

McDowell, John

From: Prescott, Karita
Sent: Monday, September 22, 2014 2:54 PM
To: Morrison, David; McDowell, John; Ingalls, Sue; Tran, Minh; Anderson, Laura
Cc: Coil, Gladys; Morgan, Greg; Rattigan, Molly; Franchi, Helene; Gong, Jackie
Subject: Appeal Packet - Napa Sea Ranch (Permit No. P14-00019-RZG)
Attachments: Replacement Pages 2-7.docx

Attached please find additional correspondence concerning the Napa Sea Ranch Appeal our office received this morning from Tom Carey.

KARITA PRESCOTT\ Deputy Clerk of the Board
Napa County Executive Office
1195 Third Street, Suite 310 \ Napa CA 94559
Tel.707.253.4423 \ Karita.prescott@countyofnapa.org

From: Morgan, Greg
Sent: Monday, September 22, 2014 11:27 AM
To: Prescott, Karita
Subject: FW: Giovannoni appeal packet form

From: tcarey.law@gmail.com [<mailto:tcarey.law@gmail.com>]
Sent: Monday, September 22, 2014 9:02 AM
To: Morgan, Greg
Subject: Re: Giovannoni appeal packet form

Hi Greg,

Good morning -- I hope you had a good weekend. In going through the cover letter for the appeal letter after filing on Friday, I corrected some typos and formatting. The corrected pages are attached if you wish to use them in copying the packet. I can come down with my corrected copy and we can go over the corrections together if you wish, just me know. Thanks!

Tom

Sent from Windows Mail

From: Morgan, Greg
Sent: Friday, September 19, 2014 4:56 PM
To: 'tcarey.law@gmail.com'

Thanks Tom,

Greg

From: tcarey.law@gmail.com [<mailto:tcarey.law@gmail.com>]
Sent: Friday, September 19, 2014 4:50 PM

To: Morgan, Greg

Subject: Giovannoni appeal packet form

Hi Greg,

Here is the additional page that needs to be filed with the appeal. I will be there shortly with the rest of the packet.

Thanks,

Tom Carey

Sent from Windows Mail

A Property Owner's Notice Guarantee meeting the requirements of NCC Section 2.88.050B (1) and (2) is enclosed.

NCC Section 2.88.050A, subsections 4 and 5 require the appellant to identify the specific factual or legal determination which is being appealed and the basis for such appeal. Those determinations and the corresponding bases for appeal are presented below.

A. The Napa County Deputy Planning Director (hereafter "Staff") has determined that "the requested rezoning is directly in conflict with General Plan goals and policies seeking to prevent the conversion of agriculturally designated lands to non-agricultural uses."

In making this determination, staff ignores plain language in the General Plan that would allow the rezoning of the property to MC, but not the development of that property unless a General Plan consistency finding could be made as part of a subsequent Use Permit application. General Plan Policy AG/LU-43, attached as Attachment A, states that "[l]ands along the West Bank of the Napa River south of the City of Napa [and certain urban areas around Lake Berryessa] are "appropriate areas for Marine commercial zoning and development." Note that the text clearly makes a distinction between "zoning" and "development." "Zoning" is a legislative action. "Development" is commonly understood as requiring an adjudicatory action by the approving authority on a specific, proposed use or division of property, typically via the Use Permit or Parcel Map application process, which requires a determination of both General Plan and Zoning consistency as well as review under the California Environmental Quality Act (CEQA).

General Plan Policy AG/LU-44 then limits the commercial "development" of MC-zoned lands as follows:

For parcels fronting upon the west side of the Napa River south of the City of Napa which are designated Agriculture, Watershed, and Open Space or Agricultural Resource on the Land Use Map of this General Plan which have commercial zoning, additional commercial development will be allowed as follows:

- All existing commercial establishments that are currently located within a commercial zoning district shall be allowed to continue to operate and use the existing buildings and/or facilities.

- Additional commercial uses which are permitted by the existing commercial zoning of the parcel shall be permitted on that portion of the parcel zoned commercial.

It is a basic principle of statutory interpretation to attempt to reconcile troublesome language rather than simply “reading-out” entire sections of a duly enacted statute. Here, the policies containing the cited language were enacted by the Board of Supervisors as part of the 2009 General Plan update. The language plainly does not disallow zoning the property to MC; in fact, it states that “[l]ands along the West Bank of the Napa River south of the City of Napa... are appropriate areas for Marine commercial zoning and (if proposed) development.” However, once zoned to MC, further development of the property is limited by Policy AG/LU-44.

