposed structures are affected by this policy according to the EIR topographic maps. Various proposed homes appear to exceed 25 feet according to Appendix B of Volume III of the FEIR. § 35-292b.3(b): Proposed structures should be in character with adjacent structures, but are much greater in size, bulk and scale, and as such, are not in character with adjacent structures. § 35-292b.3(e) “Development on ridgelines shall be discouraged if suitable alternative locations are available on the parcel.” Instead, the PC included structures on the West Mesa Ridge, a highly visible prominent ridgeline, as part of the project. Feasible alternative locations are available on the parcel.

### **RWQCB Basin Plan**

Appellants were denied their request for Planning Commission continuance to allow adequate time to have an independent hydrogeologist review the septic data provided only three days prior to the final Planning Commission hearing. Given the short period for filing an appeal, that independent review is not complete. As such, appellants reserve the right to raise further specific septic issues as part of this appeal based upon an expert hydrogeologist’s analysis, or other such technical analysis as determined by appellants as relevant, to the Board of Supervisors. Some issues of concern are identified below.

- Project’s septic systems and drywells are inconsistent with the RWQCB Basin Plan Policies and Prohibitions. The RWQCB Basin Plan states a preference for reducing the number of septic systems and for consolidation of waste water treatment to facilitate waste water reclamation. Moreover, County policy and practice disfavors drywells, only allowing them when soil and other conditions dictate that no more preferable system is feasible.
- Project fails to utilize the most effective and least impactful sewage disposal or treatment system available, including the most shallow liquids distribution system feasible on each residential site.

- Project conflicts with AB885 and proposed regulations thereunder, which prohibit drywells if a shallower system is available.
- The findings and record fail to address the Basin Plan prohibitions of septic for new subdivisions. Such as:
  - a) Percolation tests were not conducted at proper time of year, i.e. when groundwater is at its highest level.
  - b) An advisory disallows septic systems with in-sink garbage disposals.
  - c) Leach field setbacks to wetlands may not be 100 feet based on inaccurate wetland mapping and flawed wetland baseline.
  - d) Inadequate test pits for leach lines.
  - e) Inadequate separation from groundwater, surface water and/or bedrock may present public health and safety threats based on potential downstream surfacing of septic in park parcel.

## *II. California Environmental Quality Act Issues*

1. Environmental Baseline is inaccurate: Substantial evidence shows the County failed to follow its adopted Thresholds and Guidelines Manual with regards to mapping native grassland and wetland habitats. The EIR significantly underestimates the acreage of native grassland and may underestimate the acreage of wetlands, and thus substantially underestimates the impacts to these habitats. See attached letters.
2. Inadequate Project Description :
  - Failure to include DR as part of the project;
  - Piecemealing three related projects: the park, DR public lands, and residential project;
  - Inconsistent description of PCA management and oversight entities;
  - Inconsistent description of the future uses of DR and the nature of the long-term owner and management entity;
  - Failure to include necessary infrastructure as part of project, including but not limited to GWD water storage tank(s);

- Failure to plan for the project as a whole, including the future activities and land uses on DR, including potential future use by, and impacts from agricultural uses (cattle grazing); urban development and public recreational use.

3. Failure to Mitigate Class I Impacts to Below Significance or to the Maximum Extent Feasible:

- Loss of Overall Site Vegetation (Bio-1): it is feasible to cluster further or reduce density to reduce footprint and impact.
- Loss of Native Grasslands (Bio-2): it is feasible to cluster further, and/or reduce density to reduce impact; can site LDEs to better avoid native grasslands (i.e., after remapping and correcting grassland baseline); can enhance mitigation measures' effectiveness by requiring at least 3:1 and salvage of native grasses in LDEs.
- Wildlife Species and Habitat Loss (Bio-8): it is feasible to cluster further, change LDE locations, and/or reduce density to reduce footprint and impact.
- Habitat Fragmentation / Wildlife Movement (Bio-11): same as above.
- Decline of Rare Wildlife Species (Bio-10): same as above.
- Public Review of Natural Resource Plans for Mitigation: The public should be permitted to review all natural resources plans (e.g., Open Space Management Plan, Native Grasslands Restoration Plan, Wetland Mitigation Plan, Coastal Sage Habitat Mitigation Plan, Boulder Relocation Plan, etc.) and other protective mechanisms that are part of this project to ensure maximum feasible effective mitigation. The applicant should be required to prepare draft versions of all natural resources protection plans required by conditions, and provide to County. County should then circulate to public and receive comment, including conducting a public hearing, before adopting each such plan at publicly noticed hearing. Disputes over the efficacy of final natural resources plans should be appealable to the PC and BOS.

