

CITY OF LARKSPUR  
Staff Report

DATE: April 13, 2009

TO: LARKSPUR CITY COUNCIL

FROM: Nancy Kaufman, Planning Director

SUBJECT: PUBLIC HEARING on the Planning Director's request for an interpretation and clarification regarding a requirement for story poles for the Rose Garden Project, 2 Ward Street (APN 022-11-45; File: PD-Prec/DR/CUP/SUB/CAP/HT/DA 08-54)

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**ACTION REQUESTED**

- That the City Council confirm the Planning Director's interpretation and clarify the requirement for story poles for the Rose Garden Project pursuant to Larkspur Municipal Code Section 18.64.040.D.

**REFERENCE**

Larkspur Municipal Code Section 18.55.100 (12) (E), Precise Development Plan  
Larkspur Municipal Code Section 18.64.040.D.1, Design Review

**FISCAL IMPACT**

None.

**GENERAL PROJECT DESCRIPTION**

The Rose Garden Project proposes construction of 85 dwelling units plus six-second units on the former Niven Nursery site. Doherty Drive, Larkspur Plaza, Larkspur Creek on the east and south, and the former railroad right-of-way, bound the 16.8-acre site. The housing mix includes 6 cottages, 29 single-family homes, and 50 senior units (42 multifamily units/8 cottage units). 2.84 acres are to be either donated or dedicated land for a community facility/park. The project application includes a request for approval of the following: a Precise Development Plan, design review, conditional use permit for senior housing, tentative subdivision map approval, circulation assessment permit, heritage tree removal, archeological investigation, and development agreement.

**BACKGROUND**

LMC Sections 18.55.100 (12) (E) [Precise Development Plan] and 18.64.040 D [Design Review] allow the Planning Commission and/or staff to require story poles. During the Preliminary Development Plan review stage, the City required story poles for the buildings proposed on the west side of the site due to concerns about the close vicinity of the proposed senior condominium

buildings to the heritage trees. Poles were installed along the west side of the property near the public multi-use path. The installation of these poles was significant to the design of the project in that, during the pole installation, the applicant realized that the senior condominium buildings were within the tree canopies. The applicant then revised his plans to move the buildings to the east.

During the Preliminary Development Plan hearings, members of the Planning Commission and City Council expressed a desire for story poles to again be installed prior to consideration of future applications for the site. Members of the public also requested story poles so that they could better understand the massing, height, and bulk of the proposed structures.

Through the law firm Real Estate Law Group, LLP, the property owner, Irving Group, LLC, has refused to allow the installation of story poles on the Niven Property and have signed the project application conditioned upon not allowing story poles to be installed on the Property and requiring the developer to appeal the requirement for story poles (see Attachment 1, letter from Real Estate Law Group; a response letter from the City Attorney is included separately in the Council's packet addressing the broader issues raised in the attorney's letter). Real Estate Law Group's March 31, 2009 letter states that the property owner's objection to the installation of story poles is based on their concern with "...the extreme liability they would pose to the Property and to the Irving Group." The letter further states that the property is in the vicinity of four schools and acknowledges that, "The state of disrepair and deterioration of the greenhouse structures on the Property already creates an attractive nuisance."

Though the project applicants do not object to installing story poles, through the law firm of Miller Starr Regalia in a letter dated April 2, 2009 (see Attachment 2), they have requested that staff seek clarification regarding the story pole requirement pursuant to their agreement with the Irving Group. The applicants have also agreed to accept a condition of approval on their design review application that would require, "...final design review approval prior to issuance of a building permit for any building to be constructed on the property and prior to final subdivision map approval."

## **DISCUSSION**

Story Pole Requirement. As noted in the Background section above, the City required story poles previously due to concerns about the close vicinity of proposed senior condominium buildings to the heritage trees on the west side of the property. The poles were important to the design of the project, for as the poles were being installed the applicant realized that the buildings were significantly within the tree canopies and he revised his plans to move the buildings to the east. These revisions also required changes in the alignment of the proposed Rose Lane.

