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Megan K. Stedtfled, County Counsel County of Calaveras

891 Mountain Ranch Road San Andreas, Ca 95249-9709

RE: CPC request for a due process hearing regarding the staff denial of a public record request. Dear Ms. Stedtfeld:

1. Background

On November 24, 2015, I presented to Planning Director Peter Maurer a Public Record Act Request for the Mintier General Plan. (Exhibit 1, 1/5/16 Appeal, Attachment 2.) As Planning Director, Mr. Maurer manages the affairs of the Planning Department. Among those departmental duties are “managing records” and “preparation and administration of the general plan.” (Calaveras County Code, secs.

2.40.020, 2.40.030.)

That 17-page request includes a detailed analysis of the reasons the County must release the plan. That request in turn references 31 attachments for factual support. Those attachments were submitted to the Planning Department in electronic format, and also can be downloaded from the CAP/CPC website at [www.calaverascap.com](http://www.calaverascap.com/) .

On December 4, 2015, I was sent a letter from Assistant County Counsel David E. Sirias denying that Public Records Act request. That letter indicated County Counsel’s Office represents the County, and that the letter was the County’s response to the request. (Exhibit 1, Attachment 3, paragraph 1.)

On December 18, 2015, I submitted an appeal of that decision to the Chair of the Planning Commission, in accord with Calaveras County Code, Section 17.98.070. (Exhibit 2, 12/18/15 Appeal.) That code section applies to appeals of decisions by planning staff. In a letter dated December 21, 2015 and mailed by U.S. postal service, Mr. Maurer claims that the decision denying the Public Record Act request was not made by Planning Department staff and is therefore not appealable to the Planning Commission.

The letter does not say who did deny the request, and on what authority. The letter does not indicate that it was copied to the Office of County Counsel. (Exhibit 3, Letter of Maurer on PRA 12/21/15.)

After receiving the letter I sought some clarification from County Counsel (email on 12/30/15 & phone message 1/4/16) to determine, among other things, if the Planning Director’s decision to reject the December 18 appeal was itself an appealable decision. No clarification from County Counsel’s Office

was forthcoming prior to the appeal deadline. (Exhibit 4, Email to County Counsel’s Office.) This is understandable given the workload of County Counsel’s Office, the intervening holiday, the complexity of the issues, and the short time frame for a pre-appeal response.

On the morning of January 5, I sent an electronic copy of an appeal to the Planning Commission Chair, with copies to your office, to Director Maurer, and to the remaining members of the Planning Commission. That appeal challenged Director Maurer’s decision to reject the prior appeal without a hearing before the Planning Commission. (Exhibit 1) When I attempted to file the hard copy of the appeal and to present the check covering the appeal fee, to the Planning Commission clerk, she asked Director Maurer to handle the transaction. Director Maurer refused to accept the appeal and the appeal fee. Director Maurer said, “Go to court.” He said, “We are not doing this.”

As we discussed the matter further, he helped me to understand what he meant in the letter of December 21. He is of the opinion that he did not deny the public record act request, the Assistant County Counsel did, so the decision is not appealable under County Code Sections 17.98.010-17.98.070. He also indicated that, even if the decision were attributable to him, it is not the sort of decision of planning staff that is appealable under those code sections. He contended that County Code Sections 17.98.010-17.98.070 only apply to decisions of Planning staff relating to land uses and land use planning; not to other administrative decisions like planning records management.

On the afternoon of January 5, I went to your office to see if anyone would accept the appeal and check provisionally, while your office sorted out the Planning Commission’s jurisdictional issue. Ms. Julie Moss-Lewis took the time from her very busy schedule to type a letter indicating that, “it is the position of the County Counsel’s Office that the Planning Commission and the Board of Supervisors are without jurisdiction to hear your complaint.” (Exhibit 6, Letter from Moss-Lewis 1/5/16.) She cited *Filarsky* and *County of Santa Clara* for the proposition that Government Code Section 6258 provides the exclusive remedy for resolving a public records dispute.

1. The California Public Records Act does limit litigation remedies, but not administrative remedies.

The California Supreme Court ruling in *Filarsky* is, “[T]he Legislature set forth in Government Code sections 6258 and 6259 the exclusive procedure for **litigating** the issue of a public agency's obligation to disclose records to a member of the public.” “Government Code sections 6258 and 6259 set forth the exclusive means under these circumstances for **litigating** the question whether the requested records must be disclosed.” *Filarsky v. Superior Court* (2002) 28 Cal.4th 419; emphasis added.) There is nothing in the *Filarsky* decision, or in the *County of Santa Clara* decision, to suggest that a local government cannot or should not provide for administrative hearings to provide a check on staff determinations under the Public Records Act. As we point out below, there is much to recommend such administrative hearings.

