Amy Ow

From: Dave Michaels <dm94402@gmail.com>
Sent: Monday, September 19, 2022 9:44 PM
To: Planning_plngbldg; Steve Monowitz; Dave Pine; David Burruto; Amy Ow; Don Horsley; Warren Slocum; Carole Groom; David Canepa; Camille Leung
Subject: APPEAL: Notice Re: Highlands Estates Lots 5 through 8
Attachments: Final County Response to Comments Grading Modification_PLN2020-00412_ 090822.pdf; Appeal Process and Alternatives .pdf

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Appeal of Community Development Director's decision and accompanying responses (emailed Friday 9/9/22 9:51pm, dated 9/8/22) ("decision") to approve grading increase of Highlands development lots 5-8 Highlands Estates Major Subdivision (PLN2006-00357), which includes the following issues:

- improper designation of this grading-increase request as a minor vs major modification
- improper certification of the inadequate and factually problematic Environmental Impact Report ("EIR") addendum
- improper acceptance of an EIR addendum vs the necessary EIR supplement
- improper attempts to prevent the public from appealing this decision
- insufficient / partial responses to public comments

I hereby, on behalf of myself and other members of my community, appeal this decision related to PLN2006-00357, AND its false assertion therein that it is unappealable. Please allow this email to serve not only as an individual appeal from me, but for any of my community members to either join with me on this appeal, or submit their own, as they see fit.

The complexity of this decision, the unsupported statements it makes, the incomplete responses, and the short time window allowed by staff in sending this decision email at 10pm on a Friday creates a significant burden for the layperson/public to untangle and respond to in 10 days, as required by the appeal process. However, I endeavor to submit a sufficient "application for appeal" email herein.

1. I request that the matter be considered a major modification, subject to a hearing in front of the planning commission.
2. I request that an EIR supplement be implemented, at minimum, and that an addendum be considered insufficient for the matter at hand.
3. I request that this decision be appealable by the public per the County's laws, so that both the venue and appropriate time frame is provided to unpack and refute the many incomplete and problematic claims made in the decision.

Background: in the spring of 2021, Staff notified the public of the Highland project applicant's requested exponential grading increase on this project lots 5-8. It provided an EIR addendum in support of this request and stated that this would be considered to be a minor modification, instead of a major modification. The minor vs major modification was significant because a major modification required a hearing and a minor one did not, and this determination between major or minor would be made by the director himself. The EIR addendum provided was inadequate because it relied on a six year old grading report that itself had a) expired b) relied on the old, lesser grading quantities not these new increased ones and c) did not include the required subsurface investigation mitigation on all lots in its reporting. In addition an EIR *addendum* was not the appropriate vehicle, an EIR *supplement* was, because these new grading quantities were introduced in 2016-2017, long after the original CEQA analysis, meaning the need for the increased grading was either not known, or not disclosed back then, which is a deciding factor for a supplement vs addendum. (This is significant because an EIR supplement, like a major modification, opens up additional analysis regarding compliance and transparency that a minor

modification and EIR addendum would not). Circuitously, the addendum itself tried to claim that it was adequate because it was the performance of a grading mitigation (the one that required subsurface investigation on all lots) was responsible for this increase in grading amount, and therefore this increase was exempt from the need for an EIR supplement. This was a false and misleading position. The mitigation that required subsurface investigation on all lots, had in fact NOT been done. The EIR addendum actually lied when it made that statement. And, even if it had been done, it could NOT be used as a basis for exemption because new information necessitates a supplement vs addendum, even if that information was gleaned during the performance of a mitigation.

There was a dual comment period (one provided for under CEQA for the addendum and a concurrent one provided for under the County's code for the modification). Strong public outcry and the equivalent of hundreds of pages of robust responses from the public resulted. Staff has uploaded many (but unfortunately not all) of the public's comments from during this period to the public record at the following web pages:

https://www.smcgov.org/planning/highland-estates-subdivision-administrative-records-may-1-31-2021
https://www.smcgov.org/planning/highland-estates-subdivison-administrative-records-june-1-30-2021
https://www.smcgov.org/planning/highland-estates-subdivision-administrative-records-july-1-31-2021

Many arguments included citations and technical rebuttals, including serious problems with poor compliance to date with mitigations and conditions, in particular existing grading mitigations, aesthetic mitigations and tree-removal-permit mitigations and conditions; inadequacy of the recent addendum; and strong concern about the apparent conflict of interest involved in the director determining which of his own decisions were subject to a hearing or not. Many expressed a strong desire to collaborate on an appropriate win/win solution.

Staff had a year to respond thoughtfully to the factual, technical and impassioned responses it received, and to collaborate on a solution, such as mediation, but it did not. Instead, after a year, staff provided this underwhelming 10-page decision. This gives the impression of staff downplaying the significance of the factual and voluminous content of the responses it received during the comment period. (On a similar note, when the applicant's new geotech of record recently signed on to the project and requested to see the public comments, staff did not provide them and instead provided only one or two responses from the public, out of dozens. This gave the impression of staff downplaying or "disappearing" the enormous and highly technical content of the public comment period.)

