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Via Email

October 25, 2023

Town of Los Gatos
Los Gatos Planning Commission
c/o Clerk's office
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Ryan Safty, Associate Planner
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Re: Appeal of DRC's approval of a lot line adjustment
17200 Los Robles Way, LLA Application M-23-001
PC Meeting 10/25/2023, ITEM NO: 2

Honorable Planning Commissioners

This office represents Alison Steer, on whose behalf I submit this rebuttal to the arguments advanced by your planning Staff and the Applicant in opposition to Ms. Steer's appeal of the Los Gatos Development Review Committee's approval of the above-referenced lot line adjustment ("LLA").

I note that the Staff Report was made available on Friday, October 20, 2023, and the Applicant's comments were only made available on October 24, 2023, leaving Ms. Steer inadequate time to prepare her rebuttal. Both Staff and the Applicant had months to prepare their opposition to Appellant's argument; publishing lengthy reports and comments the day before a final appeal hearing is unconscionable and prejudicial.

1. **The approval of the LLA is not per se a ministerial act as that term is used in CEQA.**

Contrary to the Staff' and Applicant's contention, approval of the proposed LLA is not ministerial under the Township's regulation because the Township can exercise considerable judgment to shape the LLA to ensure consistency with the Town's General Plan, Hillside Specific Plan, and all applicable Hillside Development Standards and Guidelines. A project is ministerial for CEQA purposes only if:

> "the decision involves only the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out." (CEQA Regs., § 15369.) (emphasis added.)"

Sierra Club v. Napa County Bd. of Supervisors (2012) 205 Cal.App.4th 162, 177.

> The statutory distinction between discretionary and purely ministerial projects implicitly recognizes that unless a public agency [is authorized to] shape the project in a way that would respond to concerns raised in an EIR, or its functional equivalent, environmental review would be a meaningless exercise." (*Mountain Lion*, at p. 117, 65 Cal.Rptr.2d 580, 939 P.2d 1280.)

Protecting Our Water and Environmental Resources v. County of Stanislaus (2020) 10 Cal.5th 479, 493–494.

2. The Town has already decided that LLA approvals under the Town's regulations is not ministerial.

The Town has already implicitly conceded that the LLA is not ministerial and therefore subject to CEQA because the Town itself processed and approved the very same LLA pursuant to the so-called "common sense" exemption. The last time around, the Applicant and its counsel went along with the Town's determination that the Project was discretionary. The Development Review Committee's ("DRC") decision that the LLA is exempt from CEQA was arbitrary and capricious because neither the DRC nor the Applicant has offered any explanation for reaching an opposite conclusion, i.e., that the decision to approve the LLA is ministerial, based on the very same facts. Reis v. Biggs Unified School Dist. (2005) 126 Cal.App.4th 809, 823 (arbitrary and capricious encompasses conduct not supported by a fair and substantial reason).

Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co. (1983) 463 U.S. 29 is on point. Congress directed a federal agency to issue regulations that would ' "meet the need for motor vehicle safety.' " *Id.*, at 33. The agency promulgated a regulation requiring cars to include passive-restraint systems in the form of airbags or automatic seatbelts. *Id.*, at 37. The agency based this regulation on a factual finding that these systems save lives. *Id.*, at 35. Following a change in Presidential administration, however, the agency reversed course and rescinded the regulation without any explanation or discussion of its prior finding that airbags save lives. *Id.*, at 47–48. The Supreme Court found the agency's rescission of the previously promulgated regulation was arbitrary and

capricious because the agency did not address its prior factual findings. *Id.*, at 49-51.

3. <u>The conclusion that LLA approvals are ministerial and therefore exempt is inconsistent with CEQA Guideline 15035.</u>

The Town's contention that LLA approvals are per se ministerial under Government Code section 66412, subdivision (d) is legally incorrect. This conclusion is inconsistent with CEQA Guideline 15305 (14 C.C.R. § 15305) which exempts LLAs from CEQA only if they involve 4 or fewer lots and the average slope is less than 20%. Staff and the Applicant claim that Government Code section 66412 essentially supersedes this CEQA Guideline but offer no authority for this proposition. There is no legal authority to show that CEQA Guideline 15305, as it relates to lot line adjustments, has been superseded.

4. <u>The DRC's decision to approve the LLA with conditions required exercise of judgment.</u>

The evidence shows that the DRC's decision to approve the LLA at issue here was not ministerial, even if the DRC ignored its responsibilities under the Town's own regulation. The DRC's decision to approve the LLA includes a requirement that the Applicant shall:

> make irrevocable offers of dedication of easement to the Town of the 'Cul-De-Sac Area' for right-of-way purposes (as that Cul-De-Sac Area is specifically delineated in the New Lot Line Adjustment Application (M-23-001) materials), and to the satisfaction of the Town Engineer, to ensure compliance with the minimum Town street frontage standards for cul-de-sacs.

The DRC did not undertake any analysis of the potential impacts of constructing the culs de sac, or the consistency of the culs de sac with the applicable regulations including the Hillside Development regulations.

