

**Amy Ow**

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**From:** Dan Cucchi <DCucchi@aklandlaw.com>  
**Sent:** Monday, June 14, 2021 4:55 PM  
**To:** Camille Leung; Amy Ow  
**Cc:** Steve Monowitz; Dave Pine; Carole Groom; Don Horsley; Warren Slocum; David Canepa; Robin Orlansky  
**Subject:** 5/17/21 Comment letter  
**Attachments:** image002\_emz; 2021-05-17 Ltr to San Mateo re Highlands Grading Permit Amendment (FINAL).pdf

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Ms. Leung,

I admit it's possible I'm missing something, but in the interests of time and the fact that I am unable to find my 5/17 comment letter on the website, I wanted to make sure the decision makers have a copy before they decide to go forward with this approach.

In case it's an attachment issue, I've also copied the text in this email below:

May 17, 2021

**Via Electronic Mail**

Ms. Camille Leung  
Project Planner  
San Mateo County Planning and Building Dept.  
County of San Mateo  
455 County Center, Second Floor  
Redwood City, CA 94063  
[cleung@smcgov.org](mailto:cleung@smcgov.org)

**Re: Objections to Proposed Planning Director's Approval of an Amendment to the Grading Permit and CEQA Addendum to the Chamberlain Highlands Project\_**

Dear Ms. Leung:

This office represents concerned neighbors in the Highlands area, who are concerned about the Planning and Building Department proposal to authorize changes to the grading plan for the Chamberlain Highlands Project ("Project") as "Minor Modifications" despite the express requirements in the San Mateo County Grading Ordinance (the "SMC-GO") requiring a public hearing prior to approval by either the Zoning Hearing Officer or the County Board of Supervisors ("Board").

Specifically, our clients believe that the County continues to make important and consequential decisions without holding a public hearing for review and approval, and in this case before either the Zoning

Hearing Officer or the Board, that blatantly ignores the requirements outlined in SMC-GO sections 9287 and 9294.

For the reasons stated below, we are writing this letter to respectfully request that the proposed Amendment to the Grading Permit be forwarded to the Zoning Hearing Officer or the Board, as required by the SMC-GO.

**1. The Planning Director has No Authority to Make Decisions Regarding This Amendment to the Grading Permit Because (1) It Involves Cut and Fill Exceeding 1,000 Cubic Yards, and (2) It Would Violate the Planning and Zoning Law's Uniformity Requirement.**

Local agencies do not have the authority to “interpret” their own ordinances in a manner that authorizes actions that are not already authorized in those codes and regulations. (*Langsam v. City of Sausalito* (1987) 190 Cal.App.3d 871, 877 [“Under the guise of construction the court will not rewrite a law; it will not supply an omission; and it will not give the words an effect different from the plain and direct import of the terms used.”]); *see also* Code Civ. Proc. §1858.) Yet, where, as is shown below, the Planning Director is seeking to ignore the explicit procedures in the County’s own ordinance in such a strained manner that it impermissibly modifies the clear intent of the SMC-GO, no deference is warranted, and any approval of the amended grading plan is void. (*Association for Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 391 [“If, in interpreting the statute, the court determines that the administrative action under attack has, in effect, ‘[altered] or [amended] the statute or [enlarged] or [impaired] its scope,’ it must be declared void.”].)

While this office and County staff have repeatedly disagreed over the full scope of authority granted by the Board to the Planning Director to allow certain changes to the Project through a “Minor Modification” process (for instance, we continue to disagree with the County’s assertions that some homes could be moved or that staff could ignore the County’s own code when calculating “floor area” when approving house plans without Board approval), there has been a general agreement that County staff does have some amount of discretion to do so via Conditions of Approval Nos. 1 and 5. This is so because in certain instances the Board’s proscribed scope of that authority set forth in those conditions is in general concurrence with sometimes broad, but vague discretion established elsewhere in the County’s ordinances and regulations. (*See, e.g., SMC Subdivision Regulations* §7014(5)(b) [requiring the County Engineer to find that “...this final map substantially conforms to the conditionally approved tentative map.”]) (emphasis added.) The process for the approval of this amendment to the Grading Permit, however, has no such discretion.

SMC-GO section 9287 defines who is authorized to approve certain grading activities through the grant of grading permits:

The following person or body shall grant the indicated permits as required by this chapter:

1. The Planning Commission: All grading and land clearing permits in State or County Scenic Road Corridors.
2. Planning Director: Land clearing permits outside State or County Scenic Road Corridors; grading permits for agricultural water impoundments which do not qualify for exemption under Section 9284(P) and which are located outside State and County Scenic Road Corridors; and grading permits involving cut or fill not to exceed 1,000 cubic bank yards.

3. Zoning Hearing Officer: All other grading permits.

The plain language of the ordinance specifically states that the Planning Director’s authority to grant grading permits involving cut and fill to only those that do not exceed 1,000 cubic yards. Here, the proposed amended grading plan would require the amount of cut and fill to increase to nearly 8,000 cubic yards:

**Table 2: Changes to Proposed Earthwork for Lots 5 through 8**

Area	Approved Cut (cy)	Approved Fill (cy)	Revised Cut (cy)	Revised Fill (cy)	Revised Cut after Balance (cy)	Cut for Landslide Mitigation (cy)	Change in Cut (cy)
Lots 5–8	4,700	700	5,230	320	4,910	2,880	+7,790
<b>TOTAL</b>	<b>4,700</b>	<b>700<sup>A</sup></b>	<b>5,230</b>	<b>320</b>	<b>4,910</b>	<b>2,880</b>	<b>+7,790</b>

Notes: cy = cubic yards  
<sup>A</sup> Includes 200 cubic yards of drain rock for Lots 5–8.  
 Source: County of San Mateo, Highland Estates Recirculated Draft EIR, September 2009, pp. 3.0-23, 3.0-29, and 4.4-31; Board Staff Report, April 12, 2010, Table 8-Changes to Proposed Earthwork, pp. 28–29; BKF Engineers, Inc., Technical Memorandum re: Grading Associated with Highland Estates Lots 5 through 11, March 7, 2019; and County of San Mateo, Spreadsheet for Grading for Chamberlain Project Lots 5-8 June 25, 2020.

