Perkins, Leslie

From: Stephen Goldfarb [steveg50_94609@yahoo.com]
Sent: Tuesday, October 16, 2012 11:31 AM
To: Perkins, Leslie
Subject: Dedication of Open Space - A concept with problems
Attachments: Zirkle_(EEdedicated_land)10022012.doc; Zirkle_EE_answer10122012.doc

Dear Land Use and Housing Committee Members:

FYI

I am copying you with my correspondence with the Parks and Recreation Department. I believe the pending proposal to "dedicate" 10,000 acres of open space is a major problem for the City. The sole purpose of land dedication is to prevent the City Council from making decisions about the land. If the City Council goes along with it, it takes a 66 2/3% vote of the electorate to make changes. In effect the land is out of reach of the City Council forever.

The provision for land dedication is presented in Section 55 of the City Charter. The original City Charter section goes back to April 7, 1931. Section 55 was last amended in 1975.

Important City occurrences make the concept of dedication questionable in today's reality. The City has run out of land for needed housing. In 2006, 4% of the City land remained for housing. The City has declared a housing emergency. And the City, based on limitations of land for housing, wrote a new General Plan in 2008. The concept of the General Plan is that because the City is running out of land, the City must focus on in-fill development, including increasing the height of residential dwellings.

Because of these circumstances, I think it is important, probably essential, that the City Council, and subsequent City Councils, retain discretion about how land is to be used. There is already considerable designated open space, steep slopes, and protected species regulation in place. The MSCP protects a vast amount of land. However, a narrow focus environmental group wishes to remove property, even MSCP property, from City Council control.

This matter is to come before the Land Use and Housing Committee on October 17.

I think consideration should be given to amending Section 55 of the City Charter so that it is consistent with today's changed circumstances regarding land use.

I wrote two letters to the Parks and Recreation Department Open Space Division. The first asked for deferral of dedication of East Elliott Planning Area parcels for cause as described in Council Policy Number 700-17, and the second answered an official's questions. I am a property owner and have an interest in common with other East Elliott owners. The issues I discuss, however, may be seen to have broad application.

Thank you for your interest and attention.

Stephen Goldfarb

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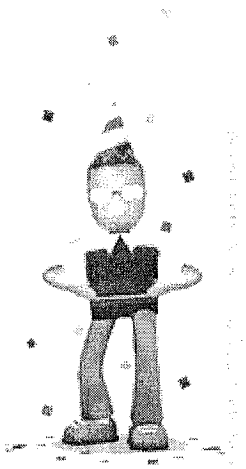

3153 Belle Isle Drive
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October 12, 2012

Chris Zirkle, Deputy Director
Open Space Division, Parks and Recreation Department
202 "C" Street – 5th Floor MS-5D
San Diego, CA 92101

Dear Chris:

Introduction. I submitted a letter requesting that the action regarding East Elliott parcels listed for possible dedication be deferred. I gave 15 reasons. The reasons are consistent with Council Policy 700-17 Policy on Dedication and Designation of Park Lands, which presents criteria for determining what parcels should be included or deferred from dedication. I also summarized the extensive history of issues about the East Elliott Planning Area. The history should make it clear that issues about East Elliott land use have been in dispute with the City, and remain so to this day. That alone provides reason to defer placing East Elliott City-owned land on a list for dedication. I would like to provide a further statement about these matters. I believe this will provide clarification, answer some or all of your questions, and is in furtherance of removing the East Elliott parcels from the proposed dedication list. I will also separately answer questions that remain.

The following is for the purpose of indicating reasons and to clarify questions about removing East Elliott parcels from the proposed dedication list in keeping with City Policy Number 700-17. This discussion is not intended to describe issues that will necessarily be subject to a subsequent legal action against the City, or to limit such issues only to the matters described. Nor is it necessary to argue the merits of the points raised. I am not an attorney, and this is not legal advice. The matter of whether, when, and on what basis to file a legal action will be left to legal experts. The fact that issues are outstanding is ample reason to defer dedicating East Elliott land.