4. Failure to Mitigate Class II Impacts below Significance or to the Maximum Extent Feasible.

- Impact Bio-5, Loss of Rare Plant Species: failure to define "rare" plants per CEQA definition. Revisions to Condition 22 limit the application of the replacement requirement for rare plants to California Native Plant Society ("CNPS") lists 1B and 2 only, excluding various rare species identified in the EIR from this measure, including but not limited to Vernal Barley, Club-haired Mariposa Lily, and Santa Barbara Bedstraw (page 4.4-45). This revised condition

fails to mitigate impacts to all the species qualifying as threatened, rare and endangered under the CEQA definition in Guidelines Section 15380.

In addition, this measure was changed to halve the replacement ratio for the subset of rare species it pertains to from 20:1 to 10:1, without any specific findings that a 20:1 replacement is infeasible or not warranted to mitigate the impact to the maximum extent feasible or below significance.

- Impact Bio 3, Loss of Coastal Sage Habitat (2.89 acres per Revision Letter): The EIR failed to define standards for coastal sage mitigation success which amounts to deferral of mitigation. Mitigation ratio was reduced from 3:1 to 2:1 without showing or finding that 3:1 replacement was infeasible or unnecessary to mitigate impacts to less than significant.
- Impact to wetlands (Recirculation Document): As approved, the wetland mitigation does not replace functions of lost wetlands. The replacement wetlands required by the Conditions will receive street runoff and are located within paraglider landing zone, exposing them to trampling and repeated disturbance. This does not constitute in-kind replacement.
- Visual Impacts from Highway 154, public viewing locations, onsite park and trails, and lighting and glare (Class II): While we believe these are Class I impacts, even as Class II impacts they are not mitigated to the maximum extent feasible. Feasible measures to reduce this impact further and to below a level of significance were not found to be infeasible or unnecessary: i.e., reduce height of structures on Lot 3. Other measures (i.e., clustering and LDE reconfiguration) to reduce these impacts are feasible per Moss report and attached letters.

5. CEQA Findings Regarding Alternatives:

- Failure to adopt the environmentally superior Alternative 3 which is proven feasible by substantial evidence in the record. See Moss Report and attached letters.
- Finding that environmentally superior Reduced Density Alternative (Alt. 3) is infeasible is not based on substantial evidence (i.e., Hammock appraisal used only one method to arrive at figure; he did not reconcile his appraisal as is standard, accepted appraisal practice, and therefore it does not constitute credible evidence). Substantial evidence (Moss and Magney) supports a finding that environmentally superior alternatives are feasible. See Moss Report and attached letters.
- No Findings regarding Reduced Park Alternative (Alt. 2 in EIR) are made even though the EIR finds it would substantially lessen traffic impacts by 40 – 50% (p. 5-13) and it would also lessen significant biological and other impacts. See attached letters.

- No findings regarding the feasibility of the Reduced Density / West Mesa Cluster Alternative are made.

6. The Range of Alternatives is Inadequate:

- No alternatives in the EIR avoid the environmentally sensitive West Mesa.
- The record shows that the project objectives were crafted by the applicant (not the CEQA Lead Agency). The objectives are overly narrow by specifying a number of units and required net revenue, restricting consideration of less damaging, feasible alternatives that may have fewer units and/or generated less revenue. See attached letters.

7. Failure to Correctly Assess and/or Correctly Classify Impacts:

- View impacts (Class II) should be Class I based on evidence in record. The County failed to require visual simulations showing fire clearance areas, night lighting, and infrastructure buildout; therefore, the visual impacts of the project have not been adequately addressed in the EIR.
- Lichen impacts (Class II) should be Class I because project will reduce the range and numbers (i.e., by blasting all lichen-covered boulders over 2,000 pounds). The mitigation measure is inadequate to achieve Class II because the numbers and range are still reduced.
- Impact to wetland in Polygon 22 was classified as “no impact;” however, an indirect impact from septic discharge above the Sespe bedrock formation upslope from the seep-fed wetland was not analyzed and the EIR assumes the Basin Plan’s 100-foot setback prohibition avoids impacts.<sup>2</sup> The Basin Plan prohibitions are based on average discharges but the proposed homes are far larger than average and generate far more wastewater than average homes. This fact, coupled with site-specific hydrogeological conditions (the Sespe formation’s location relative to the leachfield and the wetland), raises concerns about water quality impacts and biological impacts to the wetland.<sup>3</sup>
- The FEIR assumes there is a 100-foot setback from the LDE of Lot 14 to the wetland in polygon 22, but the GLA map (Exhibit 2a in EIR Recirculation Document), the most detailed map showing the wetland and the LDE of Lot 14, reveals the LDE and the home structure are within 75 feet of the wetland. Therefore, the assumption on which the finding of no impact was solely based upon was incorrect according to the FEIR.