Furthermore, SMC-GO section 9294 defines who has the authority to approve all amendments to approved grading permits:

Upon application by the permittee, the permit required by this chapter may be amended by the approving authority. Application for and action on an amendment shall be accomplished in the same manner specified by this chapter for initial approval of the permit. All sections of this chapter shall apply to the permit amendment.

This section specifically states that a grading permit “may be amended by the approving authority” and further states that it “shall be accomplished in the same manner specified by this chapter for initial approval of the permit.” Here, the initial approval of the Grading Permit for the Project was made by the Board at a public hearing on April 27, 2010. The SMC-GO is somewhat ambiguous as to whether that would mean: (i) the Board must be the approving authority, since they were the “approving authority” for “the initial approval of the permit,” or (ii) the Zoning Hearing Officer is the approving authority since the Zoning Hearing Officer is described as having authority to initially authorize all grading permits involving cut and fill of more than 1,000 cubic yards. Regardless, there is no reading that would authorize the Planning Director to grant a Grading Permit for nearly 8,000 cubic yards of cut and fill, let alone an amendment to a Grading Permit that nearly doubles the amount of cut and fill initially authorized.

In addition to the patent violations of the SMC-GO, allowing the Planning Director to approve a “Minor Modification” to the Project without a public hearing, despite the clear procedural requirements in the SMC-GO, would likely violate the uniformity requirement under the Planning and Zoning Law. (Gov. Code §65852.) Here, the County is seeking to authorize a special procedure for the approval of an amendment to a Grading Permit for a development project in the RM Zone, via a condition of approval that is not provided to any other similarly situated development project in the RM Zone, in violation of the Planning and Zoning Law. (*Neighbors in Support of Appropriate Land Use v. County of Tuolumne* (2007) 157 Cal.App.4th 997, 1001 [holding the County’s approval of a development agreement that allowed a use on the property that was not authorized under the zoning code violated the uniformity requirement in Government Code §65852].) “Cities and counties may create rules and create zones; the rules should be the same for each parcel within a zone but may be different for parcels in different zones.” (*Id.* at p. 1008.)

Furthermore, holding a public hearing for the review and consideration of an approval of an amendment to the Grading Permit is warranted given the context upon which this Project was originally approved.

Specifically, when approving the modifications to the normally required building setback requirements the Board relied on the more limited amount of grading as one of its primary reasons for adopting the requested changes. (See Highlands Project Board Staff Report dated April 12, 2010, for the Public Hearing held on April 27, 2010, at p. 24. [“Minimization of Grading: In addition to the density bonus incentive and the site design criteria, a setback reduction would be an additional incentive to minimize project grading and would only be granted under this condition.”](emphasis added).) Here, the applicant is now seeking to substantially increase the amount of grading for the Project, undermining the original finding used to grant the setback reductions in the first place. Under these circumstances, both the public and the Board should be afforded an opportunity to evaluate the necessity and the implications of this substantially expanded grading request.

**II. The Public Interest Demands the County Provide the Public with More Than Fourteen Days to Review and Comment on the Nearly 300-Page Proposed CEQA Addendum for this “Minor Modification.”**

Despite regularly reviewing the County’s website for the release of documents for the Project, several months had gone by and nothing was updated (Past January 31, 2021) to allow the public, or our clients, to keep abreast of the County’s review of the Project. Then suddenly months of documents, a new proposed “CEQA Addendum,” and notice of the County’s pending decision to authorize a massive increase in grading on a landslide-prone hillside above the Highlands’ primary access road all appeared on the website. Suddenly, despite the disclosure of hundreds of pages of analysis, studies, and proposed findings, the public was offered a measly 14 days to review, understand, and provide meaningful feedback on this newly-revised approach to address the landslide issues and introduction of a nearly nine-fold increase in construction truck trips than was originally proposed in the Project EIR.

Given its location, it is critical that this work is done right. A hillside failure could not only risk lives and damage property above and below the hillside, but could also block the primary access road to the remaining homes in the Highlands community, as well as put the apartments and townhomes further down the hillside on Ticonderoga Drive at risk. Public scrutiny afforded by adequate time for review and comment and the public hearing process often improves the quality of outcomes as discrepancies or errors missed by the internal review process are brought to light. If the analyses and conclusions are sound, neither the County nor the applicant should fear this process.

**III. Conclusion.**

The SMC-GO expressly establishes that the Planning Director is not the approving authority for this request to amend the Grading Permit approved by the Board for this Project. Thus, the County must set a public hearing date before either the Zoning Hearing Officer or the Board before the requested grading activities can be approved. Furthermore, given the breadth and complexity of the documentation prepared for this request by the applicant, the County should grant additional time for public review and comment before setting that hearing.

If you have any questions, you may reach me at (916) 456-9595.

Very truly yours,



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