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March 10, 2021

Via E-mail

Board of Supervisors
San Benito County
County Administration Building
481 4th Street, 1st Floor
Hollister, CA 95023

**Re: Technology Advancement Research Mobility Automotive Center (TARMAC)
a/k/a Strada Verde Innovation Park
Objection to Board of Supervisors Referral of Pending Application to Planning
Commission**

Dear Chair Medina and Members of the Board:

This office represents Bristol SB, LLC (“Applicant”), applicant for the proposed project commonly known as the Technology Advancement Research Mobility Automotive Center, and also known as the Strada Verde Innovation Park (the “Project”). This letter was prepared and is submitted at the specific request of County Counsel following the regular meeting of the Board of Supervisors on February 23, 2021 regarding the status of the Project. We are writing in an effort to respectfully provide further guidance to the Board in this matter as well as express our client’s legal objections to any further attempt by the County to short-circuit the process mandated by the San Benito County Code (“SBCC”) and the San Benito County 2035 General Plan (“General Plan”) for consideration of the proposed General Plan Amendment that would be necessary for this Project.

At your February 23 meeting, a lengthy discussion took place regarding the status of Applicant’s pending preliminary application to the County Resource Management Agency (“RMA”), filed in May 2019 (prior to Measure N), for approval of a General Plan Amendment (“GPA”) implementing the policies and procedures in the General Plan, Specific Plan, Zone Change, Major Subdivision, Design Review, Grading, and Building Site Review for the proposed Project and whether the Board could “refer” the GPA to the Planning Commission for recommendation of an early denial.

At the meeting, Supervisor Gonzalez and a majority of the Board expressed significant confusion as to why this matter was even on the agenda and that any consideration of a GPA was “premature” until Applicant determined to proceed with the Project, and until the precise nature of the Project

was established. Notwithstanding such confusion, at the conclusion of the meeting, the Board determined to have this matter brought back to the Board at its March 23, 2021 meeting — after Applicant informed the County whether it intended to proceed with its application for the Project — in order for the Board to consider “referring” the GPA to the Planning Commission for a recommendation of an “early denial” of the GPA.

As further explained below, the Board’s proposed ad hoc, fast-track “referral” process for consideration of the pending GPA application for this Project – which we are informed by County Counsel has not been used before in the County for any project – contravenes applicable provisions of both the SBCC and the General Plan governing the well-established process for the initiation and consideration of General Plan amendments, such as this one, proposed by a project applicant. Any continued effort by the Board to pursue this novel “referral” process for this singular project would be arbitrary and capricious, would establish a negative precedent for other potential projects within the County, and could subject the County to legal liability under well-established due process protections afforded Applicant under both Federal and State constitutions and other applicable law.

Therefore, Applicant respectfully requests that, if the Board still chooses to re-visit this item at its meeting of March 23, the Board take no action and instead properly allow the GPA (as well as the other components of the pending application) for the Project to proceed in accordance with the County’s codified procedures for consideration of such applications.

I. Project Background

In May 2019, Applicant submitted a preliminary planning application to RMA for approvals for the Project, including a General Plan Amendment, Zone Change, Specific Plan, Design Review, Major Subdivision Tentative Map, Grading, and Building Site Review (PLN190029). As noted in this preliminary application package, the Project as proposed therein would consist of an automotive proving grounds facility on an approximately 2,777-acre site located approximately 2.5 miles southeast of the US-101/SR-25 interchange in unincorporated County. To date, none of these pending applications have been deemed complete by the County. Applicant also entered into a “Reimbursement Agreement for Project Review” with the County whereby Applicant is obligated to advance costs incurred by the County for its processing of applications for the Project, subject to periodic accounting by the County to Applicant of such advances and expenditures.

After submitting the preliminary planning application package, Applicant prepared an initiative with respect to the Project (General Plan amendment, Specific Plan, and Zoning) which qualified for the November 3, 2020 general election as “Measure N.” After Measure N did not pass, Applicant requested that RMA staff pause all work on preparing an Environmental Impact Report (“EIR”) for the proposed Project under the California Environmental Quality Act (“CEQA”). Applicant did not, however, withdraw its planning applications from consideration.

