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cc: Don Ridenhour 4/8/04
Carrie Ballwagher

April 5, 2004

File No.: CARR5.2

Napa County Board of Supervisors
1195 Third Street, Suite 310
Napa, California 94559

Re: Lot Line Adjustment Appeal by Brian Carr

Dear Board of Supervisors Personnel:

On behalf of Brian Carr, we prepared the enclosed materials for the purpose of appealing the Napa County Department of Public Works' denial of a lot line adjustment on March 18, 2004. Mr. Carr currently resides outside of the United States. Therefore, as part of this application, the application form with Mr. Carr's signature is a faxed copy. In conformance with Section 2.88 of the Napa County Code, we will be submitting an original version of the application with Mr. Carr's original signature within the next 5 business days. If you have any questions or comments regarding this application, please do not hesitate to contact us immediately.

Sincerely,

GAW, VAN MALE, SMITH,
MYERS & MIROGLIO

CONOR J. MASSEY

/CJM

Enclosures

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TO: Napa County Board of Supervisors

FROM: Gaw, Van Male, Smith, Myers & Miroglio on behalf of the Appellant, Brian Carr

DATE: April 5, 2004

RE: Appeal of the Department of Public Works' Denial of a Request for a Lot Line Adjustment on March 18, 2004; Summary of Facts and Argument in Support of a Reversal of the Lot Line Adjustment Denial

MEMORANDUM OF APPEAL

Introduction

On March 18, 2004, the Napa County Department of Public Works ("**Department**") sent a letter to the appellant, Brian Carr ("**Appellant**"), informing him that his lot line adjustment application, which had been sought with respect to Napa County parcels 027-510-006, 027-510-016, 027-510-018, and 027-510-019, had been denied under Section 17.46.040(C)(5) of the Napa County Subdivision Ordinance (the "**New Code**") (attached). The ordinance states that "[t]he resultant parcels will not be bisected or otherwise internally severed by a road previously offered for a dedication to a public agency, except that this standard may be waived by the director of public works if the director determines that the proposed bisection or other severance will facilitate the elimination or significant reduction of a previously existing risk to the safety of users of the road or to the physical integrity of the structure of the road." The Department alleged that the lot line adjustment application maps proposed a new parcel that would be bisected by a County maintained road, and therefore, the application was denied.

It is our contention that the Department's determination regarding the application was incorrect, and therefore we request that the Board of Supervisors approve the revised lot line adjustment application. In contrast with the Department's justification for denying the application, we believe that the New Code does not apply to the application in question, as it was originally filed with the Department prior to the adoption of the New Code. Therefore, the application should have been considered with reference to the Code as it existed on the date of the application ("**Original Code**"), without regard to provisions enacted thereafter.

In response to the Department's statements of their intent to deny the application, the Appellant's position with respect to this lot line adjustment was presented to Napa

In response to the Department's statements of their intent to deny the application, the Appellant's position with respect to this lot line adjustment was presented to Napa County Counsel ("**County Counsel**") in a letter dated March 12, 2004 ("**Letter to County Counsel**") (attached). In response to that letter, Ms. Carrie Gallagher, Deputy County Counsel, provided a letter in response on March 17, 2004 stating County Counsel's disagreement with our position ("**Response from County Counsel**") (attached).

In addition to the argument discussed above, County Counsel presented other arguments to the effect that the original application was rejected by the Department soon after the initial submission, and that the applicant waited beyond a reasonable time to address certain issues within the original application. However, as we will discuss further herein, these arguments are not only inaccurate, but they are also contrary to the Department's subsequent actions and statements. Such arguments further illustrate one of the central arguments of this appeal. Namely, the Department denied the lot line adjustment application on the basis of various policies which are apparently internal and unwritten. These unstated policies suggest that modified or revised applications terminate pre-existing applications, and are treated as wholly new applications; and that unreasonable delays in processing lot line adjustment applications will serve to justify the Department in denying applications, even in the absence of notice to the applicant. It would be inequitable to permit the Department to treat applicants in such a manner as the applicants are provided no notice of such policies, yet their projects are denied on the basis of the policies. As such, applicants are not afforded sufficient due process in their administrative applications, and therefore, the Department's decision to deny the lot line adjustment application in question should be overruled. In rejecting the application, the Department abused its discretion, and lacked the requisite factual basis to support its decision. Accordingly, we request that the Board of Supervisors grant our appeal and allow the revised lot line adjustment application to be processed under the original ordinance, or in the alternative, permit the Applicant to process the original application without the additional parcel under the Original Code.

