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November 22, 2011

Hillary Gitelman
Director
Napa County Conservation, Development, &
Planning Department
1195 Third Street, Suite 210
Napa, CA 94559-3035

Re: Aetna Springs: Permit History and Analysis

Dear Hillary:

As you know, on October 18, 2011, Aetna Preserve LLC submitted to the County of Napa an application for a major modification to the existing Use Permit # 96349-UP (the "Use Permit") for Aetna Springs Resort (the "Retreat"). In order to prepare the application, our legal team spent numerous hours analyzing the lengthy and somewhat convoluted permit history for the Retreat to determine exactly what uses are and are not currently permitted on the Retreat property. Given the amount of time that we have spent analyzing the entitlements files for the Retreat, we thought it could be useful to provide to you a "road map" to the Retreat's entitlements history, including the evolution of the existing Use Permit, and our conclusions as to the scope of permitted uses at, and County authority concerning, the Retreat. We hope that you will find the information below useful, and invite you to contact us with any questions or comments you may have.

Entitlements History

The following chronology sets forth the dates and entitlements that are relevant to this Use Permit modification request (certain other approvals have also been issued that are not applicable to the request at hand):

Date	Entitlement
November 18, 1986	Use permit issued to New Educational Development System (N.E.D.S.) for overnight retreat accommodations and related uses, which expired of its own terms in 1996. An Environmental Impact Report was certified in connection with this use permit.

Date	Entitlement
April 9, 1996	The zoning for the Retreat site (Agriculture Watershed or “AW”) was amended via Ordinance # 1105 to allow as a permitted use overnight lodging with a Certificate of Legal Nonconformity (“CLN”). ¹
October 24, 1996	The property owner applied for a new use permit for the property, plus a CLN (in order to recognize the overnight lodging accommodations that otherwise would not have been a permitted use in the AW zoning district).
February 28, 1997	The first of four components of the requested CLN was approved for overnight lodging for a total of 200 persons, plus staff housing for 25 persons, plus the existence of structures within the stream setbacks. The CLN did not refer to a “church,” nor did it impose any limitation or description on the site uses (e.g., recreational/religious/educational), but instead merely broadly authorized overnight lodging on the Retreat site. The approval of this element of the CLN made the overnight lodging activity a permitted use under the zoning.
April 16, 1997	The Use Permit was approved for overnight lodging (for 200 weekend guests and 100 weekday guests) and associated dining, recreational and other uses, as well as a church and a 9 hole golf course. A Mitigated Negative Declaration was adopted in connection with the Use Permit.
June 20, 1997	The second of four components of the requested CLN was approved for (1) overnight camping outside structures but within the resort area subject to adequate sanitation and water facilities and within the guest maximum of the Use Permit, and (2) youth camping along lower Swartz Creek outside the immediate resort area but below the 800 foot elevation level for a maximum of 44 persons (40 youth and 4 adults) for up to 3 nights per year between June 15 and September 15.
October 17, 1997	The third of four components of the requested CLN ² was approved for the use of the non-golf facilities and areas of the Aetna Springs Golf Course for private parties (e.g., wedding receptions, family reunions, corporate parties, organizational gatherings) for no more than 150 (average) and 250 (maximum) people between April 1 and October 31 (no more than two events per week) and between November 1 and March 31 (no more than 3 events per month)
November 13, 1997	The fourth of four components of the requested CLN was approved for: (1) use of the Golf Course parking lot by up to 8 self-contained motor homes associated with the “Berryessa Bums” organization for up to 14 nights per year from 1998-2002, and (2)

¹ See, e.g., County Code § 18.20.020.N.

² While implied for all CLNs issued after the Use Permit was approved, this CLN expressly indicated that it was for “actual uses not legitimized by [the] Use Permit (e.g., #96349-UP).”

Date	Entitlement
	non-lodging day use of Retreat buildings for between 35-100 people, up to 1-3 days per week at various times of the year, as specified. ³
December 11, 1997	CLN # 96348-CLN was issued for the property, encompassing all four CLN components discussed above.
July 1, 1998	CLN # 97477 was issued authorizing overnight camping (outdoor tent or open air) in the Playground area (as depicted on the map attached to the CLN) for up to 50 persons in no more than 10 tents, at any time between May 15 through September 15, and December 15 through January 15.
October 13, 2006	The Use Permit was amended via Use Permit Modification # P06-01144-MODMIN to authorize renovation of the golf course. The County determined that this amendment was exempt from the California Environmental Quality Act (“CEQA”) pursuant to the Class 2 (Replacement or Reconstruction of Existing Structures) and Class 4 (Minor Alterations to Land) categorical exemptions.
April 18, 2007	The Use Permit was amended via Use Permit Modification # P06-01526-MODVMNR to authorize a new, substantially larger golf course clubhouse, 4 tennis courts, 2 maintenance buildings and new parking lots/loading area. A Mitigated Negative Declaration was adopted in connection with this Use Permit Modification.

