

Jackson Law Offices

245 East Laurel Street
Fort Bragg, CA 95437
E-mail: jackson@mcn.org

Telephone: (707) 962-0222
Facsimile: (707) 962-0269

James A. Jackson

March 18, 2015

Fort Bragg City Council
City of Fort Bragg
416 N. Franklin Street
Fort Bragg CA 95437

Re: Patton Appeal (CDP 8-13), (DR 7-13), (USP 5-13), (LLA 3-2014)
1250 Del Mar Drive, Fort Bragg (APN 018-450-40, 018-450-41)

Dear Councilmembers and City Staff:

This letter is written in support of Project applicant Group II Real Estate (Bill and Greg Patton) and their proposed project commonly known as the Hare Creek Center. This project is located on approximately 3 acres of undeveloped commercial property which has been zoned highway visitor commercial since at least 1981. In addition to the three acres under consideration, the Pattons own two adjacent properties to the west and south of the Project site. The Pattons have allowed the community to use portions of their property for many years for circuses, logging shows, carnivals and the like. Bill Patton and his former partner also sold on favorable terms the property for the construction of the College of the Redwoods west of their current holdings (now operated by Mendocino College). Other projects pursued by the Pattons in the City of Fort Bragg have included the Boatyard Shopping Center at the intersection of Highways 1 and 20 and the Franklin Street shopping center where the DMV office is located (among other commercial uses). Through these projects, and the proposed Project, the Pattons have successfully attracted substantial new businesses to Fort Bragg.

As discussed in the comprehensive staff report prepared by Community Development Director Marie Jones, the Pattons have proposed a number of developments over the years for their property on Del Mar Drive. In comparison with some of the formerly considered projects, the proposal now before the City Council is a relatively modest development of 3 acres with the construction of three buildings (consisting of 15,000, 10,000 and 4,500 square feet respectively) totaling 29,500 square feet of retail space. To put this in perspective, the proposed Project is one-third the size of the Boatyard Shopping Center. Indeed, Harvest Market alone is larger than the entire proposed Project buildings, as is the Safeway supermarket. The Dollar Tree store in the Boatyard is larger than the largest store in the proposed Project (which is intended to be occupied by Grocery Outlet). For this Project, the Pattons have retained the services of a LEED-certified architect who has incorporated numerous green design elements into the project including photovoltaics, bioswales and 100% stormwater recharge.

Surrounding property uses include a miniature golf course and hotel to the north, a

shopping center to the east, undeveloped land zoned very high density residential to the south and undeveloped highway visitor commercial property to the west. The parcels to the south and west owned by the Pattons have been on the market for sale for the past year if any one wishes to preserve or develop these properties.

The Project as conditioned by staff and the associated mitigation monitoring and reporting plan is consistent with the City's general plan, land use development code and related city and state requirements. The Project should accordingly be approved by the City Council.

PROCEDURAL HISTORY

The proposed project requires a coastal development permit (CDP 8 – 13), design review (DR 7 – 13), use permit (USP 5 – 13) and lot line adjustment (LLA 3 – 2014), as well as an appropriate environmental document (in this case, a mitigated negative declaration).

An initial study and mitigated negative declaration was prepared for the Project by City staff.

A hearing on the Project was held before the Fort Bragg Planning Commission on January 28, 2015. After receiving substantial public testimony regarding the project, the Planning Commission voted 3-1 (one commissioner recusing himself) to approve the mitigated negative declaration (MND). The commission then deadlocked 2-2 on the CDP and related permit requests.

Based on the comments of Commissioner Statham (who voted against the requests) the issue creating controversy involves aspects of the project design. The lot line adjustment and use permit seem to be non-controversial. The other dissenter (Commissioner Rodriguez) offered no specific reason for denying the CDP and related permits, but based on some general comments appears to prefer the Project site in its undeveloped state despite its long-time zoning as highway visitor commercial. The Project architect has continued to work with City staff to prepare alternative aesthetic designs intended to "soften" the visual impact from Highway 1.

