

MEMORANDUM

To: Del Rey Oaks City Council Members, Acting City Manager and Staff
From: Douglas Mackenzie, 16 Saucito Avenue, Del Rey Oaks, CA
Date: January 18, 2021
Re: Alice Angell Green's Appeal of the November 10, 2020 Planning Commission decision approving a conditional Conditional Use Permit for Del Rey Oaks Garden Center (File Number: ARC 20-03 and to amend CUP 14-08)

This memorandum advances arguments in support of Ms. Green's appeal referenced above and suggests remedies to address and abate certain violations of law and procedure that have occurred and continue to occur in relation to the City's relationship with the Del Rey Oaks Garden Center.

As an initial matter, the issuance of Conditional Use Permit CUP#14-08 by the Planning Commission on November 12, 2014 was fraught with procedural and substantive problems. Among these, the Planning Commission did not make a finding that the negative declaration reflected its independent judgment and analysis as required by Public Resources Code Section 21082.1(c)(3) given that the negative declaration was prepared by a consultant, Denise Duffy & Associates (DD&A), hired by the project applicant, Tope's Tree Service Inc. (Exhibit A)

More significantly, Commissioner Reikes moved to approve ARC#14-02 and CUP#14-08 "with the conditional approval that an easement wide enough to fit a truck be maintained". Commissioner Hayworth further amended the approval "for hours to be set: Monday through Friday 7:30 - 5:00, Saturday 7:30 - noon and limited to 12 Sunday's a year". The amended motion was seconded by Commissioner Hayworth and passed by a vote of 5-0. (Exhibit B) The language of CUP#14-08 as issued however does not accurately reflect the Planning Commission's decision and provides that "1) Tenant must create and maintain a public access easement wide enough to allow access to travel to Wilson Way behind Safeway." Further the permit provides that "3) Hours of operation to be Monday through Friday 7:30am-5:00, Saturday 7:30am-3:00pm and limited to 12 Sunday's a year."

Besides the obvious problems with the inconsistent language of the CUP as issued, by approving the permit that included a public access easement wide enough to allow access to travel between the Garden Center and Safeway, the Planning Commission did not consider the limitations placed on the project by the negative declaration and thereby acted improperly and in violation of law. The negative declaration does not include a study of a public easement across Work Memorial Park. Areas outside the proposed lease boundaries were explicitly excluded from the project so that the following determination and finding could be made by DD&A: "I find that the proposed project COULD NOT have a significant effect on the environment, and a NEGATIVE DECLARATION will be prepared." The lease boundary is shown in Exhibit A of the lease agreement.

As previously noted, CUP#14-08 was issued to Tope's Tree Service Inc. (the proposed name for the garden center was Tope's Sustainable Garden Center). At the December 16, 2014 meeting of the City Council, in discussing Agenda Item 6.C., Resolution 2014-16, City Manager Dawson informed that council that "Topes decided they are not going to move forward with the project. The original team that put the plan together Mark Bordonaro and Frank Lucido have found another person interested in doing this same project. They are now working with Mr. Mori of Seaside Garden Center." Mayor Edelen stated that "[i]f they decide to go ahead with the lease agreement they have to state that they are approving the findings of the Planning Commission and all CEQA requirements. Accepts all the conditions imposed by the Planning Commission." Council Member Ventimiglia asks "[n]othing has really changed just the name of the owner correct" to which Mr. Dawson responds by saying "[c]orrect." The City Council approved the resolution by a vote of 3-0. (Exhibit C)

It appears that Mr. Mori applied for a conditional use permit identical to the one issued to Tope's. The application number is shown as CUP 15-05 indicating that it was submitted in 2015. No application date is shown although the application was received and signed by Karen Minami. No fee was submitted by Mr. Mori. The date issued is shown as 4/18/15. The application was purportedly approved by "Dan Dawson".

A review of the record reveals that neither Mr. Mori or anyone representing Mr. Mori appeared before the Planning Commission to discuss his application and answer questions from the commissioners.

Mr. Dawson's approval of Mr. Mori's application CUP 15-05 without due process and public input was improper and in violation of law.