During the hearings on the Preliminary Development Plan, members of the City Council and the Planning Commission, as well as members of the public, referred to the story poles. There were also a number of speakers that expressed a concern about the limited time the poles were in place and that they were unaware that they had been installed. It was staff's understanding that the story poles were important to the review process and that the Council and Commission had a desire for story poles to be installed again prior to further hearings and that they should be in place for a longer period of time so that the public is able to view them (see Attachment 3, February 10, 2009 letter from staff to the property owner and applicant).

With regards to the location of the story poles, staff worked with the applicants to develop a plan that identified sample locations that would help viewers to understand the project from Doherty

Drive, the pathway on the south side of Larkspur Creek, and from the multi-use path along the former railroad right-of-way (see attached story pole plan). The opportunities for the placement of story poles is limited given the current on-site structures and vegetation. Staff had requested that the poles be installed at least two weeks prior to the Planning Commission's public hearing and that they remain in place through the City Council hearing. Also, due to staff's awareness of the property owner's concerns with liability and the vicinity of the informal path to the previous pole locations, staff also required that the applicant install temporary fencing around any story poles that would interfere with existing paths or that may otherwise be accessible to the public.

To further address the property owner's concerns, staff suggests that the period of time for the poles to be in place could be reduced to two weeks. Prior to their installation, notices could be mailed to the project's interested persons mailing list notifying them of when the poles would be installed.

Liability Issue. The poles that were installed prior to the Preliminary Development Plan hearings, were located in the vicinity of an informal path that exists between the multi-use path near the Warming Hut building and the Lucky Store delivery area. Some of the support wires for the poles crossed over the path. Due to concerns with the potential conflict with the poles and the informal path, staff requested the Twin Cities Police Department to provide specific surveillance in that area while the poles were in place. Staff is unaware of any problems or issues with the poles. The applicant has said that survey stakes placed prior to the installation of the poles were pulled out and had to be replaced, but the poles were never vandalized.

With the current story pole plan, all of the poles would be within the fenced nursery site except for those along the multi-use path. Therefore, staff has requested temporary fencing around those poles.

Staff does not recall ever hearing an objection to the installation of story poles due to liability concerns. Experienced contractors generally install the lightweight poles. Staff also is not aware of any incidents relating to the vandalism of story poles. It is noted that story poles were recently in place at 11 Magnolia Avenue, a vacant lot near the southern boundary of the City. The poles were located across from Marin Primary and immediately adjacent to two streets, including Magnolia Avenue. There were no concerns raised relative to the placement of the poles nor were there any reports of vandalism.

Precedents. It has been suggested that staff either waive the story pole requirement or condition the project on the future installation of story poles. There have been numerous precedents set for requiring story poles, the most recent precedent similar to this project is the processing of the precise development plan and design review for the 2000 Larkspur Landing Project, where the property owners allowed the poles to be installed even though the applicant had only an option on the property. Given the open gate and the in and out access to the 2000 Larkspur Landing site at that time, the site was probably less secure than the Niven property and no problems were reported. Story poles are consistently required for projects including both small home remodels and the construction of new homes. The projects are almost always located within neighborhoods where children live, play, bike, and walk, and there have not been any known incidents or problems.

The Rose Garden Project is a major project for Larkspur, particularly for the Downtown area. In addition to backing up to the Downtown, the property faces onto Doherty Drive, the paths to the

east and south, the homes above on Meadowood Drive, and onto Ward Street. It is important that the Planning Commission and City Council, as well as the public, have an understanding of the project's impacts in terms of mass and bulk and its relationship to the major thoroughfares and Larkspur Creek.