As the staff report for the February 23, 2021 Board meeting correctly notes:

“the failure of Measure N had no legal effect on the still pending TARMAC applications. Ballot box planning by initiative and the normal planning process through public hearings before the Planning Commission and Board of Supervisors are independent of one another under state law and can proceed separately. However, the project applicant notified the County on November 4, 2020 to request that all work on the EIR and processing of the application be suspended.”

At the February 23, 2021 regular meeting, a representative of Applicant informed the Board of Supervisors that Applicant would inform them in two weeks as to how Applicant wished to proceed with processing of its pending applications. Although we understand that one or more representatives of Applicant may have already advised County staff that Applicant intends to proceed with the Project, **this letter hereby confirms that Applicant does intend to proceed with the Project and its pending planning applications in accordance with applicable County procedures and requirements**. As Applicant has stated to County personnel, since the defeat of Measure N, Applicant has been utilizing this time to assess how, and to what extent, the topical issues identified during the general election process might be addressed by the Project moving forward.

II. Board of Supervisors’ February 23, 2021 Regular Meeting

The February 23, 2021 Board meeting ambiguously agendized this item (as both a potential Board action and non-action item) as “Informational Report and discussion on the Status. . . *and provide direction to Staff.*” RMA staff initially provided the Board with an informational update on the status of the Project’s planning applications. After this informational update, a lengthy discussion among the Board and County Counsel took place both before and after public comment regarding whether the Board was authorized to “refer” the GPA portion of the Project application to the Planning Commission for a recommendation to the Board of an early denial.

It became evident that this potential directive stemmed from the results of the November 2020 General Election and Measure N – despite County Counsel’s clear direction during the meeting that General Plan amendments initiated by an applicant through the regular planning processes under the SBCC are distinct and “can proceed separately” from the prior ballot measure. It became evident that the primary goal of the referral, at least for Supervisors Medina and Kosmicki, was to specifically elicit a Planning Commission recommendation for a “fast-track,” “early denial” of the GPA to alleviate any need for project review under CEQA. As expressed by Supervisor Kosmicki, who publicly helped spearhead opposition to Measure N, “why put the public through such misery” when the referral process would help avoid “semantics,” would “cut to the chase” and would avoid further public “contention.” As expressed by Supervisor Medina, the goal is to “save time and money for everyone.”

On the topic of whether the Board has authority to “refer” the General Plan amendment for this fast-track, rejection-inclined review, a number of conflicting and incorrect statements were made regarding the proper procedures governing County consideration of the GPA.

February 23, 2021 Board Meeting Statements Concerning General Plan Amendment “Referral” for Early Denial ¹	
Procedurally Incorrect	Procedurally Correct
<p><u>Supervisor Medina:</u></p> <p>“Well, I’ve been clear on many projects and in my four years have been an advocate of this. If we know we do not want to change the general plan amendment [sic], why go through all these dollars that these developers are spending knowing that the outcome is going to be, we’re not interested in a general plan amendment. ... That’s my opinion, not the Board’s.” (3:48:48 - 3:49:12).</p>	<p><u>Assistant County Counsel (Joel Ellinwood):</u></p> <p>“In San Benito County, there is no preliminary review by the Board of Supervisors of whether or not to consider a General Plan amendment. Other counties do have such a process” (3:45:40 - 3:46:05).</p>
<p><u>Supervisor Kosmicki:</u></p> <p>“To pretend as those we have to allow a process to go forward. When we don’t. <u>The law is very clear here. We are allowed to deny this General Plan application now, and there is no issue with that.</u> There is no reason to allow this to go forward, unless you are eventually going to potentially support something there of this magnitude. There is no reason to go further with this. ... My recommendation is that we give direction to bring this item back, if we have to do it to the Planning Commission, legally that’s fine, I would prefer to bring it back straight to the Board.” (3:55:30 -- 3:56:16).</p>	<p><u>Supervisor Gonzales:</u></p> <p>“At this point there’s not even a vote on the table. We need to be clear with what is going to be the next course of action. Once we know what the property owner and the developer want to do, and right now, we don’t have that information. So it’s kind of putting the cart before the horse at this point When it does come up, we give [the public] every opportunity to address their concerns and issues. (3:50:11 – 3:50:43).</p>
<p><u>Assistant County Counsel (Joel Ellinwood):</u></p> <p>“You can decide to let the rest of planning process work out, including the preparation of an EIR at the full expense of the applicant, and after that process is complete, receive the recommendation from the Planning Commission on the project and decide after the full process has been completed to either approve the general plan amendment or not. ... <u>In a month from now, the vote would be to refer the issue of doing an early denial of the General Plan amendment without the rest of the process.</u> And they can make a report on that, return it to you for a final decision on whether to do that.” (4:49:15 – 4:50:34).</p>	<p><u>Supervisor Tiffany:</u></p> <p>“For us to just make a decision now, we’re done with it, I don’t think is necessary. I don’t think it’s appropriate. And it will eventually come back to us anyways, and we can consider it if they decide to bring it back to us.” (4:01:53 – 4:02:10).</p> <p>“I also believe that ... it is the applicant’s right to spend the money if they chose to and to go forward with an EIR if they chose to. And the reason why I feel that ... because it is such a significant project, potentially, and such a potentially transformative project, <u>I think it is incumbent on us to let the process play out.</u> And also I want to point out that if the process goes forward ... a lot can change in 18 months. ... I don’t think today we</p>