The Project applicant appealed the denial of the CDP and related permit requests. An opposition group led by Edward Oberweiser filed an appeal of the Planning Commission's approval of the mitigated negative declaration. These two appeals are scheduled to be heard by the City Council at a meeting presently scheduled for March 23, 2015.

DISCUSSION

1. The Planning Commission's denial of the Patton CDP was arbitrary and capricious.

As noted above, the Planning Commission denied the Patton's request for a CDP and

related permits for the Project on a tie 2-2 vote. One of the dissenting Commissioners provided no reason for her denial. The other (Commissioner Statham) indicated that he felt the buildings as designed were "too blocky" as seen from Highway 1. He suggested that he would vote to approve the other requested permits but was told they were not severable.

Design review and aesthetic considerations will be discussed by Project architect Debra Lennox who has conducted an in-depth review of Fort Bragg architectural styles in preparation for this Project, and will provide evidence concerning the existing architectural styles in the surrounding areas and the City in general. The evidence will show that the proposed Project meets or exceeds the design parameters of buildings found in Fort Bragg. Indeed, the proposed Project will be an attractive addition to the City.

The Planning Commission's denial of the Project permits on this dubious ground was arbitrary and capricious, constituted a denial of due process to the applicants and was not supported by substantial evidence in the record inasmuch as the Project (as conditioned) is consistent with all City requirements pertaining to the Project and the Project should accordingly have been approved by the Planning Commission. The applicants request that the City make the appropriate findings and approve the Design Review, CDP and related permits for this Project.

2. The appeal of the Planning Commission's approval of the MND is without merit

An opposition group led by Edward Oberweiser has appealed the Planning Commission's decision to approve the mitigated negative declaration (MND) for this Project. The appeal is based primarily on subjective anecdotal impressions of the Project with little evidence of any environmental impact from the Project (never mind significant environmental impact). It largely ignores the four years of work by the numerous Project consultants and City staff that went into the preparation of the initial study and MND for this Project. While the appellants repeatedly call for the preparation of an EIR for the Project (no doubt in the hope of causing further unwarranted cost and delay, and possibly dissuading the applicants from building at all), their failure to identify any substantial evidence that there may be *significant* environmental impacts requiring further study renders their appeal meritless.

To require an EIR, there must be substantial evidence that the Project may have a significant environmental impact. "If there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment, an environmental impact report shall be prepared." (Public Resources Code § 21080(d); see also § 21151(a).) "Argument, speculation, unsubstantiated opinion or narrative, [and] evidence which is clearly inaccurate or erroneous ... is *not* substantial evidence." (§ 21082.2(c) [emphasis added].) Rather, "[s]ubstantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (*Id.*) Importantly, public controversy, standing alone, is not enough to require an EIR. (Public Resources Code Section 21082.2(b).)

Section 21060.5 defines "environment" as "the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance." (§ 21060.5.) A "significant effect" is a "substantial, or potentially substantial, adverse change[] in physical conditions which exist within the area as defined in Section 21060.5." (§ 21151(b); see also Bowman v. City of Berkeley (2004) 122 Cal.App. 4th 572, 580.)

Based on the comprehensive staff report and its proposed 16 special conditions and 21 mitigation measures, the Planning Commission properly approved the mitigated negative declaration for this Project. The Project (and its predecessor proposed projects over the past 30 years) has been extensively studied by numerous experts and consultants, including the City's Community Development Director who prepared the MND. In contrast, the Project opponents have filed an appeal without any supporting expert opinion which is based largely on speculative subjective observations by persons living nearby the project (or who drive by the Project) who prefer to see this commercially zoned property continue in its undeveloped state. Based on the General Plan, the City has anticipated a shopping center in this location for the past 35 years. The Project site is undeveloped commercial property, not open space.

The following discussion will analyze the failure of the appeal to raise any significant environmental issue which would require the preparation of additional environmental documents. Subsections are numbered to correspond to the subsections of the appeal (even where those subsections are misnumbered).