Use Permit – Scope of Uses

In 1997, as now, section 18.20.020.N of the County Code permitted in the AW district “[o]vernight lodging in public parks or in structures, at the density and intensity of use (number of units) lawfully developed for such purpose prior to October 13, 1977, provided that such use has a currently-valid [CLN].” The County had granted a CLN for overnight lodging in February 1997, i.e., prior to issuance of the Use Permit. Thus, at the time the Use Permit was granted, overnight lodging was (and thus remains) a permitted use of the Retreat site.

The Use Permit includes multiple references to the February 1997 CLN. It also addresses and adds conditions pertaining to overnight lodging as a permitted use. For instance, Condition 1.A of the Use Permit limits the overnight lodging allowed by the CLN to 100 guests on weekdays and 200 guests on weekends. The staff report for the Use Permit (the “1997 Staff Report”) similarly discusses at length the inclusion of the overnight lodging use as a component of the Use Permit, and even refers repeatedly to

³ The CLN further specified that “[i]n no instance may the number of attendees at an authorized, licensed or recognized event at Aetna Springs legally exceed the applicable capacity of the sanitary, water, and fire suppression systems or rated occupancy of the resort as determined by the County Departments of Fire, Environmental Management, and Building Inspection.”

that use as a “resort,” a “recreational resort,” and a “destination type resort.”⁴ 1997 Staff Report, pp. 3 and 8. Thus, while the Use Permit incorporated and regulated the same activities as the February 1997 CLN, it also further refined and circumscribed the limits of the overnight lodging use.

The Use Permit also specifically authorizes a number of accessory uses to the overnight lodging use, including certain recreational activities that might not otherwise be considered “rural recreation” uses, food service facilities, common use buildings, and recreational structures. These accessory uses would not have required a use permit as they would have been treated as part of the principally permitted overnight lodging use. *See*, County Code § 18.104.040 (“Uses allowed without a use permit or uses permitted upon grant of a use permit shall include any accessory use.”).

In addition to the above permitted uses, the Use Permit also authorizes three separate categories of uses for which a use permit was (and still is) required by the AW zoning designation:

1. The church use (which, as noted in Condition 1.G of the Use Permit, “includes contemplation, meditation and prayer, singing, music, religious instruction, and other similar activities, whether indoors or outdoors”);⁵
2. Parks and rural recreation uses and facilities (including the 9 hole golf course for up to 250 golfers per day and various other outdoor recreational activities);⁶ and
3. Camping⁷ (provided such use is recognized through a CLN and occurs below the 800 foot elevation and at least 200 feet from any surface, water or spring).⁸

Given the explicit and inclusive language of the Use Permit, it is clear that the County intended that the entirety of the permitted and previously approved uses of the site would be governed by the Use Permit. Because a use permit establishes the zoning for a particular parcel of land,⁹ it is quite common for such an approval to include permitted uses in addition to conditionally permitted uses. A similar principle

⁴ In fact, the 1997 Staff Report also noted that “renovation of the existing structures will be necessary for the continued use at the site.” 1997 Staff Report, p. 8.

⁵ County Code § 18.120.010.B.11 (allowing a church as a conditionally permitted use in any zone).

⁶ County Code § 18.20.030.A (allowing as a conditionally permitted use in the AW zone parks and rural recreational uses and facilities); County Code § 18.08.428 (defines “parks and rural recreational uses and facilities” as “a place or facility where outdoor recreational uses that are generally unsuitable for urbanized uses are conducted, with structural development limited to customarily accessory structures which are necessary to conduct the outdoor use.”).

⁷ *See*, County Code § 18.20.020.O (a campground is a conditionally permitted use in the AW zoning district); *see also*, County Code § 18.08.118 (defining “campground” as “a primarily outdoor facility for short-term overnight recreational use, including customary accessory structures and uses, with sleeping accommodations in temporary facilities such as tents, tent cabins, yurts or similar rustic enclosures on platforms, and recreation vehicles pursuant to the standards set forth in [County Code] Chapter 18.104.”).