This interpretation is further supported by the Zoning Ordinance. NCC Section 18.34.010, attached as Attachment B, states that:

A. The intent of the MC classification is to establish areas which will provide the public with improved waterfront use, enjoyment and accessibility by providing for a variety of water-related commercial developments, recreational activities, services, facilities, accommodations and amenities.

B. Only those commercially-zoned parcels or those portions of noncommercially-zoned parcels legally used for marine commercial uses as defined herein which front directly on the west bank of the Napa River, south of the city, may be zoned to this classification.

Not only does the Napa Sea Ranch property meet all of the Subsection B criteria, which alone is sufficient for rezoning the property to MC, it meets all of the Subsection D criteria. Subsection D reads:

D. In addition to those parcels described in subsections (B) and (C) [subsection C applies to lands around Lake Berryessa] of this section, parcels eligible for inclusion within the MC zoning district shall have the following characteristics:

1. Napa River:

- a. Adjacent to a paved highway or road,
- b. Located within five hundred feet of the main river channel,
- c. Not located in a floodway...

d. Not located on lands classified as prime agricultural soils.

As shown on Attachment C, the property is adjacent to paved Cuttings Wharf Road and is located within five hundred feet of the main channel of the Napa River. As shown on Attachment D, the property is located outside the FEMA-defined floodway. As shown on Attachment E, the property is not shown as “Prime Farmland” on the state’s Farmland Mapping and Monitoring Program map of Napa County, but as “Grazing Land,” “Urban and Built-up Land” and “Other Land.”

One might ask, why go through the bother of rezoning if additional development of the property is not on the horizon? The answer is that those existing commercial uses on the RS and AW-zoned portions of the property (two floating docks, a boat launch, dredge spoils pond and wastewater disposal facilities), which currently are classified as legal, nonconforming uses, would become legal, conforming uses. Future improvements to those uses would be subject to the Use Permit process (and CEQA review) rather than the Certificate of Legal Nonconformity (CLN) process. This result is simply good planning practice.

B. Staff has determined that the requested rezoning conflicts with “those provisions of the General Plan adopted by voter initiatives Measures J and P that require voter approval of any land use change to agriculturally designated property.”

This a misreading of Measures J and P. The voter approval portion of Measure P (see Attachment A) states in full:

Policy AG/LU-111: Limitations on General Plan Amendments relating to Agricultural, Watershed, and Open Space and Agricultural Lands:

a) Until December 31, 2058, the provisions governing the intent and maximum building intensity for lands designated Agriculture, Watershed and Open Space and Agricultural Resource set forth in Policies AG/LU-20 and 21 (which are identical to Sections 3.F.7.a, 3.F.7.d, 3.F.8.a, and 3.F.8.d of the Agricultural Preservation and Land Use Element adopted on June 7, 1983, as amended through September 28, 2007 [hereinafter the “Land Use Element”]), shall not be amended unless such amendment is approved by vote of the people. Until December 31, 2058, the provisions governing minimum parcel size for

lands designated Agriculture, Watershed and Open Space and Agricultural Resource set forth in Policies AG/LU- 20 and 21 shall not be amended to reduce minimum parcel sizes unless such amendment is approved by vote of the people. b) All those lands designated as Agriculture, Watershed and Open Space or Agricultural Resource on the Napa County General Plan Land Use Map adopted by the Board of Supervisors (hereinafter, "Board") on September 8, 1975, as amended through September 28, 2007 (hereinafter "Land Use Map"), shall remain so designated until December 31, 2058, unless said land is annexed to or otherwise included within a city or town, redesignated to another General Plan land use category by vote of the people, or redesignated by the Board pursuant to procedures set forth in subsections c, d, e, or f below.

General Plan Policy AG/LU-20 states that the minimum parcel size in the AWOS is 160 acres. The proposed rezoning and text amendment does not create any new legal parcels and does not change the minimum parcel size applicable to the AWOS. Policy AG/LU-20 states that the maximum building intensity in the AWOS is one dwelling per parcel. Under the proposed rezoning and text amendment, the number of dwellings allowed on the property remains one dwelling per parcel.