I. Aesthetics: The staff report discusses in detail the visual analysis conducted as part of the initial study and MND. This element will also be addressed by Project architect Debra Lennox. The Project opponents have provided no expert opinion to support their appeal. The opponents' appeal regarding aesthetics primarily focuses on two identified issues: A fleeting limited ocean view from Highway One and a small knoll on the adjacent Patton property.

A. Small knoll: As noted in the staff report at page 9, grading for the Project will remove approximately 30% of the easternmost slope of a small knoll. Most of the small knoll will remain following project development. Concerns expressed about views from the top of the knoll are unfounded as the top of the knoll will not be altered by this Project. The knoll itself is not a "prominent landform" nor has anyone ever called it Hare Creek Hill prior to this appeal. These issues are further discussed in correspondence from Project engineer Lee Welty.

B. Ocean view: There are no panoramic ocean views across the Project site. In fact, it is understandable that City staff at first didn't believe there was any ocean view at all.

As Community Development Director Marie Jones noted at the Planning Commission

hearing, her initial opinion that there was absolutely no ocean view from Highway 1 across this Project site was not entirely correct. If a southbound driver contorts oneself so as to look over one's right shoulder while traveling at 40 miles per hour past the Project site, there is a fleeting view of some blue water to the west. Most motorists (including this writer) would never notice any ocean view from this perspective and whatever view may exist is both fleeting and insignificant compared to the views to the west along the highway in the surrounding area from across the Noyo River bridge to the Hare Creek bridge and elsewhere in the general vicinity of the Project.

If such a fleeting blue water ocean view was ever allowed to impede the development of commercially zoned property in the City of Fort Bragg any proposed development west of the highway (including the former GP mill site) will be doomed. Limited blockage of this fleeting ocean view cannot be considered a significant environmental impact.

The opponents raise two additional issues under Aesthetics.

C. Grading for new road: The opponents claim that the proposed new road along the west side of the Project site will "bisect or completely remove" the small knoll on the Patton property. This claim ignores both the Project plans and the staff report findings. Only 30 % of the knoll will be affected by the Project (in part to reduce the visual impact from Highway 1), and the top of the knoll will be untouched. The road will be constructed over the existing topography and requires only minimal cut and fill. The proposed road is part of the street improvements required by the City as part of the Project (as is the eventual connection of this road to the neighborhood roads to the south and west, although this Project does not involve the construction of roads beyond the Project's southern boundary.)

D. Lighting: The staff report concludes at page 16 that all lighting on the Project site will remain on the Project site. The opponents offer no evidence to the contrary but instead speculate that a "herd of deer" will be affected by the outdoor lights, as may some wild turkeys, skunks and raccoons. Even the Project opponents admit that these creatures have no special status in the context of an environmental document.

This Project has undergone vigorous design review and visual impact analysis by City staff. Under such circumstances, CEQA does not even apply to aesthetic issues. As the Court of Appeal in San Francisco reasoned in Bowman v. City of Berkeley (2004) 122 Cal.App. 4th 572, 594, "[w]here a project must undergo design review under local law, that process itself can be found to mitigate purely aesthetic impacts to insignificance, even if some people are dissatisfied with the outcome. A contrary holding that mandated redundant analysis would only produce needless delay and expense." Here, the opponents have not raised any aesthetic issue requiring further study, and certainly have not produced any expert evidence challenging the effectiveness of the City's Design Review process.

III. (sic) Air Quality: Although the opponents refer to the issue, there is no discussion in the appeal other than the conclusory statement "air quality effects cannot be completely addressed without a complete EIR". This issue is accordingly waived.

IV. Biological resources: The opponents assert violations of policies OS-1.1 and OS-1.7, both of which concern environmentally sensitive habitat areas (ESHAs). However, there is no evidence that there are any ESHAs on the Project site, nor are there any ESHAs adjacent to the Project site. As noted above, the Project site is surrounded by property that is either already developed for commercial purposes or is designated for future development for commercial uses or for high density residential. The opponents' list of common animals which may or may not have been seen on the property has no bearing on this Project. In short, these policies simply have no application to this Project.