To require the installation of story poles as a condition of project approval negates the purpose of the poles relative to making decisions on the project as the project layout and design would be well set by that time. The applicant has previously suggested that the design review process, including the installation of story poles, take place at a later date after approval of the precise development plan and subdivision map. However, the precise development plan procedures require the submittal of detailed information relative to the project similar to that of design review (e.g., floor plans, building elevations, circulation, etc.) and the developer has submitted the application materials which staff is currently reviewing for application completeness. Therefore, there is no point in separating the application review processes. As evidenced by the first poles installed for the project, the placement of story poles provides a visual representation of a project's bulk and mass and may result in design changes to the project as well as changes to other project components, such as circulation. If story poles were to be required after all or most of the discretionary approvals were obtained (e.g., the Precise Development Plan) it would be difficult for the City to require project changes or for the developer to make those changes. In addition, the public could only raise objections to approvals that have already been granted.

Further, to not require the poles for a project of this size and importance, or to condition the project upon the installation of story poles, would set a bad precedent. It would provide other applicants, whose project sites are likely to be less secure and more accessible than the Niven Property, with an argument for not installing story poles.

Summary. The requirement for the installation of story poles is justified based on the following:

- the requirements of the Larkspur Municipal Code and the past precedent of requiring the installation of story poles for both small and large projects including for a precise development plan and design review application for a similarly large project,
- the lack of evidence that the story poles previously placed on the site or on any other project site have been a liability problem,
- the suggested fencing for the poles to provide extra protection against potential vandalism given the property owner's concerns (Note: The poles within the property could also be fenced by the applicant if the property owner wished to require it.),
- the Project's size and importance to the community, including its prominent location close to the City's Historic Downtown District and as an entry into the City,
- the concerns expressed by both Council and Commission members relative to the potential bulk and mass of the proposed single family homes and senior complex,
- the discussion of story poles during the public hearings on the Preliminary Development Plan including concerns expressed by residents with regards for the need to view story poles in order to understand the project proposal, and
- the precedent that would be set if story poles are not required or required as a condition of approval.

#### **STAFF RECOMMENDATION**

Staff recommends that the City Council confirm the Planning Director's interpretation and clarify the requirement for story poles for the Rose Garden Project pursuant to Larkspur Municipal Code Section 18.64.040.D.a.

Respectfully submitted,  
Nancy Kaufman, Planning Director

Attachment:

1. Letter from Real Estate Law Group, LLC, dated March 31, 2009
2. Letter from Miller Starr Regalia, dated April 2, 2009
3. Letter from Planning Director, dated February 10, 2009
4. Proposed Story Pole Plan

Marina Office Plaza  
2330 Marinship Way, Suite 211  
Sausalito, California 94965

415.331.2555  
415.331.7272 (FAX)

APR 02 2009

March 31, 2009

VIA FEDEX

Ms. Nancy Kaufman  
Planning Director  
City of Larkspur  
400 Magnolia Avenue  
Larkspur, CA 94939

Re: Irving Group, LLC ("Irving Group"); Larkspur Housing Partners, LLC ("LHP") Precise Development Plan/Design Review and Story Pole Requirement.

Dear Ms. Kaufman:

This firm represents the Irving Group, the owner of the subject Property. I am in receipt of your letter dated February 10, 2009 to Ms. Cyndi Niven and Steve Seely regarding the requirement that story poles be installed on the Property during the City's processing of LHP's most recent planning application for the various land use approvals noted on the enclosed application (the "Application"). While the Irving Group has again agreed to sign the most recent Application, the authority given by the Irving Group in the Application for LHP to process the Application is expressly subject to the terms and conditions set forth in this letter.

As Cyndi discussed with you in early February, it is the Irving Group's position that they will not allow story poles to be erected due to concerns for the extreme liability they would pose to the Property and to the Irving Group. As you know, the Property is surrounded by four schools directly next door to it or within a quarter mile of it. The state of disrepair and deterioration of the greenhouse structures on the Property already creates an attractive nuisance. The police are called to the Property regularly for children discovered on the Property and vandalizing the Property. Adding story poles is an additional "red flag invitation" for children to trespass and get into trouble. My client pays for a full-time caretaker to live on and manage the Property as it is, and has had to continue to do so to maintain the Property for the excessive duration of LHP's processing of its land use approvals; almost twelve (12) years. Adding story poles is a legitimate child life/safety concern – one that my client does not take lightly nor want to incur.