⁸ *See*, Use Permit, Condition #15. As discussed previously, two CLNs (issued on June 20, 1997 and July 1, 1998) address camping on the Aetna Springs Resort site. By virtue of these later-issued CLNs, the areas allowed for camping by the Use Permit have been enlarged.

⁹ *See, e.g., IT Corp. v. Solano County Bd. of Supervisors*, 1 Cal.4th 81 (1991) (California Supreme Court observes that “[t]he reasonable conditions included in [a conditional use] permit become part of the zoning regulations applicable to the affected parcel” and equates violation of conditions imposed on a use permit with violation “of applicable zoning rules”); *accord, Essick v. City of Los Angeles*, 34 Cal.2d 614, 622 (1950) and Longtin’s California Land Use § 3.71[1].

applies in the environmental review context such that if a project “involves an approval that contains elements of both a ministerial action and a discretionary action, the project will be deemed to be discretionary” and thus subject to CEQA. 14 Cal. Code Regs. § 15268(d). Similarly, it is not uncommon for a city or county code to authorize referral to the legislative body of action on discretionary approvals that could otherwise be approved by an official or an appointed body. Here, the County incorporated both the permitted and conditionally permitted uses within the single Use Permit, i.e., the most conservative document with the most ability to impose conditions, and concluded that the entire scope of proposed uses was consistent with the applicable zoning and General Plan provisions. 1997 Staff Report, pp. 7 and 10.

As demonstrated by the Project Statement submitted in connection with the pending request for a modification to the Use Permit, Aetna Preserve intends to incorporate all of the uses allowed by the Use Permit. However, there exists no requirement that it do so. In the fashion of most use permits, the Use Permit is structured so as to allow the property owner to implement, at its discretion, some or all of the uses authorized therein. By stating that the uses are “limited to” particular specified uses, the Use Permit lists the uses that *may* occur on the site just like a zoning ordinance lists the uses that may be implemented in each zoning district.¹⁰ The permitted uses allowed on the Retreat site per the Use Permit include overnight lodging, a golf course, recreational/educational/religious retreat uses, church uses, fishing, bicycling, children’s games, field hockey, among many more. While the Use Permit allows and regulates each of these uses, it does not mandate that all of the uses occur on the site. As further evidence of its permissive nature, the Use Permit does not preclude a property from being used for other permitted uses allowed by a zoning ordinance. For instance, in *Sports Arenas Properties, Inc. v. City of San Diego*, 40 Cal.3d 808 (1985), the California Supreme Court ruled that a property was not restricted for use as an affordable senior housing project although a use permit had been granted for that use, reasoning that “[w]hen a conditional use permit is obtained, the permittee may make those uses of the property authorized by the zoning ordinance in the absence of a permit and in addition to those uses authorized by the permit.” 40 Cal.3d at 815.

In particular, Condition 1.A of the Use Permit allows private “recreational/educational/retreat *uses*” and not a recreational, educational *and* religious retreat. As such, any or all of these uses may take place on site pursuant to the Use Permit. Aetna Preserve is not required to undertake all three uses, nor is it required to include a church, a golf course and horseshoes, though it may choose to do so. In the same way that Condition 1.B, which authorizes a “golf course/driving range/pro shop/snack bar” does not mandate Aetna Preserve to operate a pro shop or a snack bar simply because it operates a golf course on site, Condition 1.A does not mandate that the project incorporate recreational, educational and retreat uses. This construction of the Use Permit not only comports with the express terms of the conditions but also with the County’s prior administrative interpretation of the Use Permit.¹¹ For instance, the County

¹⁰ See, *IT Corp.*, *supra*; see also, Governor’s Office of Planning & Research, “The Conditional Use Permit,” (state planning agency describes a use permit as “a project-specific change in the uses allowed [by the zoning ordinance] on a specific property”).

¹¹ An agency’s interpretation of its enactments or approvals is entitled to great deference when, as is the case here, it involves or reflects an agency’s familiarity with the legal and regulatory issues, careful consideration by senior agency officials and a consistent, administrative interpretation over time. See, e.g., *Yamaha Corp. of America v. State Board of Equalization*, 19 Cal.4th 1, 12-13 (1998); see also, *Robinson v. City of Yucaipa*, 28 Cal.App.4th 1506, 1516 (1994).

authorized construction and remodeling of the golf course under the Use Permit without numerous other allowed uses occurring on the site.

In short, the Use Permit allows a wide range of uses on the Retreat site. Akin to a zoning ordinance, the Use Permit specifies the uses that may occur on the site, but does not mandate that all of the uses be implemented. Nonetheless, Aetna Preserve intends to implement all of the uses specified by the Use Permit.