When the Town Council considered this LLA, the Council also considered the Applicant's suggestion that access and frontage nonconformities with the Town's regulation could be addressed with by a condition requiring a Hillside-compliant cul de sac. Administrative Record ("AR") 3802 at 1:52. During that hearing, Planning staff acknowledged that building the cul de sac would require cutting down several trees and therefore could be undesirable. AR 3802 at 1:53. As the DRC did in August, the Town Council refused to consider the feasibility or environmental impacts of the proposed cul de sac and deferred consideration of those impacts and presumably the ultimate decision whether to require the construction of the cul de

sac to a later hearing. This shows that the requirement that the Applicant dedicate an easement in the shape of a cul de sac is not a ministerial act because it will require the exercise of judgment, albeit deferred, based on potential environmental impacts.

This decision whether, where, and how to construct the culs de sac will need to be consistent with the Hillside Specific Plan ("HSP"), which was adopted "to address the existing and future development policies of town and county, to make recommendations for future development in the planning area, and to promote harmony between development and the natural environment." The HSP "establishes a series of policies and standards related to land use, facilities, services, circulation, fire protection, safety, and open space. . . to prevent deficiencies in access to water and sewer services [and] ensure conservation of the sensitive natural environment . . . ." Los Gatos General Plan ("LGGP") Land Use ("LU")-19-20. "Development in the Hillside Specific Plan area is prohibited outside of designated 'least restrictive development areas' (LRDAs) unless it is compliant with conditions established in the Plan." LGGP LU-20. All development in the HSP area, including single family residences, is subject to review; Architectural and Site Review procedure or Design Review shall be required for all development proposals in the hillsides, including buildings, grading, **roads,** parking areas, landscaping and outdoor lighting. The purpose is to provide for the design of building sites which will be appropriate in mountain environment. HSP 1.3.4 (emphasis added).

The Hillside Development Standards and Guidelines ("HDSG"), adopted in 2004, require development to minimize "the potential for geologic failures, fires, and floods that result from or adversely impact new development," maintaining "the natural appearance of the hillsides from all vantage points" as well as their "rural, natural, open space character," and conserving "the natural features of the site such as topography, natural drainage, vegetation, wildlife habitats, movement corridors and other physical features. HDSG I.E.

Thus, the decision to approve the LLA—with the proposed cul de sacs to ensure consistency with Township regulations—is required to be consistent with the above-described provisions. The DRC simply ignored this requirement when it approved the LLA and the cul de sac without any consideration of its consistency with these important provisions. Thus, the decision to approve the LLA as conditioned did require exercise of discretion to ensure consistency with all applicable regulations.

Staff attempts to skirt this argument by contending that "construction of the cul-de-sac is not proposed or required, and Condition of Approval #5 makes clear that any and all disruption, development, construction, including future construction of the cul-de-sac, would require a discretionary Architecture and Site Application with environmental review to determine appropriate CEQA compliance,

and review for General Plan, Specific Plan, Zoning, and Building Ordinance compliance." This argument is unavailing because the offer of dedication of the culs de sac is intended to ensure the resulting lots conform to the applicable regulations. Accordingly, the Town must assume that any requirement necessary to ensure the LLA's consistency with Township regulations will be implemented.

Moreover, the Applicant admits that the culs de sac will be built to provide access to the resulting lots: "the plan is to access only one of the resulting parcels from Los Robles Way and the other 2 from a cul-de-sac at Worcester Lane. In addition to improving the compatibility of the 3 parcels themselves, it will bring the street frontages for the three resulting lots into compliance with the General Plan and zoning ordinance." See Exhibit 6 to Staff Report.

5. <u>The Town must analyze the LLA's consistency with all relevant guidelines and policies.</u>

As Staff concedes, the LLA must be consistent with all applicable provisions of the Town's General Plan, any applicable specific plan and all applicable zoning regulations and ordinances. Gov't. Code § 66412, subd. (d). The DRC did not analyze the proposed LLA's consistency with all applicable goals, policies and regulations. The road construction necessary to provide access to Lot 3 of the proposed LLA would impact an ephemeral streambed that carries water during and after rain. AR 767. Moreover, Hillside Standards & Guidelines III.C Guideline 2, provides "[t]he maximum length of a driveway should be 300 feet unless the deciding body makes specific findings for deviation and places additional conditions such as turnouts and secondary accesses to reduce hazards." The Staff Report does not discuss the length of the driveway or its consistency with the applicable policies.

Similarly, the goal of General Plan Land Use policy 6 is "to preserve and enhance the existing character and sense of place in residential neighborhoods." LGGP LU-6.4 prohibits "uses that may lead to the deterioration of residential neighborhoods, or adversely impact the public safety or the residential character of a residential neighborhood." Members of the public and the Town Council have already expressed grave concerns about the potential impacts of creating a new buildable lot at this location through the LLA process. The Staff Report ignores LGGP LU 6.4.

Sincerely,

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Babak Naficy
Attorney for Alison Steer

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