Ms. Niven allowed LHP to install story poles on the Property in Spring 2008 in connection with the then version of its preliminary development plan application. At that time, Ms. Niven expressed liability concerns to both the City and LHP and it was agreed that the time the story poles would remain up be limited to a few weeks at most. In your February 10<sup>th</sup> letter you stated that to further address liability

Ms. Nancy Kaufman

March 31, 2009

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concerns when the poles were previously installed, the Twin Cities Police Department provided specific surveillance in the area while the poles were in place. However, despite additional police surveillance, within two days of the installation thereof the story poles were vandalized and required to be re-built.

Both the City and LHP have acknowledged these liability issues and legitimate safety concerns of my client for the story poles by virtue of the City's additional and unusual requirement that temporary fencing be installed with the story poles. As stated above, site specific police surveillance did not prevent vandalism to the Property when the story poles were installed in Spring, 2008 and it is doubtful that temporary fencing would prevent vandalism in this location today. Your comparison of this Project to the 2000 Larkspur Landing project is misplaced and does not give my client any comfort as the Larkspur Landing project is not surrounded by four schools and does not have anywhere near the same potential for children to trespass and get into trouble. The bottom line is that the installation of story poles on the Property would create an attractive nuisance, presenting a significant threat to the safety of the many children in the area as well as an unacceptable risk to my client for any liability that may result.

A copy of the Application signed by my client is enclosed herewith but is delivered upon the following conditions:

1. Irving Group does not give its approval for story poles to be installed on the Property and LHP must, at its sole cost and expense, appeal the story pole requirement to the Larkspur Planning Commission and City Council, if necessary, for administrative relief to the City's requirement.
2. No land use approval or entitlement shall be binding upon the Property unless and until LHP closes on the Property and acquires fee title to the Property.
3. Irving Group shall have no liability or responsibility in connection with the Application or for refusing to consent to the installation of story poles on the Property.

We hereby urge you to process the Application promptly and with diligence, subject to the conditions set forth above.

Very truly yours,

Real Estate Law Group, LLP

By: Bonnie Frank, A Professional  
Corporation, partner

By: 

Bonnie Frank, President

Enclosure

cc: Ms. Cyndi Niven  
Mr. Alan Bear  
Mr. Bill Speir, Esquire  
Mr. Karl Geier, Esquire



**MILLER STARR  
REGALIA**

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George B. Speir  
GBS@msrllegal.com

April 2, 2009

APR 03 2009

Nancy Kaufman  
Planning Director  
City of Larkspur  
400 Magnolia Avenue  
Larkspur, CA 94939

Re: Precise Development Plan/Design Review and Story Pole Requirement  
The Rose Garden mixed use residential development  
(Niven/Irving Group Property)

Dear Ms. Kaufman:

This office represents Larkspur Housing Partners LLC, proposed developer of The Rose Garden project in Larkspur. On March 31, 2009 Cynthia Niven signed the planning application for the property at 2 Ward Street, Larkspur and submitted it to the City on behalf of property owner Irving Group LLC. The application was accompanied by a letter from the owner's attorney Bonnie Frank of Real Estate Law Group LLP.

Irving Group takes the position in its attorney's recent letter, as it did in previous communications, that (1) the erection of story poles on the property results in an unacceptable level of potential liability to the property owner; (2) adding story poles as part of the project creates a public health and safety concern, especially to children passing by the property; and (3) because of these liability and public health and safety concerns, the Irving Group will not consent to the erection of story poles on the property. In earlier communications, the Irving Group also took the position that the City either did not have the authority to compel the erection of story poles or if it did have such authority, should decline to exercise it. The owner has demanded that site developer Larkspur Housing Partners appeal any requirement or condition imposed upon it to erect story poles as part of the current application process.