Brief review. The East Elliott Planning Area dispute has been in effect since the Federal Government sold the property to citizens starting in the early 1960s. The City incorporated former Camp Elliott into the City, published an Elliott Community Plan, and designated the area for residential development. Prior to selling the property, the City sued the Federal government to prevent the sale. The City claimed that the manner in which the Federal government had drawn the parcels and laid out the roadways would make development impossible. The City then settled its lawsuit, and allowed the Federal Government to sell the East Elliott land to unsuspecting private citizens. As summarized in my initial letter, the City has stifled or denied East Elliott development to the present. The owners subsequently (in 1996) sued the City. The fact that the owners sued the City for Inverse Condemnation and other causes is a clear indication that the City's treatment of the private owners is disputed, and therefore a reason to not dedicate the property. That the Court determined that the suit was not ripe, and dismissed the suit without

prejudice (meaning the suit can be re-filed), means that the issues in that lawsuit remain outstanding. The Court concluded the case with direction to both plaintiff citizens and defendant City. To paraphrase, the Court said that in keeping with well-established Takings law, it was now up to the City to provide meaningful compensation for the land or to permit the land to be developed. The City could not simply leave the land in its then current state. Twelve years after the suit, the City has not purchased all the land, and the City has put restrictions on development that make development unfeasible.

At the time of the Appellate Court's ruling (January 2000) the Multiple Species Conservation Program (MSCP) provisions were not well known. Though the MSCP was implemented in 1997, the owners' case was filed in 1996. MSCP issues were not a prominent part of the case. The City's failure or contradiction of MSCP provisions are further matters that are at issue, and constitute reasons to not dedicate the East Elliott land.

The City has not complied with the direction of the Court. Parcels not purchased. Since the Court ruled in 2000, the City has only been in partial compliance with the Court's direction for the City to purchase the land for a meaningful price or allow development. The City has bought some land, but not all land. Moreover the conditions the City has imposed to make development unfeasible as a precursor to creating conditions for the city to buy land cheaply may themselves be the subject of a subsequent legal action. Therefore, the matters that were brought up in the owner's lawsuit against the City are prospectively at issue, and subsequent City conduct that has caused damage to the owners may also be at issue.

The City has acted to restrict development. City conduct that makes private residential development unfeasible includes the City's revision of the East Elliott Community Plan in 1997, and City Development Services creating a policy restricting development to 1 dwelling unit per parcel (not per acre as the East Elliott zoning (RS1-8) provides). The Community Plan eliminates all development in the Multiple Species Habitat Area. This is contrary to the stated purpose of the MSCP to allow owners to develop 25% of their property.

The City resists development plan submissions. Since the Court ruled, two developers have submitted development plans to the City for Preliminary Review. The City applied restrictions, referred to above, that made development unfeasible. In another instance a major developer met with the then separate Planning and Development Services Departments. Planning officials told the developer, which had signed a letter of intent with the East Elliott Property Owners Association to develop their property, that the developer could only develop at the 1-dwelling unit per *parcel* density. Note that the actual zoning (RS1-8 or 1 dwelling unit per 40,000 square feet) is already considered very low residential density. It is development density that one might find in a rural area. It is consistent with development in the MSCP. One dwelling unit per *parcel*, however, means that if an owner held title to a 25-acre parcel, the owner, according to Development Services policy, would be entitled to one dwelling unit.

The existence of issues in conflict is reason to defer dedicating East Elliott land. The most sensible occurrence is for the owners and the City to come to a satisfactory resolution. But either way, the fact that issues in conflict are outstanding and current, and in the face of the City's lack of compliance with the Court's direction, should provide all the rational needed for deferring dedicating East Elliott land.

Policy II of Policy Number 700-17. This policy states:

"All land acquired for population-based park and recreation purposes and owned in fee by the City shall be dedicated by ordinance pursuant to Section 55 of the City Charter upon acquisition if the following affirmative conditions exist:

Item 4. "The Park and Recreations Board, City Manager and/or City Council determine that there are no *unusual circumstances* which indicate dedication consideration should be deferred."

East Elliott land that the City acquired was not purchased for "population-based park and recreation purposes." It was purchased to be part of the MSCP. Whether the city-owned land in East Elliott was or was not purchased as population-based, the clear meaning of the policy is not to dedicate land for which *unusual circumstances indicate dedication consideration should be deferred.*

The circumstances need not be immanent. Policy 700-17, Policy II, Item 4, does not determine that the circumstances must be *imminent.* The clear meaning is to provide a means to defer dedication when circumstances are in existence, whether those circumstances are to be immediately acted on or are held in abeyance. In land issues, it may take considerable time for the issues to come to the table for resolution. There does not have to be an active lawsuit or plan submission to defer dedication.