¹ Video recording of the Board of Supervisors’ February 23, 2021 Regular Meeting, available at <https://www.youtube.com/watch?v=zrKKTdvatrE>. Time stamps bolded for each quote correspond with the times in this video recording.

	can predict how the project might or might not come before us. <u>It may be very different in some ways than what was voted on in November. And I think for that reason we ultimately we should wait and let the process play out as the law generally provides.</u> ” (4:42:26 - 4:44:06).
<p><u>Supervisor Kosmicki:</u></p> <p>“We had an election on this particular issue. ... My thinking for this was we have the right ... we have the right to stop this now and be upfront and say we’re not interested in this General Plan amendment.” (4:38:05 - 4:38:57).</p>	<p><u>Supervisor Hernandez:</u></p> <p>“I just think this is very premature for us to talk about something because ultimately – like Supervisor Tiffany mentioned – you might have a project come forward that’s a lot different. Maybe it has tighter measures. Maybe other things that the public is concerned about, they will address. <u>We don’t know until that comes forward. I think it’s very premature to talk about this.</u> (4:07:35 - 4:07:56).</p>

III. The Board’s Referral of a General Plan Amendment for a Planning Commission Recommendation for Early Denial Contravenes the County Code, State Law and the Procedures and Policies of the General Plan Itself, and Stifles Meaningful Public Input.

The County’s procedures for initiating and considering General Plan amendments are contained in Chapter 19.29 of the SBCC. Chapter 19.29 provides that “[e]ither the county, or any interested party, may initiate the consideration of a General Plan amendment.”² The County may initiate a General Plan amendment itself by way of a formal action of the Planning Commission or the Board of Supervisors.

SBCC § 19.29.004 establishes the procedures for submittal and County processing of General Plan amendment applications, which include the following steps:

1. **Application** – an application for a General Plan amendment must be filed and accompanied by the appropriate application fee and executed agreement to pay for all County costs.³
2. **Completeness Determination** – the Planning Department must review the application for completeness, and notify the applicant of such a completeness determination within 30 days.⁴
3. **Planning Director Consideration** - the Planning Director must schedule necessary hearings, prepare the requisite notice and staff reports and otherwise ensure compliance

² SBCC § 19.29.003.

³ § 19.29.004(A).