We understand that your office has taken the position that story poles must be erected in connection with design review at the precise development plan, tentative map, and senior housing use permit stages of the application processing, based upon an understanding that the City Council and/or Planning Commission have required such story poles as part of this application process. We request that Staff immediately seek clarification from the Council as to whether or not story poles must be erected on the property at this time. To the extent that an appeal is necessary, please regard this letter as Larkspur Housing Partners appeal of the Planning Director's determination that story poles will be required in connection with the pending application.



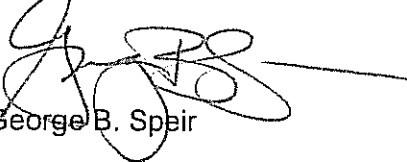
Nancy Kaufman  
April 2, 2009  
Page 2

Larkspur Housing Partners believes that the written materials which have been provided in the application, combined with the extensive previous planning effort which has taken place with respect to this property, should be sufficient to permit the Planning Commission and City Council to make informed judgments regarding the application and the proposed project, and the story poles are not essential for the project in connection with the precise development plan, tentative map and the permit process. Should the Council clarify that story pole requirement is not essential at this time, we request that Staff not require the erection of story poles as part of this application. Larkspur Housing Partners remains willing, as previously suggested, to accept a condition requiring final design review approval prior to issuance of a building permit for any building to be constructed on the property and prior to final subdivision map approval.

Should you have any questions regarding this matter, please do not hesitate to contact Steve Seely of Larkspur Housing Partners or Karl Geier or the undersigned of this office.

Very truly yours,

MILLER STARR REGALIA



George B. Speir

GBS:mj

cc: Steve Seely  
Karl E. Geier  
Cynthia Niven  
Bonnie Frank



Administration 415 927-5110  
Customer Service  
  
Fire 415 927-5007  
Public Works 415 927-5017  
  
Recreation 415 927-6746  
Library 415 927-5005

Planning 415 927-5038  
Building Permits  
  
Twin Cities Police 415 927-5150  
  
Fax 415 927-5022  
Web [www.ci.larkspur.ca.us](http://www.ci.larkspur.ca.us)

**CITY OF LARKSPUR**

February 10, 2009

Sent and Distributed via E-Mail

Cyndi Niven (cniven@maguireinc.com)  
5 Baltimore Avenue  
Larkspur, CA 94939

Steve Seely (srseely@aol.com)  
Larkspur Housing Partners, LLC  
1800 Alma Avenue, #311  
Walnut Creek, CA 94596

RE: Precise Development Plan/Design Review and Story Pole Requirement.  
CLASP/PrelDP/Prec/TM/CUP/DA/DR 08-54: Ward Street/Doherty Drive  
(Niven Property)

Dear Ms Niven and Mr. Seely:

It has been brought to the City's attention that Ms. Niven has refused to allow the installation of story poles on the Rose Garden Project site. Although the reasons for the refusal have no bearing on this matter from the City's perspective, it is my understanding that Ms. Niven has expressed concerns about potential liability from the placement of story poles on the Project property and disputes that the terms of the sales agreement between the seller and buyer of the property allow for their installation. We also understand that Ms. Niven has refused to sign the project application for Design Review, which is a requirement under the Municipal Code. Her signature is also required for the necessary Circulation Assessment, Archaeological, and Heritage Tree Removal permits. To date, Ms. Niven has signed the application relative to the Precise Development Plan, Subdivision, Development Agreement, and Conditional Use Permit. Her signature on the application attests that, "I, property owner, do hereby authorize the applicant designated here in to act as my representative during the review process by city staff and agencies."

During the review process, it was determined, pursuant to Larkspur Municipal Code ("LMC") Chapters 18.14, 18.64, 15.42, and 12.16, that the Design Review, Circulation Assessment Permit, and Heritage Tree Removal permit applications are required in order to further process and review the project application. LMC Sections 18.55.100 (12) (E) [Precise Development Plan] and 18.64.040 D [Design Review] allow the staff and/or the Planning Commission to

require story poles. As you both know, the City required story poles during the Preliminary Development Plan review stage of the project due to concerns about the close vicinity of the proposed buildings to the heritage trees. The poles were installed along the west side of the property near the public multi-use path.