Furthermore, in this instance there are very effective administrative remedies that the Planning Commission and the Board of Supervisors have the discretion to apply. First, they may not agree that the draft document and deliberative process privileges apply, and they may release the Mintier General Plan on that ground. Second, they may agree that those privileges apply, but nevertheless decide to release the document anyway. This is not unprecedented. In the past, the County Counsel has both claimed the existence of the draft document and deliberative process privileges, and decided to release a document. (See Exhibit 5, Letter of Sirias 9/26/06.) Either of these remedies would make judicial review of the prior staff decision unnecessary.

1. Local government administrative hearings play a key role in affording the due process needed to protect people’s constitutional rights.

Our local governments, not the courts, are the first line of defense for constitutional freedoms. If every constitutionally protected life, liberty, and property interests were first reviewed by the courts, the courts would scarcely have time for other matters. By correcting mistakes inadvertently made by staff, or by affording the local government the opportunity to explain and bolster the strength of staff’s position, administrative hearings reduce the burden on the courts. In addition, they may provide relief to injured parties much more rapidly than the courts. Finally, by correcting its own mistakes, administrative hearings help a County maintain the trust and good will of its citizens. For these reasons, local government administrative hearings play a key role in protecting constitutional rights.

1. Due process hearings also protect County staff.

Another benefit of due process hearings is that they help to protect County staff. A due process hearing can help to quickly identify and simply correct serious errors by staff that could otherwise impact their careers. Such hearings also provide important validation and support for proper staff actions. Finally, they ensure that any legally close calls that may result in County liability are made, in their final step, at the discretion of the elected officials. In this way, staff is not compelled to risk illegal or unwise final decisions, based upon political pressure from those elected officials with the power to hire and fire.

1. Hearings give the Board of Supervisors the opportunity to review staff decisions which with they disagree.

In the instance before us, it may very well be that the Planning Commission and the Board of Supervisors do not want the document in question released. Thus, since they are in agreement with the staff decision to deny the request for the record, the Planning Commission and the Board of Supervisors see a hearing as having no benefit to them. But what if the situation were different? What if the staff decision was at odds with the desires of the Planning Commission or the Board of Supervisors? What if staff agreed to release documents that the Commission and the Board did not want released? Under those circumstances, the Commission and the Board would want to have a hearing to review the staff decision. Thus, it seems that the Planning Commission and the Board would benefit from an interpretation of the County Code that allowed for the review of planning staff decisions regarding public records.

1. I think we all agree that the County Code provides for many such hearings to check against the violation of constitutionally protected real property and liberty interests.

In my discussion with Mr. Maurer on January 5, even he agreed that there are a number of provisions of the County Code that deal with the appeal of staff decisions regarding a person’s use of real property.

These include provisions for appeals of building official decision regarding fire safety measures for development, appeals by subdividers of Planning Commission decisions, appeals of rulings on permits for vacation rentals, appeals of decision regarding special event permits, appeals of rulings under the grading ordinance, appeals of rulings regarding water quality protection by developments, appeals of rulings regarding mineral extraction, appeals of road impact mitigation fees, appeals of code enforcement fines, appeals of permit and variance decisions, appeals of sewage permit decisions, appeals of tax administrator decisions, appeals of flood plain administrator decisions, appeals of

business license decisions, appeals of kennel license decisions, appeals of condominium conversion decisions, and appeals of design standards decisions. There are also appeals not related to real property interests including appeals of employee disciplinary actions, appeals of solid waste hauling permit decisions, and appeals of film permit decisions, (See County Code Sections 8.10.720, 16.05.140, 20.20.070, 17.87.110, 15.05.310, 13.01.090, 17.56.170, 12.10.020, 8.06.580, 8.20.720, 13.12.160,

3.12.100, 2.64.540, 15.06.044, 5.04.050, 8.12.310, 6.18.110, 16.09.160, 17.04.115, and 12.02.190.)

These administrative hearings are not just some sort of luxury that the County provides for the fun of it. These hearings provide an important check on staff actions that might inadvertently and incorrectly harm an individual’s property or liberty interest.