Deferring dedication is independent of the City's current position regarding the land use. Policy 700-17, Policy II, Item 4 is not dependent on the City's current *position* about use of the property. One would expect the City to have a position, which in this case constitutes part of the reasons that underlie a dispute. The policy holds only that there be *circumstances* that indicate dedication should be deferred.

Why should dedication be deferred if the City owns the land?

1. The City owned land is contiguous with private land that has development rights. Development may require boundary adjustments with the City-owned land. Boundary adjustments are common when a development plan is being weighed. If the land were dedicated, the City Council would not have control of the ability to adjust the boundaries of City-owned land.
2. The City may wish to trade city-owned land for private land in the development area. A reason for doing so is that the privately held land may better meet the City's wish or need for open space, it may improve open space boundaries, or

open space contiguity. This would not be possible if the land were dedicated. The City would have relinquished its control over the land.

3. The City may wish to sell a portion of the open space. This would benefit the City because it would earn revenue that could be used to obtain more desirable parklands or to fund park improvements. (Policy III B).
4. The City may wish to sell land based on an agreement with private interests under the MSCP that 75% of the sold land be deeded back to the City at no charge to become a component of its open space.

Why should all City-owned property in East Elliott be at issue? The means of acquisition is a potential issue, and therefore constitutes an unusual circumstance that justifies not dedicating the land. The means of purchase include restricting development rights in order to induce despairing owners to sell their land to the City at low prices. The City is both the purchasing agent and the land use-determining agent, and therefore is in a conflict of interest.

All of these reasons are applicable pending a resolution of the *unusual circumstances* that pertain to East Elliott.

It should be noted that the City has declared a housing emergency and has written a new General Plan because the City has run out of land for essential housing (4% remaining in 2006). The City should retain discretion on use of land that may be determined to be suitable for residential housing. Land the City purchased in East Elliott is under the MSCP, and retains development rights. This is a present and future-oriented matter. Dedication of land today will freeze the ability of subsequent City leaders to make adjustments that fit unfolding and essential City needs.

Council Policy III B may also apply. Policy IIIB states:

The land does not include areas which are undesirable for park purposes, would be more suitable for other purposes, or which could be traded or sold to obtain more desirable park lands or to fund park improvements. In these cases, to provide flexibility in making revisions, which would be beneficial to meeting the City's open space goals, the land shall not be dedicated.

Your questions.

Key questions are answered in the above discussion. I will add or elaborate as needed.

Chris Zirkle said: Thanks Steve. Here are some quick answers and some questions/comments that I hope you can clarify to facilitate better answers.

A. The issues pertaining to the private owners wish to develop their property remain outstanding. The causes of action of the owner lawsuit against the City are unresolved.

Chris Zirkle said: It is not clear to me how dedication of City land would affect developability of private property. Could you please elaborate? Also, could you please let me know the name of the City Attorney with whom you're working?

SG: This was answered above. There is no presently active case.

B. The City's means of acquiring East Elliott property by restricting development it now may wish to dedicate is an issue for possible legal dispute.

Chris Zirkle said: Sorry, I'm not sure I understand this concern. I think I understand your allegation that the City is trying to acquire private property by restricting development on it but only City-owned property is proposed for dedication.

SG: This was answered above.

C. Dedicating property, which removes City Council discretion about the use of the property, preempts the ability of the City Council to formulate a resolution of disputed issues.

Can you be more specific about how City Council discretion on the use of dedicated land could affect the City Council's ability to resolve disputed issues?

SG: Answered above. Dedication removes sale, trade, and boundary adjustments from control of elected officials.

D. All of East Elliott, with the exception of Sycamore Landfill and the area where the Castlerock development is sited, is under the Multiple Species Conservation Program (MSCP). The MSCP includes provisions to make boundary adjustments when use of adjoining properties is undertaken. Boundary adjustments would be pre-empted if the MSCP land were dedicated.

Chris Zircle said: You are correct in that dedicated parkland cannot be used for other than park uses but is this an issue peculiar to East Elliott? Also, are you of the opinion that adjusting dedicated park land into or out of the MHPA is different from adjusting designated park land into or out of the MHPA? If so, I'm not following why that would be.