Again, the concerns that Ms. Niven has expressed have no bearing on the City's requirements, but it is worth noting the following:

- When story poles were previously placed on the Project property, to address potential liability issues, the poles were erected for only a short time and few people other than members of the Council and Commission were aware they were up and specifically viewed them. To further address liability issues, the Twin Cities Police Department provided specific surveillance in that area while the poles were in place. They reported no problems or issues with the poles.
- With regards to the Precise Development and Design Review story pole requirement, staff has minimized the locations where story poles would be required and suggested that temporary fencing be installed for poles installed outside the nursery fence line. Once the new story poles are installed, the City will again notify the Twin Cities Police Department and request monitoring of the area.
- To the extent that there is a dispute about whether the installation of story poles constitutes construction of permanent improvements, from the City's perspective, story poles are not considered as structures and do not require a building permit.

During the Preliminary Development Plan hearing before the City Council, the conceptual design of the Project structures changed, and members of the Planning Commission and Council expressed a desire for story poles to again be installed prior to consideration of Design Review and Precise Development Plan consideration. Members of the public also requested story poles so that they could better understand the massing, height, and bulk of the proposed structures.

It has been suggested that staff either waive the story pole requirement or condition the project on the future installation of story poles. There have been numerous precedents set for requiring story poles, the most recent precedent similar to this project is the processing of the Precise Development and Design Review for the 2000 Larkspur Landing Project, where the property owners allowed the poles to be installed even though the applicant had only an option on the property. Given the open gate and in and out access to the 2000 Larkspur Landing site at that time, the site was probably less secure than the Niven property and no problems were reported. Story poles are consistently required for projects, even small home remodels or the construction of new homes. You may have seen the story poles installed at 11 Magnolia Avenue, which have been in place for some time with no reported problems.

Given:

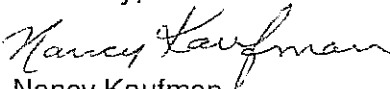
- (1) the requirements of the Larkspur Municipal Code and the past precedent of requiring installation of story poles for both small and large projects including for a Precise Development Plan and Design Review application for a similarly large project,
- (2) the lack of evidence that the story poles previously placed on the site or on any other project site have been a liability problem,

- (3) the suggested fencing for the poles to provide extra protection against potential vandalism given the property owners' concerns,
- (4) the location of this Project close to the City's Historic Downtown District and entry into the City,
- (5) the Project's size and importance to the community,
- (6) the concerns expressed by both Council and Commission members relative to the potential bulk and mass of the proposed single family homes and senior complex and their direction to install new story poles for the purpose of Design Review and Precise Development Plan processing, and
- (7) the concerns expressed by residents at both the June and July 2008 City Council meetings on the Project with regards for the need to view story poles in order to understand the project proposal,

Staff does not find it appropriate and, because of the direction from the Commission and Council, does not have the discretion to grant a special privilege to this Project to either not install story poles or to defer installing them until any more decisions are made on the Project. Should the property owner not sign for the additional applications, staff will not be able to proceed with further review or processing of the Project, as the additional applications are required at this time. Should the property owner sign the application, but continue to refuse to allow the installation of story poles, the matter of the story poles will have to go to the Planning Commission and possibly the City Council for resolution before the application will be considered complete. The Project cannot move forward until those applications are complete.

If you have any questions, please feel free to call me at (415) 927-5025.