Statement of Facts

The original application was submitted by Riechers Spence & Associates ("**Applicant**") on behalf of the Appellant on March 15, 2002. On March 19, 2002, Gail Forward of the Department of Public Works returned the map noting certain changes that had to be made to conform with general application requirements (showing adjacent property owners, contours, septic systems and wells on the map). Ms. Forward's March 19, 2002 letter also informed the Appellant of an issue regarding the legal creation of one of the parcels (attached). A week later, on March 26, 2002, the Napa County Code was amended (by Ordinance 1194) to include Section 17.46.040(C)(5), a provision which applied to lot line adjustments involving parcels that bisect a county road. The provision went into effect 30 days after its adoption.

After investigating the legal parcel creation issue, an application for a certificate of compliance was submitted on June 2, 2003, and the certificate was ultimately recorded

on October 6, 2003. In July of 2003, employees of the Applicant corresponded with the Department on a number of occasions regarding the lot line adjustment. This correspondence, primarily between Peter Martin of Riechers Spence and Gail Forward of the Department, notes that the application was still being processed, and more importantly, that the Department was aware of the applicant's intent to include an additional parcel in the application upon submission in the future (see attached). Subsequently, on November 3, 2003 (28 days after the Certificate of Compliance was recorded), a revised lot line adjustment application was submitted to the Department (see attached submittal form). The submittal of the revised lot line adjustment application conformed with the statutory requirement for submitting applications following a determination by the Department of an application's incompleteness. While an applicant is typically required to remedy incomplete applications within 35 days after receiving notice, Section 17.46.030(C) provides that the time period shall be tolled if the remedy requires issuance of a certificate of compliance, as was the situation with the application discussed herein. In addition to addressing the defective aspects of the original application (the missing map components discussed above), the revised application included an additional 1 acre portion of APN 027-510-016, as the Applicant had mentioned to the Department in the correspondence months earlier.

In January and February of 2003, the Department notified the Applicant of its concerns regarding the revised application, and the likelihood of a denial of the application on that basis. Our office was contacted by the Appellant to attempt to resolve the situation with the County Counsel and the Department. After exchanging correspondence in the form of the Letter to County Counsel and the Response from County Counsel, the Department ultimately sent a notice on March 18, 2004 that the lot line adjustment application had been denied as a new application which could not be processed due to the New Code (attached).

Analysis

<u>The Lot Line Adjustment Application Should be Processed Under the Code as it Existed in March 2002</u>

It is our contention that either the revised application should be processed under the Original Ordinance, or in the alternative, the application should be permitted to go forward as originally filed in March of 2002 without inclusion of the additional parcel, which was added to the revised application in November of 2003. The additional parcel was added to the application along with other necessary changes which were required by the Department to remedy the originally incomplete application. As stated above, the Department had been informed of the Applicant's intent to include an additional parcel in July of 2003 and had given the Applicant no indication that the application would be treated any differently due to the inclusion of an additional parcel. The Applicant submitted the revised application including the additional parcel under the belief that the application would still be treated under the Original Code. Had the Applicant or Appellant known of the Department's policy of treating revised applications as wholly new applications, they clearly would not have included the additional parcel. For the

result of the Department's unstated and unwritten policy with respect to the revised application would be to foreclose the Appellant's rights to adjust the parcels contained in the original application forever. Furthermore, the additional parcel was unnecessary to the revised application. The Appellant and the surrounding property owners could have submitted a separate application for a lot line adjustment involving the small additional parcel that was added to the November of 2003 application. However, they chose to include the additional parcel for convenience purposes, and based on the fact that there was no written ordinance or policy stating that the application would be treated any differently as a result.

In the Response from County Counsel, County Counsel alleges that where applications are "drastically changed" or "substantially altered", the original application is terminated and such revised applications are treated as wholly new applications. The problem with such a policy is that the public is provided no notice of the Department's treatment of applications, or of how the policy is interpreted and applied from a definitional standpoint. For example, at what point does a modification rise to the level of "drastic change" or "substantial alteration"? Should not the Department be obligated to set out guidelines of interpretation, or provide notice to applicants when they are about to surpass the threshold, thereby providing sufficient notice to complete an application? To affect such a drastic result on the Appellant and other interested parties on the basis of an unwritten policy seems inequitable, and contrary to the notions of due process. Without knowledge of the policy, applicants are unaware of the impact of making alterations to their applications until it is too late to proceed with their original intentions.