SG: It need not be applicable only to East Elliott. However, I am only stating the rationale for deferring dedication of East Elliott land. The Land Use and Housing Committee may wish to consider this issue for other areas proposed for dedication that are under the MSCP. When dedicated, adjustments of land are not permitted without a vote of 2/3 of the electorate. Under the MSCP, (where the land is designated but not dedicated) land adjustments are provided for.

E. MSCP property the City acquired in East Elliott retains development potential. Dedication would prevent the City Council from discretionary sale, transfer or use of the MSCP property for residential use or other use. The City may wish to

formulate a plan in which residential potential is traded or transferred to a suitable area for development while enhancing open space.

Chris Zirkle said: Dedicated park land can be used for any park purpose, e.g., open space, ball fields, tot lots, etc. The Real Estate Assets Department has evaluated the potential of using the proposed sites for non-park purposes under the Council Policy criteria and the Council can decide whether or not to accept the recommendation that follows from the evaluation.

SG: In this case, the circumstances potentially include transferring open space, which may be by sale or trade, for other non-park use. The fact that such a circumstance exists, regardless of current Council Policy, forms the basis of the rationale for deferring dedication. In the case where the Council wishes to adjust its policy, the Council would be unable to do so if the land were dedicated.

F. MSCP land is dedicated in perpetuity to conservation. Dedication of that same land is unnecessary and duplicative, in addition to removing the City's ability to make adjustments to the land use where indicated.

Chris Zirkle said: My understanding is that the MSCP is a 50-year agreement. There may be easements on some of the MHPA land, some in favor of other agencies, which may require agency action to remove. MHPA land can be sold with a majority vote of the City Council and that seems to be the primary concern of the pro-dedication faction. Also, I don't think it's that easy to compare the land use limitations in the MHPA with land use limitations of dedicated park land. For example, only roads shown in existing community plans can be built in the MHPA but any road can be built on dedicated park land. For uses, only passive recreation uses are allowed in the MHPA but any type of recreation (as long as it's a park use) is allowed on dedicated park land.

SG: Whether the agreement is for 50 years or in perpetuity begs the issue. The City MSCP Q&A states the land is dedicated in perpetuity. The point of Item F is that there is already more than ample protection of land in the MHPA. It also allows some flexibility upon determination of the City Council. Advocates for dedication want to remove the City Council's ability to make adjustments. Some adjustments may involve non-park use, sale of land to raise funds that may be used for park use, trading or selling property to improve park use and/or to enter into mutually beneficial arrangements with non-park owners. All of these are provided for in Council Policy 700-17 regarding Dedication and Designation of Park Lands. The City has a number of priorities it must balance; the advocates for dedication have only one.

G. Pre-emption of land from Council discretion may be contrary to the City's policy to provide essential housing. The City prepared a new General Plan in 2008 because the City had declared a housing emergency. The City needed to formulate new residential development policies because most residential land had been used as the City expanded outward. In 2006 only 4% of City land was left for residential development. Acting to curtail needed residential development where it is feasible is contrary to the City's stated goals and policies. The City needs to retain discretion over use of land that has residential potential.

Chris Zirkle said: The Development Services Department has reviewed the proposed dedication sites to determine if they will be needed for purposes other than park land.

SG: Development Services is limited in what they are able to determine. That determination is based on current policy. There is no indication that Development Services determined what land, presently designated open space, may be used for subsequent residential development. The promoters did not use this criterion in providing its list of 10,000 or so acres it proposed for dedication.

H. Owners may elect to develop or master plan privately held land in East Elliott (estimated 778-acres). In such event, the City may elect to trade City owned land for private land that may be suitable for or create more contiguous or logically organized open space.

Chris Zirkle: Same response as "G" above.

SG: The reasons why East Elliott land should be deferred and removed from the proposed land dedication list is included in the discussion above. The reasons are consistent with City Council Policy Number 700-17. Development Services cannot make an a-priori determination of this issue until it is considering a development plan submittal. Also see my answer in G above.

I. The City may sell MSCP land for substantial revenue with the contingency that 75% of that land be deeded back to the City at no charge for use as open space. Under the terms of the MSCP, 25% of the land may be developed, while the City gets 75% of the land at no charge for open space.