⁴ § 19.29.004(B).

with all provisions of state law relevant to the consideration of amendments to General Plans or the adoption or amendment of a Specific Plan.⁵

4. **Planning Commission Review** - the Planning Commission must hold at least one public hearing to consider the application. The Planning Commission shall make a written recommendation to the Board of Supervisors about the application.⁶
5. **Board of Supervisors Action** - After receipt of the Planning Commission's written recommendation, the Board of Supervisors must consider the application at a public hearing.⁷

Nothing in the SBCC authorizes the Board of Supervisors to “refer” a pending General Plan amendment to the Planning Commission for an “early denial” recommendation. The SBCC is clear: either an interested party or the County may initiate a General Plan amendment. However, the SBCC does not authorize the Board of Supervisors to initiate an antecedent, fast-tracked disapproval of an Applicant-initiated General Plan amendment in a manner that conflicts with the processes specified in the SBCC and the General Plan. While “listening to the voters” is a laudable goal that the Board will have ample opportunity to achieve during its consideration of the GPA for the Project, it should not be used as a convenient catchphrase to in fact stifle in advance meaningful public participation that would occur during the normal planning and environmental review processes or to violate the rights of the Applicant or property owner in this instance. While proponents of the fast-track approach in this case seek to rely upon the results of Measure N, this could create a precedent for extending this same approach to any other “unpopular” projects proposed within the County by reliance upon other expedient political justification.

Assistant County Counsel correctly mentioned that some counties have codified procedures for preliminary review of General Plan amendments.⁸ But the County does not. Unfortunately, Assistant County Counsel may have mistakenly advised the Board of Supervisors that it has legal authority to refer a pending General Plan amendment to the Planning Commission for an “early rejection” recommendation. That is simply not the case, and doing so will evade the County’s codified procedures, including those specifically aimed at facilitating meaningful public input.

Without an SBCC procedure to the contrary, nothing in state law permits the Board of Supervisors to refer the pending General Plan amendment to Planning Commission for a preliminary, fast-track review for rejection. Gov’t Code § 65358(a) provides, “[i]f it deems it to be in the public interest, the legislative body may amend all or part of an adopted general plan. An amendment to the general plan shall be initiated in the manner specified by the legislative body.” In other words, state law recognizes that the Board of Supervisors may itself initiate the process of adopting a General Plan amendment, but not prepare an early, fast-track review to deny a pending General Plan amendment application outside of codified County procedures.

⁵ § 19.29.004(D).

⁶ § 19.29.004(E).

⁷ § 19.29.004(F).

⁸ See, e.g., Riverside County Code Section 15.52.020 (allowing Pre-application review for, among other things, General Plan amendments).

If the County proceeds in this manner, the Board of Supervisors will be effectively “re-writing” the SBCC and General Plan provisions for processing of such General Plan amendments. The Board of Supervisors does not have general legislative authority to skirt codified procedures on an ad hoc basis for particular projects. It must act in accordance with adopted procedures that are known to decisionmakers, applicants and the public alike. *See, e.g., U.S. Fidelity & Guaranty Co. v. Superior Court*, 214 Cal. 468, 471 (1931)(agencies “must act within the powers conferred upon it by law and may not validly act in excess of such powers.”); *Mumaw v. City of Glendale*, 270 Cal.App.2d 454, 458 (1969)(where the municipal code provision prescribes the procedure to be followed, “the mode must be followed. The mode in such cases constitutes the measure of the power.”); *Cohan v. City of Thousand Oaks*, 30 Cal.App.4th 547, 559 (1994), as modified on denial of reh’g (Dec. 21, 1994) (overturning permit appeal initiated by Councilmember, and emphasizing “that if such a procedure is contemplated, it should be authorized by the ordinances or rules which govern ...”). Applicant is not arguing with respect to any ultimate decisions on the Project and any related CEQA review that may subsequently be reached by the Planning Commission or the Board, but simply that the County must adhere to the processes mandated by its own SBCC and General Plan before reaching such decisions (and any ability of the County to deny the Project in advance of CEQA review, pursuant to Pub. Res. Code §21080(b)(5) and CEQA Guidelines §15270, does not supplant these County-mandated processes).⁹

Lastly, the “fast-track” referral process would violate procedures and policies within the General Plan itself. First, the Project site is wholly situated within the overlying New Communities “Bolsa Study Area” established by the General Plan (LU-7.10). The New Communities provisions of the General Plan expressly contemplate that any proposed development application will be generated by project applicants (not the County) and require “all project applicants” to submit to the County, among other things, completed General Plan Amendment and Zone Change applications, a detailed Specific Plan consistent with State specific plan requirements, an Infrastructure Master Plan, a Fiscal Impact Analysis, Water Supply Assessment, and a Public Service Financing Program (LU-8.4). These provisions clearly contemplate that the substance of any General Plan Amendment for any of the New Communities areas are to be found within a to-be-formed Specific Plan. As explained below, in this instance and as recognized by a majority of the Board, the County cannot possibly know the contents of the post-Measure N Specific Plan that has yet to be completed and submitted by Applicant.