On May 20, 20 Mr. Mori requested two use permits, one making reference to map #2 and requesting an "extended area we are seeking for permit to use. It also indicates a fence area we installed for security purpose. Since we opened our business, a number of theft and vandalism occurred. We had to erect fence in hurry. The chain link fence seemed to be most reasonable fence around for the security for the appearance. So we proceeded. I did not realize we need a permit" and another requesting "[w]e would like to stay open more Sundays beyond October and Open early in Spring. I would like the option to stay open year around, although we might want to close Sundays in January and February." The Staff Report prepared for the August 12, 2020 Planning Commission meeting that was subsequently cancelled included a copy of Mr. Mori's May application, a letter and two maps, one prepared in 2019 by L&S Engineering and Surveying, Inc. and titled "Old Driving Range Topographical Survey", and the other Mr. Mori's map showing the "extended area". (Exhibit D)

A review of the L&S Engineering map shows the wall Mr. Mori constructed as encroaching to the north of the driving range structure and to the west of the the lease boundary line as a comparison with a map provided in the Staff Report prepared for the November 10, 2020 meeting will show.

A review of Mr. Mori's map shows that there are two areas outside the lease boundary line, areas that Mr. Mori labeled "5199SF over" (the northern "cutout") and "322SF over" (the western area outside the large wall next to the back entrance to the Garden Center. This area has been "graded" and a plurality of potted trees are located there. The amount of land Mr. Mori is "seeking for permit to use" totals 5,531 square feet according to his figures or approximately 0.127 of an acre.

The location of the chain link fence is not shown on Mr. Mori's map. It does show the fenced areas as being "over".

The Staff Report prepared for the November 10, 2020 Planning Commission meeting included a copy of Mr. Mori's application and letter, two maps and a copy of a Google Earth image. One of the maps was Mr.

Mori's map showing the extended areas. A second map was prepared for Marc Bordonaro by Lucido Surveyors in October 2014 and shows Work Memorial Park and the proposed lease area. The western boundary of the leased area is curved. This is the map presented to the Planning Commission in 2014. Compared to the map included in the 2014 Staff Report, it appears that the retaining wall Mr. Mori constructed on the western side of the leased area falls outside the lease boundary.

The Google Earth image is undated yet shows a snapshot of the footprint of the Garden Center including Mr. Mori's encroachment into the area outside the lease boundary on the north side of the leased area, including the so-called cutout. As clearly shown in Exhibit A of the lease agreement, this area includes a steep slope. As with other wetland areas in Work Memorial Park, and as identified by DD&A, this area was explicitly excluded from the project and yet Mr. Mori has built a road up the hill beginning at the southern end of the area and is using the northern part of the former driving range structure excluded from the lease area by placing a large storage container under the structure, building a retaining wall, and storing bins of large rocks. Compare this Google Earth image to the aerial image attached to the negative declaration. (Exhibit E)

It is highly improper for City Staff to provide two versions of Mr. Mori's application as representing his application. The reasons for the City Staff having done so are unknown.

Mr. Mori's request for architectural review was determined by City Staff to be categorically exempt pursuant to CEQA Guidelines 15301 and 15304. CEQA Guideline §15301 relates to Existing Facilities and provides in part:

Class 1 consists of the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of existing or former use. The types of "existing facilities" itemized below are not intended to be all-inclusive of the types of projects which might fall within Class 1. The key consideration is whether the project involves negligible or no expansion of use.

As previously noted, Mr. Mori's project, as proposed in his application, involves the City's ratification of substantial alterations to the topography of the steeply sloped "cutout" area including the road up the hill and expansive use of the areas encroached upon such as the northern end of the driving range structure. In addition, areas to the north of the driving range structure are being encroached upon by Mr. Mori.

The Planning Commission did not consider the applicability of exemption 15301 to Mr. Mori's project.

For at least these reasons, exemption 15301 is inapplicable to Mr. Mori's project.

CEQA Guideline §15304 relates to Minor Alterations to Land and provides in part:

Class 4 consists of minor public or private alterations in the condition of land, water, and/or vegetation which do not involve removal of healthy, mature, scenic trees except for forestry and agricultural purposes. Examples include but are not limited to:

(a) Grading on land with a slope of less than 10 percent, except that grading shall not be exempt in a waterway, in any wetland, in an officially designated (by federal, state, or local government action) scenic area, or in officially mapped areas of severe geologic hazard such as an Alquist-Priolo Earthquake Fault Zone or within an official Seismic Hazard Zone, as delineated by the State Geologist.