V. Cultural resources: The opponents have evidently ignored the provisions in the mitigated negative declaration which require the presence of a Native American monitor during all ground disturbing activities (Mitigation Measure 6), and the requirement that all development cease immediately if human remains are identified during Project construction (Mitigation Measure 7). In addition, it is a standard condition of the requested coastal development permit that the discovery of any archaeological site requires an immediate halt to further excavation and disturbances within 100 feet of the discovery, and notification of the Director of Public Works (Standard Condition 6). Other than speculating that there "may" be artifacts on the site, the Project opponents have provided no evidence, much less substantial evidence, suggesting any need for an archaeological study beyond the standard requirements for a coastal development permit.

VI. Geology and soils: The Project opponents mistakenly state that the soil geology in the project area is "unknown". The Nolan Associates report submitted by the applicant concerning groundwater recharge and water balance evaluation (attachment 4 to the MND) contains substantial information about the hydrogeology of the Project site based on 24 soil borings. (See, particularly, pages 3-5). There is nothing remarkable about the soils on the site (it consists of fractured Franciscan bedrock overlain by marine terrace deposits as is typical of the Mendocino coastal bluffs.) Although the opponents attack the Nolan Associates report based solely on its age, these soils would not have changed since the report was prepared. Geological conditions can change over time, of course, but 20 years is a blink of the eye in geological terms. Moreover, Mitigation Measure 8 in the MND requires that all recommendations in the Nolan report shall be followed. Moreover, the Nolan Associates report was prepared for a substantially larger project, and the report concluded that there would be no significant environmental effect from that project. Further discussion of the Nolan Associates report and this Project may be found in recent correspondence from Lee Welty. The Project opponents have raised no issue requiring further study.

VII. Greenhouse gas emissions: This is a relatively new issue for consideration in environmental documents, and there remains some considerable uncertainty on the part of permit applicants, regulators and the courts regarding how to address the greenhouse gas (GHG) emission reduction targets established for California in Assembly Bill 32, the Global Warming Solutions Act of 2006 (commonly known as AB 32). See California Health and Safety Code Sections 38500 et seq.

The City of Fort Bragg prepared a Draft Climate Action Plan in 2012. The portion of that Plan which deals with commercial buildings (pages 44-47) should be included in the record of this appeal. The City found that commercial GHG emissions relate to the use of electricity (71%), propane (25%) and heating oil (4%). Recommended emission reduction measures include energy efficient lighting, windows, heating and insulation, and photovoltaics. Among the suggested preferred practices are new commercial development built to LEED certification or higher and the use of energy efficient appliances. Enhanced stormwater catchment standards are also discussed. The 2012 Plan concludes, "The commercial building sector has already exceeded the City's target of a 15% reduction in GHGs. The Private sector is reducing GHG emissions very well on its own...." See 2012 Fort Bragg Draft Climate Action Plan, page 47.

The Project before you was designed by a LEED-certified architect and incorporates numerous green building features including photovoltaics, bioswales, energy efficiency and 100% stormwater recapture. The Project will do more than its fair share to reduce GHG emissions when compared to a "business as usual" scenario in which less efficient building designs were pursued. The Project applicants have demonstrated their commitment to sustainability and green design. The Hare Creek Center continues the trend of green building design in the City of Fort Bragg and will enhance the ability of the City to meet its overall GHG reduction targets.

Reduction of GHG is a laudable goal, but how we achieve that goal while continuing to permit new projects in the City remains a work in progress. Staff's determination that this Project will not significantly increase GHG emissions in the City of Fort Bragg is supported by substantial evidence. The opponents have offered no countervailing substantial evidence suggesting that the impacts may be significant. In the context of GHG emissions' impact on global climate change, this is an insignificant project which enhances, rather than detracts, from the City's ambitious goals. The real problem society faces are GHG emissions from motor vehicles and sources of electricity. As cars and power plants get cleaner over time in response to policies imposed at the state level, this Project will get even greener than it currently is. The applicant cannot control the vehicles used by customers or the power sources used by electricity providers such as PG&E.