Use Permit – Site Plan

The 1997 Staff Report, similar to most other County staff reports for use permits, includes as its final attachments a graphics package, consisting of a map of the general location of the area subject to the Use Permit and a site plan for the site itself that is entitled “Approved Site Plan – Existing Structures.” 1997 Staff Report, pp. 88-89. It is this “Site Plan” that governs the physical location of structures within the core Retreat area today. The Site Plan is the same plan that was attached to the 1986 use permit, but with buildings labeled more clearly and was intended to represent the approved site plan once the Use Permit was approved in 1997. While the Site Plan does not include all physical improvements covered by the Use Permit, it does include those within the core Retreat area that are implicated by the proposed modification request.

Vesting of Use Permit

The Use Permit, which replaced the expired 1986 use permit, was for the *continued* use of the site for overnight retreat accommodations and related uses. The permitted activity was occurring prior to the Use Permit and continued after approval of the Use Permit. Plainly, Aetna Preserve’s predecessors vested the use by initiating the permitting activity within the 1 year timeframe then required by the County Code. As expressly acknowledged in the County’s letter notifying the applicant of approval of the Use Permit, “[o]nce used, the issued permit will not expire.”¹² The Use Permit thus is valid and, like all use permits, runs with the land and does not attach to the permittee. *See, e.g., Anza Parking Corp. v. City of Burlingame*, 195 Cal.App.3d 855, 858 (1987).¹³

The County approved two modifications to the Use Permit in 2006 and 2007 to authorize renovations to the golf course and construction of the golf course clubhouse. Condition 13 of the 2006 approval expressly acknowledged that all previous conditions of the Use Permit “remain in full force and effect.” More fundamentally, Aetna Springs Preserve has spent over \$20 million dollars in reliance on the Use Permit and Use Permit modification approvals to upgrade the golf facilities, including a complete renovation of the historic 9 hole golf course and construction of a new golf course clubhouse (with pro shop, office, dining room and related facilities), two new lighted tennis courts and the partial construction of one of two approved maintenance buildings.

¹² *See*, April 23, 1997 letter from County Deputy Planning Director Michael Miller to Alan Seher.

¹³ In addition, once vested, a use permit can be revoked only in very limited circumstances and with strict adherence to due process rights. *See, e.g., O’Hagen v. Board of Zoning Adjustment of City of Santa Rosa*, 19 Cal.App.3d 151, 158 (1971) and *Malibu Mountains v. Recreation, Inc. v. County of Los Angeles*, 67 Cal.App.4th 359, 367-368 (1998).

In short, the uses authorized by the Use Permit vested, as evidenced by the substantial reliance on the Use Permit exhibited by Aetna Preserve and its predecessors. The Use Permit runs with the land and continues to govern permitted uses on the Retreat site. Since the Use Permit remains in full force and effect, both the County and the applicant can and should rely on it to enable renovation and productive use of the historic Retreat.

Request for Modification to Use Permit

On July 6, 2011, Aetna Preserve LLC submitted to the County an application for a minor modification to the existing Use Permit. In order to respond to some concerns raised by County staff and in order to provide the most information and data possible, Aetna Preserve re-cast its application as a major modification to the Use Permit and submitted the revised application to the County on October 18, 2011. The major modification, which is described in detail in the submitted application binder, consists primarily of relocating four buildings, the swimming pool use and a parking area out of the stream setback area; relocating one building further from the stream; restoring a historic bridge; and adding a small structure (approximately 450 square feet) to the Social Hall building to accommodate accessible bathrooms and pool equipment storage. The only changes requested in connection with the Use Permit modification are physical changes to the Site Plan (which covers only the core Retreat area) in order to shift the locations of buildings and associated facilities outside the stream setback and add a small accessory structure to the Social Hall building for accessible bathrooms. Aetna Preserve intends to adhere to the Use Permit operating parameters.

If the Use Permit modification request is approved, all Retreat buildings will be renovated, rehabilitated or reconstructed in accordance with the Secretary of the Interior's Guidelines for the Rehabilitation of Historic Buildings and Standards for Reconstruction. In addition to restoring all existing buildings as detailed in the Aetna Springs Preservation Plan (dated October 3, 2011), the applicant intends to restore and rebuild three historic buildings that were all included on the approved Site Plan, but are not extant. The original historic Owner's Residence (to be called the Owens Building so as to reflect the site owner who built it) will be reconstructed on the general outline of the existing foundations as shown on the governing Site Plan. Reconstruction of this structure, which was historically used for overnight lodging before it was destroyed by fire,¹⁴ was expressly allowed by Condition 2 of the 1986 Use Permit. As a result, it was depicted on the approved Site Plan that was incorporated into the current Use Permit. Aetna Preserve also plans to build two other buildings shown on the Site Plan (the Plumbing Shop and Garage) that do not now exist, but are part of the Aetna Springs Resort Complex on the National Register of Historic Places. These buildings are intended for use as maintenance/back of house functions.