Clearly Mr. Mori has made major alterations to the land including grading the "cutout" area that has a slope greater than 10 percent in what has been determined to be a wetland. Whether Mr. Mori removed healthy, mature and/or scenic trees to build the road up the hill is yet to be determined.

The Planning Commission did not consider the applicability of exemption 15304 to Mr. Mori's project.

For at least these reasons, exemption 15304 is inapplicable to Mr. Mori's project.

The City has a duty to comply with CEQA any time a lead agency must make a discretionary decision about whether to approve or carry out a project that is not exempt from CEQA. *Public Resources Code §21002*. While a lead agency may rely on a previous EIR or negative declaration when making a subsequent discretionary decision on a project, the agency is required to review the possible need for a subsequent EIR or negative declaration if case one of the threshold conditions triggers the need for a subsequent EIR or negative declaration. *Public Resources Code §21166*. The threshold conditions are: Substantial changes are proposed in the project; Substantial changes occur in the circumstances under which the project is being undertaken; or New information of substantial importance to the project becomes available.

In Mr. Mori's case, all three of the threshold conditions are present and a subsequent EIR must be prepared and presented to the Planning Commission. Mr. Mori is proposing substantial changes in the project. For example, Mr. Mori is requesting that the City ratify his encroachment of environmentally sensitive lands outside the leased area. Inarguably, substantial changes have occurred in the circumstances under which the project has been undertaken. Mr. Mori has acted with disregard for, and in contravention of, the findings of the negative declaration and the basis for CUP#14-08 that he now seeks to amend. Finally, new information of substantial importance to the project has become available as exemplified by the public comments presented to the Planning Commission on November 10, 2020.

Quoting from the *Practice under the California Environmental Quality Act* published by CEB:

When an agency considers a subsequent discretionary action on a project, it will know whether changes are proposed in the project but may be unaware of changes in circumstances or new information of importance to the project. Nothing in CEQA or the Guidelines requires the agency to conduct an investigation to ferret out changes in circumstances or new information. If the agency becomes aware of such factors, however, it should then consider all the relevant facts and explicitly decide whether conditions exist that necessitate further environmental review. If a project opponent is aware of changed circumstances or new information, bringing that material to the agency's attention might obligate the agency to conduct an

investigation to determine whether further environmental review is required. An unresolved question in the record concerning whether a further EIR might be required could provide a basis for a legal challenge to the agency's decision on the project.

The Planning Commission was made aware of many changes in circumstances and new information of importance to Mr. Mori's project. Despite being presented with changes in circumstances and new information, the Planning Commission did not consider all the relevant facts and explicitly decide whether conditions exist that necessitate further environmental review. Concern was expressed by the public about the lack of information upon which the Planning Commission was basing its decision. The information presented to the Planning Commission in the agenda packet was faulted. The maps were insufficient and confusing. The process by which the haul road was built was brought into question by the public and by some of the commissioners. Mr. Mori was not present to answer questions.

Clearly a subsequent EIR is required.

Mr. Mori's lease violations are numerous and include violations of lease provision 3. Use of Premises (Mr. Mori has created an environmental nuisance next to the creek adjacent the repair shed and has not complied with all applicable federal, state, and local laws, rules and regulations applicable to the leased premises), lease provision 6. Irrigation Well (On information and belief the City does not have Mr. Mori's well production and consumption records relating to the use of the well), lease provision 7. Improvements and lease provision 8. Use of the Leased Premises (Mr. Mori has constructed new buildings and structures on the leased premises including retaining walls, cribs, storage containers and a three story high storage rack, has paved most of the yard and thereby altered the leased premises to create an environmental nuisance, and has not maintained the leased premises in good repair and in an attractive condition), lease provision 9. Compliance with Law (Mr. Mori has not complied with "all the requirements now in force, or which may hereafter be in force, of all municipal, county, state and federal authorities, pertaining to the Premises, or the operations conduct thereon, and to faithfully observe and secure compliance with, in the use of the Premises, all applicable federal, state, and local laws, rules, and regulations now in force or which may hereafter be in force. Nothing herein shall be constructed to allow Tenant to use the

Premises without obtaining all permits required by the Del Rey Oaks Municipal Code.”), lease provision 15. Conduct of Business (Mr. Mori does not conduct his business in a “first-class manner” and, to the contrary, uses the leased premises in such manner as to create environmental nuisances and violations) and lease provision 17. Signs (Mr. Mori has a plurality of temporary signs displayed about the leased premises).