IX. (sic) Hydrology and water quality: The project opponents acknowledge that the MND addresses the permit requirement for a National Pollution Discharge Elimination System (NPDES) permit, but contend that this does not address "the potential pollution of the groundwater sources

to the Todd Point residential area" significantly west of the Project site. This lay comment ignores the sophisticated system of bioswales and filtration systems which were designed as part of the storm water recharge system. Their speculative claim that "hydrocarbons" will somehow migrate across the substantial distance between the Project site and the residential neighborhood at the west end of Todd Point is completely unsupported by any evidence, substantial or otherwise. The claim that the Project is "dangerously close to Hare Creek itself" is nothing more than hyperbole. There is an 8-acre buffer between the Project and the boundary of Land Trust property (which is itself a significant distance away from Hare Creek.)

X. Land use and planning: The opponents make the unsupported claim that the Project will have a significant effect on an environmentally sensitive habitat area and/or the coastal trail. They make no attempt, however, to identify any significant effect or ESHA, or to identify any further study needed to address the alleged effect. As noted earlier, there are no ESHAs on the Project site, and the coastal trail is on land donated by the Pattons.

XII. (sic) Noise: The Project opponents speculate, without any support, that trucks and deliveries to the businesses occupying the Project will "adversely affect" the Mendocino College campus. Notably, though, there has been no objection to the Project from the College itself (which is shielded from highway noise and the Project site by the small knoll that stands between the college and Highway 1). There is no substantial evidence in the record of any significant noise issue related to this Project.

XIV. (sic) Public services: The project opponents state (in somewhat alarmist terms) that the project will somehow increase fire danger and/or require more police protection. The staff report clearly states, however, that both the police department and fire department were consulted regarding this Project and neither agency expressed any concerns regarding the Project.

XV. Recreation: The Project opponents apparently object to the Project on the dubious grounds that more people may visit Pomo Park (located at the West and North ends of Todd Point), and that this would increase the need for police presence. That is directly contradicted by the staff report (as discussed above). Moreover, one would think that increased use of City recreational areas would be considered a good thing (although it is doubtful that this Project would have much of an impact one way or the other).

The opponents also apparently believe that because the Pattons have permitted public use of their property over the years for various fundraisers and other public events the Project should be denied because it may deprive the public of the continued free use of the Patton property. If that view prevailed it would be a good example of the adage "no good deed goes unpunished." However, it is not an appropriate basis for denying this Project or requiring an EIR.

XVI. Transportation/traffic: This issue is further addressed by the Project applicant's

traffic consultant Matt Kennedy. The project opponents claim that the opening of the Dollar Tree store in the Boatyard Center (which replaced a Rite Aid store) has generated increased traffic which needs to be further studied. No evidence is provided to support this claim. The applicant's traffic consultant has determined that the change in stores would make no difference. The slight drop in level of service (LOS) at the unsignalized intersection at the southern entrance to the Boatyard Center is likewise insignificant and could be addressed with a traffic light if demand increased in the future. However the trigger for adding a signal to this intersection has not been met, and there are alternative routes to Highway 1 if this driveway was to become congested during peak flows.

The opponents also claim that traffic impact data from August 2013 is inadequate to address traffic relating to the college campus. However, it was specifically directed by Caltrans that August is the month with the highest traffic volume on Highway 1 (representing a reasonable "worst case scenario" relating to the tourist season in Fort Bragg), and that accordingly was the time period for which the applicant was required to develop data for the Project.

The opponents also speculate that the Project might cause "substantial traffic backups", and seek to hold the Project applicants responsible for the condition of Hare Creek bridge. Obviously the bridge is the responsibility of Caltrans, and based on the traffic study conducted by the Project applicants (see Attachment 6 to the MND) the proposed Project will not have any significant impact on traffic in this area. The opponents have offered no evidence or analysis supporting the notion that a significant environmental effect would result solely from customers coming to and from the Project site across the bridge.