Second, the “fast-track” referral also would violate multiple policies within the Administrative Element of the County’s General Plan that specifically ensure meaningful public participation and

⁹ *See*, CEQA Guidelines § 15040(b) (“CEQA does not grant an agency new powers independent of the powers granted to the agency by other laws.”); *see also* League of California Cities, *Discretion – The Gateway To And Limitation On CEQA* (Oct. 17, 2019) at p. 9 (noting that “[t]hus, in sum, CEQA provides no separate grant of authority to require project changes or allow project denials in the name of environmental protection beyond the authority and discretion other non-CEQA laws afford an agency. Those other laws generally flow from the general police power or from overarching state laws (e.g., zoning, planning and/or subdivision laws) and are typically codified in the various Municipal/County Codes and Charters that exist across the state.”), available at <https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2019/2019-Annual-Conference/10-2019-AC:-Velyvis-Discretion-The-Gateway-To-And>

consistent application of all permit processing to all project applicants, including, but not limited to:

- **AD-1.1 Equal Public Participation** - The County shall ensure that all community residents, business owners, works, and other stakeholders have meaningful opportunities to participate in the decision-making process.
- **AD-1.4 Development Review and Permitting Streamlining Process** - The County shall maintain a development review and permit process that is cost and time efficient. *The County shall ensure that permitting procedures and regulations are applied [in a] consistent manner to all project applicants.*

As Assistant County Counsel apprised the Board, referring a General Plan amendment to the Planning Commission for a recommendation of early denial has not been used before for any other projects in the County. Doing so now would clearly contravene not only the SBCC's codified procedures for General Plan amendments, but would conflict with express procedures and policies in the General Plan and establish negative precedent.

IV. The Board's "Referral" to the Planning Commission for a Recommendation is Premature and Improper Because the Planning Commission and Board of Supervisors Do Not Yet Know what the Project or General Plan Amendment Entails

SBCC § 19.29.003 provides that "the adoption or amendment of a Specific Plan shall constitute an amendment of the County General Plan." This provision refers to exactly what is happening for this Project.

Here, Applicant's May 2019 planning application package contained only a minimal preliminary summary of the GPA and Specific Plan needed for the Project. It stated that "[A]pplicant seeks a revision of the current San Benito General Plan designations for the site from the existing New Community Area Study (LU-7.10). Consistent with the requirements of the General Plan, *a Specific Plan would be prepared to detail the project land use designations and development components.*" The GPA for the Project is anticipated to simply amend the land use designation for the Project Area from Agriculture (AG) to "Strada Verde Innovation Park Specific Plan" and, in turn and pursuant to applicable requirements of the General Plan, the specific Project components will be designed, processed and implemented by means of the Specific Plan (*i.e.*, land use designations, development standards and controls, financing and implementation measures, etc.).

In other words, Applicant's proposed Project seeks to implement the General Plan by amending it in accordance with the specific procedures and requirements established by the General Plan, *i.e.*, by means of a Specific Plan that ***has not yet been prepared or submitted to the County.***¹⁰ As noted

¹⁰ Applicant has also not yet submitted a proposed vesting tentative map for the "Major Subdivision" component of the planning application

by Supervisor Tiffany, it may reflect a project quite different than the one submitted to the voters. This is not a situation in which the Planning Commission can currently consider and prepare a fully informed recommendation to the Board with respect to a General Plan amendment that has been fully formulated and submitted to the County and also reviewed and reported upon by County staff. To the contrary, here, the GPA for the Project *does not even exist yet* for the Planning Commission and the public to consider. Any referral to the Planning Commission for a fast-track recommendation to reject (or even approve) the GPA would be premature and improper because there is no Specific Plan ready for the Planning Commission to consider.