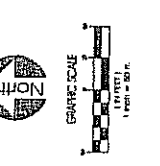
Sincerely,



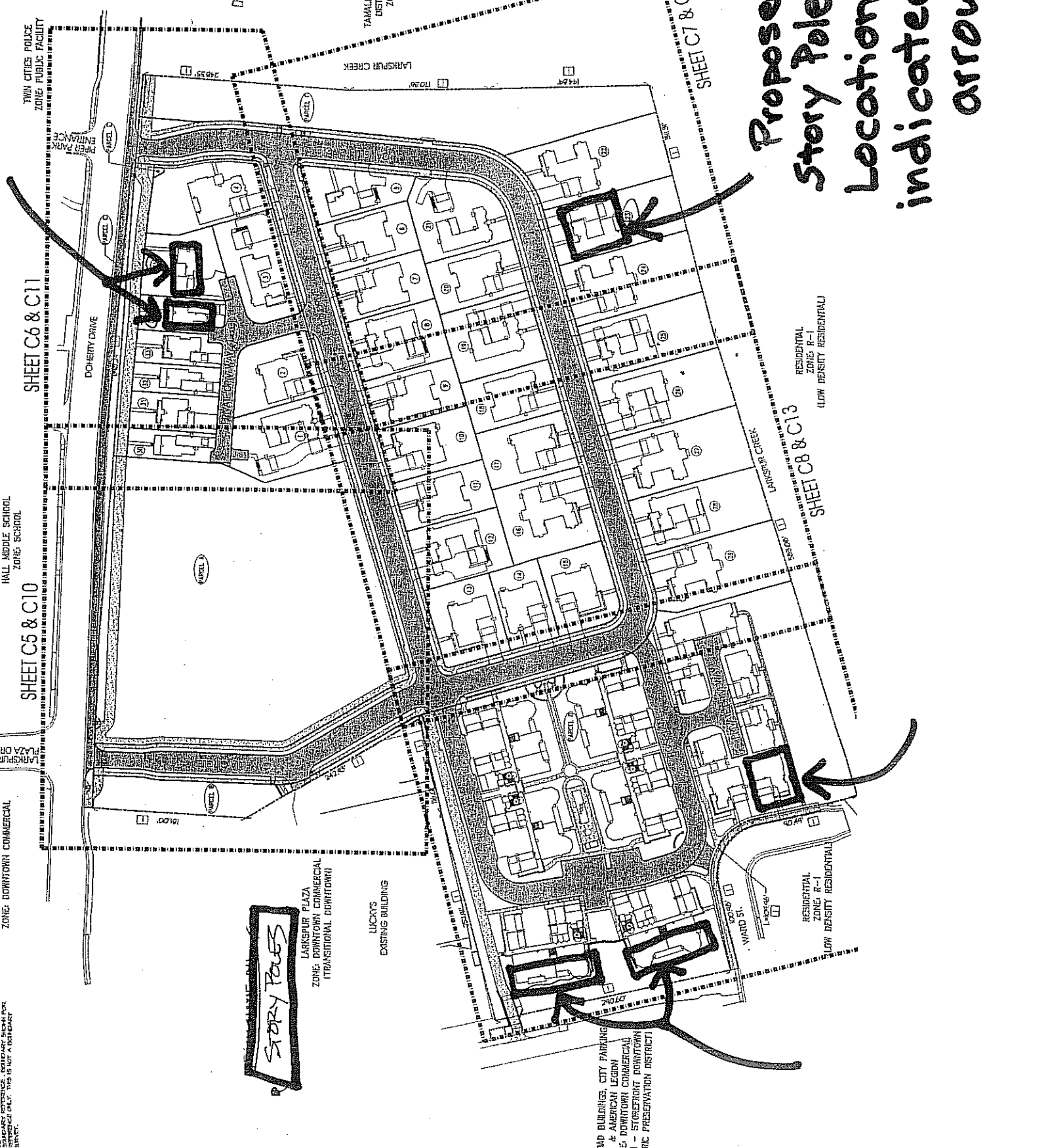
Nancy Kaufman  
Planning Director

C: Bonnie Frank (bfrank@relg.com)  
Karl Geier (KEG@msrlegal.com)  
Jean Bonander  
Neal Toft  
Sky Woodruff