County Counsel contends that a failure to implement this unwritten policy by permitting the original application to go forward under the Original Code would set a harmful precedent. However, the concern over setting a precedent seems to be one which the Department could easily resolve by establishing written policies, or providing notice to applicants of the effects of revising or amending their applications, particularly under circumstances where the Department is made aware of an applicant's intent to revise an application in advance and fails to notify the applicant of an adverse effect.

The Original Lot Line Adjustment Application Was Never Rejected

In addition to the foregoing arguments, we would also like to briefly address some of the County Counsel's other arguments against processing the application, and our correlating opposition to those arguments. County Counsel indicates, in the Response from County Counsel, that the original application was rejected by the Department soon after the initial submission on March 19, 2002 due to defects in the application. Such an argument is in direct conflict with Section 17.46.030(C) of the Code, where it is noted that "if an application fails to contain any of the foregoing information it shall be determined by the Department of Works to be incomplete." While it is true that the application had some defects which were later remedied by receipt of a Certificate of Compliance and revisions to the November of 2003 application, defective applications are only incomplete, and are not automatically considered to be rejected. Therefore, given this provision of the Code, and the lack of a written rejection by the Department at

the time, it is inappropriate for the County Counsel and the Department to contend that the application was rejected as of March 19, 2002. Such a position would be in direct conflict with the Department's subsequent communications with the Applicant recognizing that the application was still being held open through January and July of 2003.

The Applicant Did Not Delay An Unreasonable Amount of Time

According to the Response from County Counsel, as of January 29, 2003, the Department was still leaving the lot line adjustment application open as a courtesy despite the lengthy amount of time that had passed (10 months). County Counsel indicates that the Applicant has the burden of going forward in a diligent and reasonable manner, and by waiting until June 2, 2003 to submit the Certificate of Compliance application ("**COC Application**"), an unreasonable amount of time had passed (14.5 months); therefore, the Department was not obligated to set a precedent by leaving the application open. The Department accepted the COC Application on June 2, 2003. Although that application is independent of the lot line adjustment application, County Counsel has argued that the delay in submitting the COC Application rendered the lot line adjustment application untimely, and therefore the Department was not obligated to process it under the Original Ordinance. The problem with this argument stems from the fact that the Department continued to hold the application open subsequent to the submittal of the COC application. The July of 2003 correspondence between Riechers Spence and Ms. Forward clearly indicates that the application was still open, and that it had not been rejected for any reason. The County should not be able to cast doubt on the validity of an application months after the fact without making any statement to that effect in the interim.

It is impossible for the County to argue that the lot line adjustment application was so delinquent so as to be incapable of being processed considering that it was never formally rejected after June of 2003 prior to the submission of the amended application. Not only did they accept the amended application in November, but they specifically communicated with Riechers-Spence in July 2003, and were notified at that time that the application was still being processed. In Ms. Forward's email communication July 2, 2003, she noted that it had been eleven (11) months since she had received communication regarding the application, but she provided no indication that an unreasonable amount of time had passed over the previous fifteen (15) months. Given the failure of the County to reject the application at the time the COC Application was submitted, or within a reasonable time thereafter (when all the relevant parties became aware of that submittal and its relation to the application as supported by internal correspondence), they should not be allowed to argue tardiness and undue delay after the fact. This seems especially true given the lack of a written policy or ordinance indicating the maximum length of time for tolling the date to remedy application defects, without providing notice of such delay. In addition, the failure of the Department to indicate the timing issue at the time the COC Application was submitted, the Appellant expended significant amounts of money in reliance on the continued processing of the application.

It would be inequitable for the County to maintain such a policy given the lack of notice to the Appellant.

It is not appropriate for the County to argue that the Original Code can not be applied to the original application due to the time delay. If there was a time delay in the Department's opinion, the application should have been rejected, and the Applicant notified via formal notice providing the Applicant with an opportunity to cure. However, considering that the application was not rejected due to delay, there is no reasonable basis for such an argument after the fact; rather, the lack of rejection suggests that the application should be processed under the Original Code. It would be inequitable for the County to maintain a policy to the contrary given the lack of notice to the Appellant and other interested parties.

Prayer for Relief

Therefore, for the reasons stated herein, the Appellant requests that (i) the Board of Supervisors overturn the Department's denial of the lot line adjustment application; (ii) process the revised application under the Original Ordinance, or alternatively; (iii) permit the Applicant to process the original application without the additional parcel under the Original Ordinance.

GAW, VAN MALE, SMITH,
MYERS & MIROGLIO

CONOR J. MASSEY