Authority to Modify Use Permit

The Use Permit authorizes the myriad, varied Retreat uses and runs with the land. Further, the AW zoning continues to allow as a permitted use overnight lodging in structures "at the density and intensity

¹⁴ See, e.g., Final Environmental Impact Report, Aetna Springs Educational & Recreational Retreat Facility, September 1978, pp. 187, 211.

of use (number of units) lawfully developed for such purpose prior to October 13, 1977,” provided that such use has a currently-valid CLN. County Code § 18.20.020.N. The Retreat was lawfully developed for overnight lodging and related uses prior to October 13, 1977. The proposed number of units will be far less than the number of units that were lawfully developed prior to October 1977. As previously described, when the Use Permit was approved in April 1997, Aetna Preserve had a valid CLN for overnight lodging use. Thus, the overnight lodging aspect of the proposal, which was wrapped up into the Use Permit process and vested through such entitlement vehicle, is a principally permitted use. Because the intended use is permitted and is governed by the Use Permit, the Use Permit may be amended per the County Code procedures so long as the proposal fits within the approved number of units, as it plainly does here.

As noted, the only changes requested in connection with the Use Permit modification request are physical changes to the Site Plan that was approved as part of the Use Permit. No operational changes to the conditions of the Use Permit are proposed. However, even if changes to the conditions of the Use Permit were deemed necessary or desirable, the County is plainly authorized to approve modifications to the Use Permit so long as such changes do not in any way alter or undermine the vested rights that attach to the land through the Use Permit. The Use Permit itself envisions that it can be modified for “new construction” and for “[a]ny expansion or changes in use.” Use Permit, Condition # 3. An example of a project component for which the Use Permit could be modified is the 450 square foot addition to the Social Hall building to accommodate pool equipment storage and accessible bathrooms. While we believe that this minor addition should be treated as a permitted accessory use, the County would be authorized to modify the Use Permit to allow this change if it believed that a modification to the Use Permit were needed.¹⁵ The County has in fact twice approved requested modifications to the Use Permit in connection with the golf course approvals granted in 2006 and 2007.¹⁶ Moreover, if the County could not modify the Use Permit, it would be unable to impose standard conditions aimed at protecting the public health, safety and welfare through the regulation of construction and other activities.

Because the underlying use is a principally permitted use and the County is authorized to modify the Use Permit consistent with Aetna Preserve’s vested rights to fully implement the Use Permit, the County can make the proposed changes to the Site Plan.

Conclusion

The Use Permit fully incorporates the permitted overnight lodging use at the Retreat, as well as the golf course facilities and associated uses, subject to the conditions of approval and the Site Plan discussed above. The Use Permit has vested and remains valid. Further, as necessary, the County is fully empowered to make modifications to the Use Permit that are consistent with and maintain Aetna Preserve’s vested rights.

¹⁵ Indeed, in a related context, the County is authorized to administratively approve expansions of up to 500 square feet to certain legal nonconforming uses to allow for accessory storage and/or to meet accessibility requirements. County Code § 18.132.030.A. This section also allows minor relocations of structures when the movement decreases the nonconformity in question, “such as moving a structure further outside of a required setback.”

¹⁶ As noted in an April 19, 2007 letter from the County to the applicant, the conditions on the 2007 Use Permit modification approval were to be combined with the 2006 Use Permit modification approval “and supercede applicable golf course conditions outlined in [the] Use Permit.”

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Aetna Preserve is excited to move forward with restoration of this unique and special historic resource that reflects Napa Valley's history. We look forward to working closely with the County in this endeavor. We are confident that County residents, staff members and decision-makers will be quite proud of the result.

Thank you for your consideration of Aetna Preserve's views on this matter. We hope that this letter proves helpful. Please do not hesitate to contact me with any questions concerning this correspondence.

Very Truly Yours,

A handwritten signature in cursive script that reads "Anna C. Shimko". The signature is written in dark ink on a light-colored, slightly textured background.

Anna C. Shimko
Sedgwick LLP

cc: John McDowell
Robert Westmeyer
Laura Anderson