Drawn	10/27/08
Checked	11/11/08
Date	10/27/08
Scale	AS SHOWN



DEC 23 2008



**Proposed  
 Story Pole  
 Locations  
 indicated with  
 arrows**

**STORY POLES**

TWIN CITIES POLICE  
 ZONE: PUBLIC FACILITY

SHEET C6 & C11

HALL MIDDLE SCHOOL  
 ZONE: SCHOOL

SHEET C5 & C10

LARKSPUR PLAZA DRIVE  
 ZONE: DOWNTOWN COMMERCIAL

LARKSPUR PLAZA  
 ZONE: DOWNTOWN COMMERCIAL  
 TRANSITIONAL DOWNTOWN

LUCKY'S  
 EXISTING BUILDING

TAMALPAIS HIGH SCHOOL  
 DISTRICT FACILITIES  
 ZONE: SCHOOL

SHEET C7 & C12

LARKSPUR CREEK  
 SHEET C8 & C13

RESIDENTIAL  
 ZONE: R-1  
 (LOW DENSITY RESIDENTIAL)

WARD ST.  
 RESIDENTIAL  
 ZONE: R-1  
 LOW DENSITY RESIDENTIAL

ROAD BUILDING, CITY PARKING  
 & AMERICAN LEGION  
 DOWNTOWN COMMERCIAL  
 - STOREFRONT DOWNTOWN  
 PRESERVATION DISTRICT



April 3, 2009

RECEIVED  
APR 09 2009

VIA U.S. MAIL

CITY OF LARKSPUR

Bonnie Frank, Esq.  
Real Estate Law Group, LLP  
Marina Office Plaza  
2330 Marinship Way, Suite 211  
Sausalito, CA 94965

**Re: Rose Garden Project Application**

Dear Ms. Frank:

This firm represents the City of Larkspur as City Attorney. Nancy Kaufman, the City's Planning Director, forwarded to me your March 31, 2009 letter on behalf of your client, the Irving Group, LLC. She asked that I respond to the asserted conditional nature of your client's submission of an application with Larkspur Housing Partners, LLC ("LHP") for the Rose Garden project ("Project").

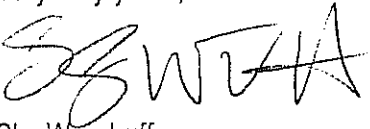
Put briefly, the City does not recognize "conditional" applications. For land use applications, the City requires information and imposes conditions that the law requires or permits or, when discretion is permissibly granted to and properly exercised, that it believes will result in better public understanding of the application and preservation of the public health, safety, and welfare. An applicant may comply with those requirements, appeal or challenge them, or withdraw the application. The City will not, however, consider itself limited by an applicant's preconditions on an application.

Additionally, I find it necessary to make a point of clarification regarding your second asserted condition that "No land use approval or entitlement shall be binding upon the Property unless and until LHP closes on the Property and acquires fee title to the Property." The City's staff intends to process all applications so that, if the entitlements requested are approved, they will become effective when each would do so under the normal operation of law. Some of those approvals require actual use or additional action (such as a final subdivision map) to effectuate. One of the entitlements requested, however, is a Precise Development Plan, which is a form of zoning. Once that becomes effective, it will apply to the Property without further action and without regard to ownership of the Property. An additional rezoning application would be required to reverse the effects of the approval of the Precise Development Plan.

Bonnie Frank, Esq.  
April 3, 2009  
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Finally, because of the disagreement between your client and LHP, a public hearing before the City Council will be scheduled for April 13, 2009 to seek clarification regarding its previous direction to require story poles for the project as part of the design review approval.

Very truly yours,

A handwritten signature in black ink, appearing to read 'S Woodruff', written in a cursive style.

Sky Woodruff  
City Attorney

SW:SW

c: Jean Bonander, City Manager  
Nancy Kaufman, Planning Director  
Karl Geier, Esq.

1218946.1