Therefore, there is no complete GPA or Project application that could even possibly be referred at this time by the Board to the Planning Commission. It would therefore also be impossible and improper for the Board and Planning Commission to attempt to gauge the Project until all of these items have been completed and submitted by Applicant.

V. The Board's "Referral" to the Planning Commission Would Be Arbitrary and Capricious, and Would Violate Applicant's and the Property Owner's Due Process Rights

As Supervisors Tiffany and Hernandez wisely noted, the Project that may be re-presented to the Planning Commission and Board of Supervisors through the County's standard process may be different from the Project envisioned under Measure N. In fact, as noted above, Applicant *does* anticipate revising certain aspects of the Project from what was identified in Measure N, in part specifically to further address and mitigate certain public concerns raised during the Measure N process.

Revising the Project will not only affect the forthcoming GPA and Specific Plan text, but also the host of other components of Applicant's planning application package (e.g., Major Subdivision, Design Review, Building Site Review, Zoning Change). Each of these components has its own procedures that the County must also adhere to.¹¹ If, based on a Board referral, the Planning Commission was to recommend an early denial of the GPA for the Project, that would also signify and constitute a pre-commitment to deny both the legislative components of the Project's planning application (i.e., the GPA, Specific Plan, Zone Change) and the quasi-adjudicative actions for the Project (Major Subdivision, Design Review, Site Plan Review).

Moreover, prematurely considering the GPA component of the Project without any consideration of the other pending planning applications would amount to fragmentized review, which is strongly disfavored under well-established planning principles. *See, e.g.,* Gov. Code, § 65862 ("[t]o the extent possible in order to expedite development applications, the amendment of a general plan and any change in zoning to implement the plan should be processed concurrently.")

¹¹ *See, e.g.,* SBCC § 25.45.001 et seq. (governing Zoning Amendments); § 23.01.001 (governing Subdivision Map Act approvals); SBCC Tit. 25 (providing design review and site plan reviews for each zoning district).

Soliciting a Planning Commission recommendation to summarily deny the GPA for the Project — before considering how the Specific Plan may be formulated and address public concerns – would be arbitrary and capricious for the following reasons:

1. The County would be proceeding with a procedure that is unrecognized by the SBCC, and in direct conflict with the procedures and policies of the General Plan;
2. The County would be basing its denial of a GPA envisioned by Measure M, despite County Counsel's clear direction that "[b]allot box planning by initiative and the normal planning process through public hearings before the Planning Commission and Board of Supervisors are independent of one another under state law and can proceed separately.";
3. The County would be prematurely denying the GPA for the Project that has not yet been prepared, and without consideration of how a revised Project might quell the decisionmakers' and public concerns.

If the Board of Supervisors proceeds in this manner, it will deprive Applicant and the property owner of federal and state due process rights, and therefore subject the County to legal liability. It would also implicate a strong showing of bias on the part of certain Board of Supervisors in evaluating the Project, including the quasi-adjudicative actions related to other components of the Project's planning application. *See, e.g., Woody's Grp., Inc. v. City of Newport Beach*, 233 Cal.App.4th 1012, 1023 (2015) ("the problem of bias is amplified when it is combined with the related phenomenon of a city violating its own procedure"); *Petrovich Dev. Co., LLC v. City of Sacramento*, 48 Cal.App.5th 963 (2020) (the city council must be 'neutral and unbiased'; a decisionmaker must be unbiased meaning he or she has no conflict of interest, *has not prejudged the specific facts of the case*, and is free of prejudice against or in favor of any party) (internal citations omitted).

VI. Recommended Path Forward

For the reasons discussed above, Applicant respectfully recommends that the Board of Supervisors not place this item on the agenda at the next meeting scheduled for March 23, 2021. However, to the extent this item is placed on the agenda for the next meeting, Applicant requests that the Board take no action and allow the Project and its planning applications to resume and proceed in accordance with the County's codified procedures.

Respectfully,



David L. Preiss

cc:

Jennifer Frechette, Clerk of the Board

Benny Young, Director of Resource Management Agency

Barbara Thompson, County Counsel

Joel Ellinwood, Assistant County Counsel

Applicant