Problems with this decision document include:

1. picked only a few benign comments or questions out of hundreds of pages of relevant public comments
2. provided inaccurate answers to several of the questions and comments from the public that it did choose
3. responses issued concurrently with the decision - this gives the appearance of encouraging incomplete or inaccurate responses to stand as the complete and final word, not subject to public correction
4. issued with strong language discouraging/preventing/warning the public from appealing - see item 3 above
5. did not adequately address several of the most significant technical and procedural arguments received from the public, including but not limited to a) the inadequacy of the addendum and b) the undisputed presence of protected tree and avian species and the failure to abide by conditions and mitigations related to same
6. does not offer sufficient supporting information to the unsupported claims made in the original "notice of proposed grading increase" from Spring 2021, that were rebutted in specific and technical claims by the public. Instead it merely restates the claims, and re-states the director's authority, the project's purported conformance, and the adequacy of addendum
7. erroneously asserts that grading and aesthetic mitigations were performed as written
8. absence of a signature or formal findings on this decision enforces the misleading narrative that no changes have taken place while allowing the director to maintain unchecked power behind the scenes

Regarding the director's assertion that his decision is "unappealable" - this decision document improperly states that Condition 1 and the BOS give the director powers to make decisions and changes administratively that are not subject to appeal even if the public can show that such decisions violate other conditions, mitigations or the county code. By this tactic the director unilaterally gives himself sweeping executive and administrative powers. This is even more power and authority than even the bodies above him have (the planning commission and BOS) because it allows him to make decisions in private, without a hearing, appeal, vote, signed declaration, or opportunity for appropriate reversal or course-correction. As we know, the approval had language allowing that minor changes can be made by the director while major ones must go before the planning commission. Guess who decides whether they are major or minor? The director. If you

combine this with the improper designation of the EIR review as an addendum vs a supplement (explained above) and you have effectively removed any and all public recourse, hearing, or review.

Here is my summary of staff's "unappealable" tactic:

> The original approval in 2010 covered the entire 11-lot subdivision. (The grading was a significant part of that approval process -- a process which included mediation between neighbors, County and applicant). That subdivision approval contained language encompassing the approved amount of grading for the entire 11-lot subdivision, both as a whole and on a per-lot basis. However it was not just approved "grading" in that language, there was an "approved grading *permit*" in the language, too. Staff now maintains that that was the only permit in the project, and therefore the only "appealable moment" in the project. They maintain that any subsequent decisions, approvals, or changes related to individual lots or sites in the decade-plus project, no matter how significant, may not be considered permits or even permit amendments, and are therefore not appealable. Again, they maintain the only "appealable" permits were issued way back in 2010 and that any subsequent decisions are instead administrative changes that are outside of the appeal process. These so-called administrative changes may be designated as minor or major, and the director is the only decider of the minor/major threshold.

This approach removes administrative remedies from the taxpaying/voting public and leaves cost-prohibitive litigation as the public's only remedy, which runs counter to the County's rules and long history regarding collaborative or administrative remedies or solutions short of litigation. I can't overstate the significance, potential conflict of interest, and appearance of ethics violation inherent in the director instructing the public not to appeal his decisions - this is like telling the public not to vote.

How many appeals did we lose as a result of both this tactic and the manner of public notification of this most decision? More time is needed to discern just how many members of the public have stayed away from filing an appeal due to this decision's assertion that it is unappealable, and how many more members of the public did not even know about the issue at all, or have time to respond due to its method of noticing. For that reason I ask that this appeal letter act as a placeholder for members of the public who have been blocked or were given bad information in this decision regarding their right to appeal.

As a basis for my, and my community's, right to appeal I refer to the following section:

> ***SECTION 8604.7. APPEALS.*** *The action of the decision maker in authorizing or denying a permit may be appealed by the applicant, or any other person who is aggrieved by issuance of or non-issuance of the permit or any conditions thereof. Permits considered and acted upon by the Planning Director or Zoning Hearing Officer may be appealed to the Planning Commission, by filing a written notice of appeal with the Planning Division within ten (10) calendar days from issuance or denial of said permit. The Planning Commission shall hear such appeal and render a decision following such hearing. The decision of the Planning Commission is appealable to the Board of Supervisors in the manner described above. The decision of the Board of Supervisors shall be final. The action taken by the decision maker shall be reported to the affected parties.*

AND

> **The attached County PDF, *"Appeal Process and Alternatives.pdf"*** Which states*: The law provides that an appeal may be filed to the next level of decision-making authority. For example, an applicant, neighbor, or other interested party dissatisfied with the Community Development Director's decision (or condition imposed) on a permit may file an appeal to the Planning Commission. If the appellant is still dissatisfied with the Planning Commission's decision, he/she may file a further appeal to the Board of Supervisors.*

I look forward to an appeal process and hearing where these issues can be unpacked. Please allow appeals and accordingly extend the appeal deadline in order to undo some of the harm done by the statements made to the public that the decision was unappealable, to allow for as many other appeals as my fellow community members wish to submit. The attached "appeals process" pdf does not specify how/when fees are paid for the appeal. Kindly advise.

Very truly yours
Dave

cc'd: staff and Honorable Supervisors
bcc'd: community members and interested parties

---------- Forwarded message ---------
From: **Camille Leung** <cleung@smcgov.org>
Date: Fri, Sep 9, 2022 at 9:51 PM
Subject: RE: Notice Re: Highlands Estates Lots 5 through 8
To:
Cc: Steve Monowitz <smonowitz@smcgov.org>, Dave Pine <dpine@smcgov.org>, David Burruto <DBurruto@smcgov.org>, Amy Ow <aow@smcgov.org>

Hi Highlands neighbors and Interested Parties,

Please see attached Notice of Decision on the Proposed Minor Modification for the Highlands Estate Project and Response to Comments Received on the EIR Addendum.

As required by the conditions of approval of the Highlands Estates Major Subdivision (PLN2006-00357), no less than 10 days prior to the start of work, the County will provide a notice to inform residential property owners within 200 feet of planned construction areas, as well as other interested parties, of the planned start date (anticipated for Spring 2023) for the grading and construction of new homes on Lots 5-8 on Ticonderoga Drive.

Thanks