As to changing the intent of the AWOS land use designation, staff cites Table AG/LU-B for the proposition that MC zoning is "not permitted" in the AWOS. This argument is baseless and is addressed in the section below.

C. Staff has determined that "General Plan Table AB/LU-B stipulates appropriate zoning designations in relation to each General Plan Land Use Category for considering changes in zoning. In the AWOS General Plan Land Use Category, Marine Commercial zoning is not permitted."

This Table is attached as Attachment F. Staff misstates the purpose of the Table, which is clearly labeled as "For Use in Considering Changes in Zoning." General Plan Policy AG/LU-114 provides the context for such consideration:

Zoning shall be consistent with this General Plan. In areas where the zoning and the land use designation shown on the Land Use Map are not identical, rezoning is desirable but

not mandated, since consistency is achieved by reviewing the stated policies of the General Plan in addition to the Land Use Map. Table AG/LU-B shall be used to determine consistency for rezoning applications. [Emphasis added.]

As argued above, there are specific General Plan policies (AG/LU-43 and 44) that are directly relevant to the Sea Ranch property and that support our argument that the rezoning is consistent with the General Plan. Staff's sole reliance on an illustrative Table that does not provide any alternative to the AWOS Land Use Designation designation as the appropriate "home" for MC zoning is arbitrary.

D. Staff has determined that in order to process the rezoning and text amendment application, the most appropriate environmental document would be an Environmental Impact Report (EIR).

The Napa County CEQA Guidelines, Section 1000 permits any interested person to appeal the determination that an EIR is required at the time such determination is made. The CEQA Guidelines state:

If a proposed project is not excluded from review under CEQA, the Planning Department shall prepare an Initial Study to determine whether a Negative/Mitigated Negative Declaration or an EIR is required for the project. If it is clear that a project may have a significant unavoidable effect on the environment, the Planning Department may proceed with preparation of an EIR without preparing an Initial Study if desired.

If the project may have one or more significant effects on the environment, then preparation of an EIR is required. However, if revisions or mitigations can be applied to the project that would clearly reduce all impacts to a level of insignificance, and the applicant agrees to these in writing via submittal of a Project Revision Statement, then a mitigated negative declaration may be prepared.

Here, staff did not do an Initial Study and did not state any basis, much less a "clear" basis, for the conclusion that an EIR is required. We believe that the proposed rezoning and text amendment in themselves do not result in any significant unmitigable environmental impacts, as any future development of the property would require a Use Permit and separate environmental review.

E. Staff has determined that “should the Board of Supervisors [wish] to enact the [rezoning and text amendment], they would be obligated to place their action on the ballot for voter endorsement before the rezoning could become effective.”

Again, staff provides no support for this conclusion. It is true that the Board has the ability to place a legislative enactment on the ballot by its own initiative (see California Elections Code section 9140, “[t]he board of supervisors may submit to the voters, without a petition, an ordinance for the repeal, amendment, or enactment of any ordinance”). The Board has taken such action in the past (see Lakeview Boat Storage in 2005, Eagle Vines Golf Course in 2012). As argued above, however, because the proposed rezoning and text amendment (1) is consistent with the General Plan, therefore requiring no amendment of the General Plan, and (2) does not change the intent, maximum building intensity or minimum parcel size within the AWOS Land Use Designation, Measure J/P does not apply.

In closing, none of the above determinations above provide any legal or factual support for the conclusions reached regarding important and contentious land use uses regarding Napa County agricultural lands. Where legislative enactments such as the Napa County General Plan, Measures J and P and the California Environmental Quality Act are cited, staff’s citations omit and/or misstate the plain language of the enactments. As such, staff’s determinations constitute a prejudicial abuse of discretion, represent a lack of a fair and impartial hearing and are not supported by the facts.

Conclusion

NCC Code section 2.88.080 states that “[w]hen an appeal has been filed with the clerk which complies with all of the requirements set forth in Sections 2.88.040 and 2.88.050, the clerk shall schedule a hearing to commence before the board at a regular or special meeting of the board held not less than fifteen nor more than ninety calendar days after such submittal. [Emphasis added.]

Please schedule this appeal for a regular or special meeting of the Board of Supervisors held not later than December 18, 2014.