Chris Zirkle said: Same response as "E" above.

SG: This issue regarding reasons the City may wish to sell East Elliott land is discussed above. Reasons to sell land are consistent with City Council Policy Number 700-17.

J. The City does not need to dedicate the land because Mission Trails Regional Park is nearby (Policy II A above). The City has alternative parkland in the vicinity.

Chris Zirkle: Policy III, not II A, was used to evaluate the property in East Elliott.

SG: IIA should be applicable. Whereas the Park and Recreation Department is preparing a Mission Trails Regional Park (MTRP) Update, which envisions incorporating East Elliott into MTRP, the Land Use and Housing Committee or the City Council as a whole has not reviewed this measure. MTRP is already one of the largest intra-city regional parks in the country, the largest in California, whereas its use by the population is minimal. There is no compelling reason to pre-empt a normal City process by dedicating land, particularly land which use is contested, when it is clear that there is already a close by alternative major park site.

K. Dedication inhibits the right of owners of nearby or adjoining land to develop their property when adjustments and trades may be indicated. This may be a factor in an Inverse Condemnation legal action.

Chris Zirkle said: Am I understanding your position correctly that if the City declined to contribute property to a private development proposal it could be held liable for inverse condemnation?

SG: As I understand it, City actions that contribute to making private property undevelopable may contribute to a determination of a Taking.

L. Dedication will spur public use and trespass on nearby or adjoining private land. This may be a factor in an Inverse Condemnation legal action.

Dedication does not change the management of the land so I don't see how it will change the behavior of the public on the land. Can you clarify?

SG: This is a legal issue, clarification of which is best handled by experts. Otherwise the statement is self-evident.

M. Dedication results in "cantonization" of the land. Cantonization may inhibit legal residential development.

Sorry, I'm not familiar with the term "cantonization" other than "to divide into small districts". Can you clarify your question?

SG: Inserting small, dedicated areas in the midst of private property may interfere with development planning. Insofar as the privately held East Elliott property is subject to development, and where land use matters are at issue, is reason to allow flexibility for use of the open space land. Flexibility may include sale, transfer or boundary adjustments. The outcome may be to improve open space contiguity and boundaries. That is a reason to defer dedication.

N. East Elliott private owners were not consulted or notified of a plan to dedicate land in the East Elliott Planning Area.

Chris Zirkle said: Noted.

SG: It would be helpful if you indicated what meaning you give to the fact you "noted". The issue is that the East Elliott owners, like owner representatives elsewhere, should be able to express their view about how they wish East Elliott land to be used. This was accorded elsewhere. The East Elliott owners are readily determinable. There are perhaps 48 or so privately held parcels, and other institutionally owned parcels. The former East Elliott Planning Advisory Committee (EEPAC) was organized at the behest of the City when the City advised the owners to organize and submit a plan to the City. This group would vote to oppose the land dedication.

O. The San Diego Canyon Lands organization consulted the Mission Trails Regional Park (MTRP) Task Force for a vote about dedicating East Elliott land. The MTRP Task Force is unable to represent the interests of the East Elliott private owners. The MTRP Task Force is in a conflict of interest with the private owners who wish to develop their property and resolve issues with the City.

Chris Zirkle said: Noted.

SG: The group that was consulted was the Mission Trails Regional Park Citizens Advisory Committee (CAC), not the MTRP Task Force, to vote on dedication of East Elliott lands. It is hard to think of a more inappropriate act. The Task Force does not have any East Elliott owners among its members. It is devoted to incorporating East Elliott into Mission Trails Regional Park. Their policy is consistent with the City's disputed conduct in East Elliott, and in opposition to the wishes of the East Elliott owners.

Chris, this is really a simple matter. Where there are reasons to defer dedication, as there are here, then deferral should occur. To defer means what it says. It puts off to a later day the action contemplated. Nothing is lost. The land remains open space. It may only cause chagrin among the special interest people who wish to tie the hands of the City's elected officials. Even so, the East Elliott land is a tiny portion of the 10,000 acres the sponsors have proposed for dedication.

Planning groups had the discretion to vote their wishes.

There is no need to complicate this issue further, even if by a careful, well intended official.

For all the reasons indicated, I am requesting that dedication of the East Elliott parcels be deferred.

Thank you.

Stephen Goldfarb

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