In addition, due process hearings can help injured parties feel that their interests have been heard. When properly conducted, such hearings allow for the presentation of evidence and argument by the parties, and the thoughtful consideration of the evidence by the administrative body. Sometimes, just having one’s concerns heard and constructively addressed helps to de-escalate the confrontation.

Sometimes, just having a fair hearing helps convey to the public that the local government cares.

1. The County Code should be applied to provide for such hearings to check against violation of other constitutionally protected property and liberty interests.

The Supreme Court has recognized liberty interests that trigger the need for procedural due process protections. The court has held that the interest “to acquire useful knowledge” is among the privileges “essential to the orderly pursuit of happiness by free men” and “implicit in the concept of ordered liberty.” The court declared that these rights are such that “neither liberty nor justice would exist if they were sacrificed.” (*Board of Regents v. Roth* (1972) 408 U.S. 564, 572.) The Supreme Court has also ruled that property interests that amount to a legitimate claim of entitlement based upon state law trigger procedural due process protections. (*Board of Regents v. Roth* (1972) 408 U.S. 564, 577.)

We at the CPC believe that access to public records falls under the liberty interests (“to acquire useful knowledge”) that the Supreme Court has recognized as triggering the need for due process protections. We at the CPC also believe that members of the CPC have a property interest to review, purchase, and possess public records. We believe that these rights trigger the need for an administrative hearing to protect due process.

Because these constitutionally protected property and liberty interests are at stake, the County would be wise to interpret the County Code to allow for an appeal hearing before the Planning Commission of the Planning Director’s denial of a Public Records Act request. Alternately, the County Board of Supervisors should grant such an appeal hearing of its own accord, to respect the due process interests of the record requestors.

1. Failure to provide a due process hearing may result in liability to the County and its officers.

Under the Civil Rights Act, 42 USC Section 1983, local governments can be held liable in state and federal court for violations of people’s due process rights. Local governments have no immunity from suit. The remedies include monetary damages, as well as injunctions and declaratory relief. Prevailing plaintiffs are awarded attorneys’ fees. The one silver lining for local governments is that officials and their employees have qualified immunity from suit. Under these circumstances, a local government would be wise to provide for due process administrative hearings.

1. Conclusions

Given the up sides to due process administrative hearings, and the serious down side to denying them, I am wondering, of what are you afraid?

Do you really believe that the Planning Commission and the Board have no jurisdiction to hear an appeal? Is there anything more I can do to help change your mind?

Do you fear that the Planning Commission or the Board is going to overturn staff’s determination regarding the Public Records Act request? While that slim possibility is the hope of the CPC, it remains only a slim possibility. I think you would agree that staff has a very good chance of prevailing in this appeal. Even if the County chose to release the document, that just eliminates the possibility for a court challenge of the previous denial. I really do not see how you can lose?

Are you afraid that the Planning Commission or Board might say or do something to make the denial of the Public Records Act request worse? Just by holding the hearing, you virtually eliminate the County’s liability for due process violations. That is huge. It is hard to imagine what damage the Planning Commission or Board might do to that would outweigh the liability reduction associated with the due process hearing.

Are you afraid the Planning Commission or the Board might be upset at you because they had to hold a due process hearing? Given how much they refer to people’s Constitutional property rights during their meetings, I believe that these officials have more respect for people’s Constitutional rights than that. Is there anything more I can do to alleviate your fears? Is there something else bothering you about this? If you think it would help, I would be glad to meet with you to discuss the matter further.

I realize your office has a lot on its plate. I sincerely hope that these administrative processes will result in a resolution of this controversy, so that you can focus on other legal matters. There is no hurry in getting back to me regarding this issue. However, it would be great if I could hear from you by this time next month. Given the gravity of this matter, I would rather get your studied opinion than your rushed response.

We at the CPC would appreciate having the appeal hearing before the Planning Commission afforded by County Code Sections 17.98.010-17.98.070. We have already submitted the written appeal, and we will provide the $100 check if and when the County chooses to accept it. In the alternative, if the County would prefer to expedite matters and hold a similar hearing before the Board of Supervisors, that would be fine too.

Even if the County chooses not to grant the CPC a due process hearing in this instance, we hope that you will suggest that the County update the County Code to provide for such hearings in the future. Who knows, the next time staff rejects a public record request, it may be for a record that the Board of Supervisors actually wants to release to the public. Then, the Board would want the opportunity to review the staff decision.

Thank you for your kind assistance in this matter. Sincerely,



Thomas P. Infusino, for Calaveras Planning Coalition

cc. Planning Commissioners, Board of Supervisors, CAO, Director Maurer.