XVII. Utilities and service systems: The opponent's appeal primarily focuses on two utilities: Water and Sewer.

A. Water usage: The applicants have reviewed correspondence from the California Department of Fish and Wildlife and the City's spirited response. These letters appear to be part of a continuing dialogue between the City and CDFW regarding water usage issues that does not directly concern this Project. We would suggest that a copy of the City's 2010 water supply analysis (discussed in the City's response to CDFW) be included in the record of this appeal.

From the applicant's standpoint, the City either has sufficient water to serve this Project or it doesn't. This is a potential issue for every pending or future project in the City, not just this Project. Based on the response from the City to CDFW, it seems that the City has more than enough water to supply this Project without violating its permits or state law. We note that the City has supplied commercial water haulers during the recent drought, plans to increase reservoir capacity on Newman Gulch, and has already accomplished a 20% reduction in water usage in the City. Based on these factors we believe that the CDFW letter has more to do with agency in-fighting than this Project. The applicant will rely on the City's statement that it can

serve this Project.

B. Waste water treatment: As with water, either the City has sufficient sewer capacity or it does not. City staff should include in the record information concerning present sewer capacity and the estimated anticipated use by this Project to confirm the availability of adequate waste water treatment services for this Project. The applicant will rely on a will-serve letter from the City for this Project.

The project opponents also speculate that the new road west of the Project may require construction of additional storm water drainage facilities. These issues are adequately addressed in the Project plans. Further discussion of the road west of the Project may be found in recent correspondence from Lee Welty.

The City should confirm that funds paid by the applicant (and other project developers) for future roadway improvements are held in a blocked account so funds will be available when improvements may be made in the future

XVIII. Mandatory findings of significance: The project opponents complete their appeal with the conclusory statement that the 21 mitigation measures imposed by City staff are "insufficient to mitigate the many serious adverse effects on the environment" addressed in the appeal and in public testimony. No evidence at all is offered in support of this broad statement.

The applicant requests that the City Council consider one additional issue:

Soil Stockpile: The applicant requests that the City Council consider an alternative to Special Condition 4 (formerly Special Condition 2) which prohibits the stockpiling of soils on the adjacent property owned by the applicant (and as a result of which staff is recommending that further study of GHG emissions from the trucks used to remove the soil be analyzed.) The basis for this recommendation is CD-1.5 which requires that grading outside the building footprint be minimized.

The physical removal of these soils (and subsequent re-delivery) seems economically wasteful and creates additional issues for study. The applicant requests that staff and the Council instead consider enlarging the area to be adjusted in LLA 3-14 to create a borrow site on the subject property so that soils may be stockpiled in place (and ultimately removed to their final destination rather than moved twice). This would comply with City General Plan policy, would be far less costly and would eliminate the need for additional study of this issue.

CONCLUSION

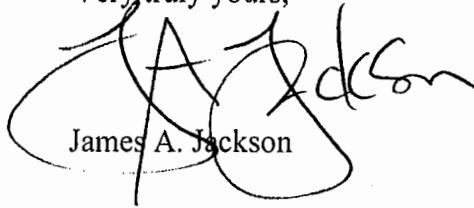
The Project opponents have failed to identify any significant issue which would require the

Fort Bragg City Council
March 18, 2015
Page 11

preparation of an environmental impact report (EIR).

If the City Council believes that any environmental issue has not been adequately addressed in the MND and supporting documents, it should identify any such issue and require further study so that proper findings can be made that the Project as conditioned does not create any significant impact on the environment. If there are no such issues, the Planning Commission's approval of the MND should be upheld and the opponents' appeal denied. Furthermore, the CDP, design review and related permits should be approved for this Project.

Very truly yours,

A handwritten signature in black ink, appearing to read "JA Jackson", is written over a printed name. The signature is stylized with large, sweeping loops.

James A. Jackson