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<sup>2</sup> As noted above, improper wetland delineation methodology may have underestimated the size of this wetland, resulting in a potential overestimation of the setback between the leach field and the wetland.

<sup>3</sup> A similar concern regarding the potential indirect impacts of the planned drywell in Lot 2 on a downslope spring/wetland was raised by the public but never analyzed by the County.

- Loss of 0.4 acre wetland: given the inadequate/ineffective mitigation (as mentioned above and supported by evidence submitted in the record by Wayne Ferren) this impact should be classified as Class I.
  - Impacts to sensitive plant species: given inadequate mitigation and unwarranted weakening of mitigation, this impact should be classified as a Class I, not a Class II impact.
  - Coastal sage habitat: given the deferral of mitigation and the reduced mitigation ratio, which was never justified by evidence showing the originally planned mitigation was infeasible or unnecessary, this impact is Class I, not Class II.
  - Traffic: the EIR improperly evaluated merging and stopping distances for Project and background traffic; failed to employ Caltrans' required gap analysis in impact assessment, then employed incorrect sight distance standard and improperly relied upon posted, rather than design speeds in considering project and cumulative traffic impacts; failed to identify significant Project and cumulative impacts to Via Chaparral and Foothill intersection traffic; used County rather than City traffic impact Thresholds at City intersections and roadways for impact assessment and mitigation; failed to identify impacts and mitigation for northbound 154 on-ramp cumulative impacts; failed to consider cumulative impacts of traffic from public use of DR trails; used incorrect comparison to Steven's Park for generating Park trip generation factors and failed to include hang glider vehicle traffic in Project trip generation projections.
  - Cultural resources: The EIR failed to properly delineate cultural resources on the site. Moreover, descendant Native American people's access to the project site for religious and spiritual purposes – and to search for suspected cemeteries - was denied by the applicant and is not established or preserved by Project Conditions.
  - Failure to classify unmitigated impacts to rare plant species as Class I: Revisions to Condition 22 limit the application of the replacement requirement for rare plants to California Native Plant Society ("CNPS") lists 1B and 2 only, excluding various rare species identified in the EIR from this measure, including but not limited to Vernal Barley, Club-haired Mariposa Lily, and Santa Barbara Bedstraw (page 4.4-45). As a result of failing to mitigate impacts to all CEQA rare species, this measure does not lessen this impact to Class II, and it should remain Class I.
8. Statement of Overriding Considerations: The Statement is not based on substantial evidence that the project benefits outweigh the numerous Class I impacts. The Statement is improperly dominated by references to mitigation measures and project elements that only partially offset impacts (e.g., Park, trails and hang glider landing areas). These only partially mitigate impacts and are not project benefits by definition under CEQA. The only legitimate project benefit supported by substantial

evidence, the five affordable homes, is so miniscule compared to the severity and number of significant environmental impacts that it does not override these impacts.

### ***III. Findings***

The findings identified below are not based on substantial evidence in the record and constitute an abuse of discretion. See attached letters.

#### Subdivision Map Act Findings:

- Finding A-2.2.2 (State Government Code Section 66473.5): This finding cannot be made because the project is inconsistent with the General Plan according to substantial evidence in the record.
- Finding A-2.3.5: “The design of the subdivision or the proposed improvements are likely to cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat.”

The design of the subdivision and subdivision improvements described under Alternative #4, “Project Redesign” as identified in the FEIR for the project, would cause “substantial environmental damage” in the form of the five Class I environmental impacts according to the FEIR.