Turning to the matter of the Commissioners’ conduct during the November 10, 2020 Planning Commission meeting, reference is made to “A Resolution of the Council of the City of Del Rey Oaks, California, Establishing a Code of Conduct for Council and Planning Commission Members” (Resolution No. 2005-04 approved March 22, 2005). (Exhibit F). Section A. Ethical Considerations 2. Conduct of Council and Commission Members provides that the “professional and personal conduct of members must be above reproach and avoid the appearance of impropriety.” The fact that Mr. Mori did not attend the Planning Commission meeting resulted in Mr. Hoyne and Chair Donaldson managing the meeting and restricting the ability of the Planning Commission to make an independent judgment. Their conduct suggested that they were carrying water for Mr. Mori and perhaps had assured Mr. Mori that his presence at the meeting was not necessary.

Section A. Ethical Considerations 4. Decisions Based on Merit provides that “[c]ouncil and Planning Commission Members shall base their decisions on the merits and substance of the matter at hand, rather than on unrelated considerations.” The record suggests that the majority of the Planning Commission members did not base their decision on the merits and substance of the matter but rather on the unrelated consideration of their personal feelings toward Mr. Mori.

Section A. Ethical Considerations 5. Conflict of Interest provides that “[i]n order to assure their independence and impartiality in the City’s best interest, Council and Planning Commission Members shall not use their official positions to influence decisions in which they have a conflict of interest.” The record suggests that Commissioner Wood had a clear conflict of interest displayed by her impassioned advocacy for Saturday deliveries at the Garden Center. Based on information and belief, Commissioner Wood has a commercial relationship with the Garden Center.

Section B. General Requirements for All Council and Planning Commission Members 6. provides that Council and Planning Commission Members shall “[p]repare in advance of Council and Commission meetings and be familiar with issues of the agenda.” Section D. Procedural Considerations 3. provides “[e]ndeavor to submit questions on Council or Commission agenda items ahead of the meeting so that staff can be prepared to respond at the Council or Commission meeting. Any clarifications or technical questions that can be readily answered should be handled before the meeting.” The record clearly shows that the Planning Commissioners did not prepare in advance of the November 10, 2020 meeting.

Finally, Section E. Enforcement provides that “[c]ouncil and Planning Commission Members have the primary responsibility to assure that this Code of Conduct is followed so that the public can continue to have full confidence in the integrity of government.”

By approving Mr. Mori’s application for a CUP permit conditionally, the Planning Commission improperly assigned its statutory duties and obligations to the City Manager. The Planning Commission is tasked with approving or denying applications, setting additional conditions for approval as appropriate, and directing the City Manager as to the specific conditions that must be included in a renegotiated lease to comply with the conditions of the CUP. On November 10, 2020 the Planning Commission abdicated its duties and apparently hoped that the City Manager would do the right thing and include the public’s comments and concerns.

As the record shows, the relationship between the City and Mr. Mori has been a long one and has been characterized by negligence at best and intentional disregard at worst for the conditions of the lease agreement and the requirements of federal, state and local laws. Mr. Mori must be made to abide by the terms of the lease or vacate the premises as provided for in the lease agreement. The City must be made to conduct a subsequent EIR related to Mr. Mori’s proposed project to determine the environmental impact of his activities. The City must compel Mr. Mori to restore the areas of Work Memorial Park disturbed and encroached upon by the haul road, the north road that runs up the hill through the “cutout”, and the area north of the driving range structure.

To this end, the City Council must grant Alice Angell Green's appeal and set aside the Planning Commission's November 10, 2020 approval of Mr. Mori's application for an amendment to CUP#14-08. Review of the Code of Conduct is also desperately needed as shown by the record in this matter.