



July 7, 2020

Via e-mail

Amy Roberts, Chair
Monterey County Planning Commission
1441 Schilling Place
Salinas, CA 93901

SUBJECT: Development Evaluation System (DES)

Dear Chair Roberts and Members of the Planning Commission:

I write to reiterate one of LandWatch's objections to the DES that remains unresolved and respond to comments made by Anthony Lombardo on behalf of his law firm.

First, projects that receive a failing score should be automatically denied. The proposed ordinance does not accurately reflect the language of General Plan Policy LU-1.19 that provides that the DES "shall be a pass-fail system." This means that the *DES system is intended to prohibit projects that do not obtain a passing score*. "Shall" is mandatory language.

Despite this, the following section would permit the decision-making body to ignore the DES objectively-determined score to approve a project with a failing score:

Projects receiving a passing score of 70 points or more are considered "passing", but are not automatically approved. Projects receiving a failing score of 69 points or less are considered "failing", but are not automatically denied. Projects with a failing score shall receive a staff recommendation of denial when staff brings the project to hearing before the Appropriate Authority. In recognition that the DES scoring is part of a discretionary process for land use entitlements in which the Appropriate Authority serves in a quasi-judicial capacity, the DES score does not and is not intended to limit the exercise of discretion by the Appropriate Authority in rendering a decision on any particular project application.

The underlined sentences should be modified to provide instead:

Projects receiving a failing score of 69 points or less are considered "failing" and shall not be approved.

Permitting any project with a failing score to be approved undercuts the intended purpose of the DES and is inconsistent with the mandatory "shall" language in Policy LU-1.19 and the language that requires a "systematic, consistent, predictable, and quantitative method" to evaluate projects in a "pass/fail system." The ordinance should not contain language that permits the objective standards to be ignored on an *ad hoc* basis.

Second, contrary to the suggestion by Anthony Lombardo, scores over 70 should not require a staff recommendation for approval, because it is up to the County to consider other General Plan policies and the CEQA review results in the project approval process, a process that is fundamentally discretionary. Mr. Lombardo mistakenly argues that the pass/fail standard requires that “[i]f a score is less than 70 is a mandatory staff recommendation to fail, a score of 70 or more should be a recommendation for approval.” Mr. Lombardo’s argument fails to appreciate that any recommendation for approval must take into account all of the other County policies that are not implemented through the DES as well as the results of the CEQA evaluation. The County cannot legally abdicate its discretion to deny a project, regardless of its DES score, under provisions of statute and ordinance that are unrelated to the DES, including CEQA, the Planning and Zoning Law, the Subdivision Map Act, and other local zoning and map ordinances. The County must clearly retain its discretion to deny a project even if it obtains a passing DES score. County staff should not be required to act as if there are no other reasons than the DES scores to recommend project denial.

Indeed, in prior hearings, County staff expressed concern that the ordinance should be designed to ensure that decision-makers do retain discretion to deny land use approvals regardless of the DES score. The County has properly exercised its discretion to regulate land use in part by adopting Policy LU-1.19, just as it adopted other policies that absolutely bar certain types of land uses. An agency is free to enact the necessary ordinances to implement its General Plan policies through non-discretionary limits on development. For example, there is no question that the zoning ordinances may absolutely bar certain uses in certain zones or mandate a particular density level. Thus, the County is free to use the DES ordinance to set up an absolute bar to development projects that do not obtain a passing score. Furthermore, we believe that the mandatory language in Policy LU-1.19 *requires* that the DES ordinance prohibit projects that do not have a passing score, not merely generate a “recommendation of denial” from staff.

As we have previously explained, there is a safety valve. The County need not treat a failing score as an absolute bar to development. As with other zoning constraints on development, the County may consider the use of a zoning variance in exceptional circumstances.

A variance is appropriate “when, because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification.” (Government Code, § 65906; Monterey County Code, Chapter 21.72.) Thus, the existing variance procedure is well suited to relieve any hardship that might be occasioned by strict application of the DES ordinance. If the DES system results in disparate treatment, a variance may be warranted.

However, a variance shall “not constitute a grant of special privileges inconsistent with the limitations upon other property in the vicinity and zone in which such property is situated.” (Id.) Thus, the variance procedure is also well-suited to ensure that the County does not apply *ad hoc* decision-making to grant “special privileges” that would subvert its policy to apply an objective, pass-fail development evaluation system outside Community Areas, Rural Centers, and Affordable housing Overlays.

In sum, we strongly recommend that projects that fail the objective, pass/fail DES criteria be denied, consistent with the language of the County's adopted General Plan, and that the County affirm its discretion to deny projects even if they have a passing score under the DES.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael D. DeLapa". The signature is stylized with large, overlapping letters and a long horizontal stroke at the end.

Michael D. DeLapa
Executive Director