In addition, two significant impacts to wildlife habitat are not avoided to the maximum extent feasible. Further clustering is feasible to avoid these impacts to a considerably greater degree. Additionally, feasible mitigation measures for wildlife habitat were eliminated (e.g., salvage of rare plants; salvage of native grasses) and others were substantially reduced. These measures would have further protected sensitive biological resources such as native grasslands and coastal sage habitats which support a variety of rare wildlife species. Therefore, the design of the subdivision and proposed improvements will, according to the evidence in the record, cause substantial environmental damage and will substantially and avoidably injure wildlife and their habitat, including habitats for numerous rare bird species that use the area.

#### Development Plan Findings:

- Finding A-2.4.2: This finding cannot be made because *adverse* (not only *significant* adverse) impacts can be mitigated further while maintaining a viable project with five affordable units. The weakening of feasible mitigation measures and the failure to adopt other feasible measures proposed by the public and qualified technical experts is evidence that adverse impacts can be further mitigated.

Finding A-2.4.5: This finding cannot be made because evidence in the record shows that revised Alternative 4 has numerous adverse impacts on the

surrounding neighborhood. These include view impacts, traffic safety impacts, and land use impacts related to the failure to maintain consistency in size, bulk and scale between the proposed homes and the neighborhood homes.

- Finding A-2.4.6 (and PRD Zone District Finding A-2.5.1): These findings cannot be made due to inconsistencies with general plan policies.

PRD Zone District Findings:

- Finding A-2.5.3: This finding, “That the buildings and structures are clustered to the maximum extent feasible to provide for the maximum amount of contiguous open space,” cannot be made. Substantial evidence in the record by Magney and Moss show that further clustering can be achieved while still fulfilling the project’s primary objectives, including 15 estate lots, 5 affordable condos, and open space preservation.

CEQA Findings: see above.

***IV. Conditions Being Appealed***

Condition 1: Project Description: this condition should be changed to include clustering and a reduced density project.

Condition 7: This condition should be changed to decrease the height of structures on Lot 3 because, as conditioned, the structures on Lot 3 would be visible from 154 creating a policy conflict, and this change is necessary to mitigate a significant view impacts to the maximum extent feasible.

Condition 15: Open Space Plan: preserve native grasslands and other habitats in fuel modification zones; prohibit planting plants (not just seeds) in PCAs; specify that the native plant species for planting shall be those native to the site and propagated from seeds collected from the site; biological monitoring should be continued for at least five years after occupation of the final home to ensure impacts from build out are identified and mitigated; a qualified third party conservation entity should implement the Open Space Management Plan to ensure effective implementation.

Condition 18: Change native grassland mitigation ratio to at least 3:1 and require salvage of native grass plants.

Condition 19: Specify performance standards for successful coastal sage mitigation and require public review and public hearing on this plan (and all natural resource plans) instead of deferring of coastal sage restoration plan.

Condition 21: This condition should be changed to site and design the proposed park trails to minimize impact on wetlands and streams (i.e., Lot 17).

Condition 23: Boulder Removal Plan: the plan to blast all boulders over 2 tons is not specified. The impacts of blasting are not analyzed. It is feasible to mitigate to a greater degree. It is feasible to move all boulders, including those not covered by lichens (in addition to those with lichens, as proposed) as mitigation for the Class I wildlife habitat impact.

Condition 25: The Weed Removal Plan must include non-native grasses that threaten the native grassland, and pepper trees saplings, since mature pepper trees will no longer be removed right away as part of the Open Space Plan.

Condition 32: Restore language requiring an endowment for a conservation organization to manage the PCAs in the future. The endowment for the County lasts only for first five – seven years. There are no conditions in place to ensure long-term management.

Condition 40: This condition should prohibit rather than allow drainage outlets into creeks since the EIR, the County and the applicant all claim there would be no outlets to the creeks from the project.

Condition (new): A new condition should prohibit the installation of infrastructure and the sale of lots until after completion and occupancy of the five affordable homes to ensure the Preserve at San Marcos condos are built.

Condition (new): A new condition should prohibit vehicle access to eastern half of Park and along Lot 17 Park ‘connector trail.’ Or, require that access to eastern part of Park is from Lots 12 – 14.

#### ***V. Planning Commission Improperly Abdicated its Authority to the Applicant***

The PC improperly abdicated its authority as decision-maker to the applicant with regards to imposing conditions necessary to mitigate significant impacts to the maximum extent feasible. They deferred to the applicant on the record rather than exercising independent judgment when deciding which conditions to impose and when and whether to approve the project over the course of several public hearings.