



Agenda Date: 11/21/2006  
Agenda Placement: 8D  
Set Time: 11:30 AM PUBLIC HEARING  
Estimated Report Time: 45 Minutes

## NAPA COUNTY BOARD OF SUPERVISORS Board Agenda Letter

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**TO:** Board of Supervisors  
**FROM:** Hillary Gitelman - Director  
Conservation, Development & Planning  
**REPORT BY:** Nancy Johnson, Planner III , 707-299-1352  
**SUBJECT:** Living Rivers Council Appeal of Patrino Stream Setback Use Permit Exception

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### **RECOMMENDATION**

Consideration and possible action regarding an appeal filed by John Stephens on behalf of the Living Rivers Council of a decision by the Conservation, Development and Planning Commission on September 20, 2006 to approve an exception to the Conservation Regulations in the form of a Use Permit (No. P04-0511-UP-CONSETB) to allow construction of a 792 square foot garage and 280 square foot workshop at a setback of 3 feet where 35 feet is required on a .53 acre parcel within the Agricultural Watershed (AW) Zoning District (Assessor's Parcel No. 034-212-010; 1109 Darms Lane, Napa).

**ENVIRONMENTAL DETERMINATION:** Negative Declaration Prepared. According to the proposed Negative Declaration, the proposed project would have no potentially significant environmental impacts. This project site is not on any of the lists of hazardous waste sites enumerated under Government Code section 65962.5.

### **EXECUTIVE SUMMARY**

This is an appeal to a unanimous decision by the Planning Commission to approve an exception to the Conservation Regulations in the form of a use permit to allow the applicant, Mr. Patrino, to build a garage within the stream setback to Dry Creek. Prior to receiving approval from the Planning Commission, Mr. Patrino completed a streambed restoration project per a 1602 permit through the Department of Fish and Game that allowed him to remove non-native invasive plants and replace them with native riparian vegetation.

Napa County Code Section 18.108.040 allows exceptions to the Conservation Regulations provided that certain findings can be made that support the request. The findings and related analysis are detailed in the attached staff report to the Planning Commission. Mr. Stephens, on behalf of the Living Rivers Council, has appealed the Planning Commission's decision and has offered several arguments that are addressed in the background portion of this report.

Following a public hearing pursuant to Napa County Code Section 2.88, the Board of Supervisors is asked to adopt a motion of intent to deny the appeal by the Living Rivers Council and uphold the decision by the Planning Commission approving Use Permit # P04-0511-CONSETB. County Counsel will prepare findings consistent with

the Board's intent and schedule them for adoption at a future meeting.

### **FISCAL IMPACT**

Is there a Fiscal Impact?                      No

### **ENVIRONMENTAL IMPACT**

ENVIRONMENTAL DETERMINATION: Negative Declaration Prepared. According to the proposed Negative Declaration, the proposed project would have no potentially significant environmental impacts. This project site is not on any of the lists of hazardous waste sites enumerated under Government Code section 65962.5.

### **BACKGROUND AND DISCUSSION**

**PROCEDURAL BACKGROUND:** On September 20, 2006, the Planning Commission approved Mr. and Mrs. Patrino's application for an exception to the Conservation Regulations (Use Permit No. P04-0511-UP-CONSETB) to allow for the construction of a 792 square foot garage with a 280 square foot workshop within the stream setback of Dry Creek. The building would be located at a setback of 3 feet where 35 feet is required. On September 29, 2006, subsequent to the Planning Commission's final decision and within the prescribed appeal period, an appeal was filed by John Stephens on behalf of the Living Rivers Council.

**CURRENT STATUS AND ACTIONS REQUESTED BY THE BOARD OF SUPERVISORS:** The matter before the Board is an appeal of the Planning Commission's decision approving Mr. and Mrs. Patrino's application for an exception to the Conservation Regulations in the form of a use permit (No. P04-0511-CONSETB). County Code section 2.88.090 provides for appeals of Planning Commission decisions and indicates that the Board's appeal hearing shall be based on the documentary record, including a transcript of the Planning Commission hearing, plus any additional evidence that could not have been presented at that time, unless the Board affirmatively permits additional evidence. The Code further states that following the appeal hearing, the Board may affirm, reverse, or modify the decision by the Planning Commission. Should the Board deny the appeal and approve the project, the Board would also need to readopt the Negative Declaration.

The Board should first consider whether any new evidence should be admitted as part of the appeal hearing, and then should consider whether to adopt an intent to deny or approve the appeal, and refer the matter to County Counsel for preparation of formal findings accordingly.

**FACTUAL BACKGROUND:** Mr. Patrino applied for an exception to the Conservation Regulations in December of 2004 for the construction of a 792 square foot garage with a 280 square foot workshop (one building) on his .53 acre parcel that is bordered by Dry Creek.

The site is a parcel off Darms Lane accessed through an easement. The half-acre property slopes gently towards Dry Creek and has limited area for further development. The proposed garage would be located within the footprint of an existing graveled area that has been used for parking since the Patrinos purchased the property in the early 1980's. The addition of the garage would require minimal site disturbance and the removal of a single tree. County staff determined the top of bank to be at approximately 3 feet from the proposed structure where 35 feet would be required, although the exact location remains difficult to determine due to the terraced nature of the stream bank.

The site has an existing residence, pool and storage sheds. At the time of submittal, a site visit was conducted by Planning staff and Greg Martinelli from the Department of Fish and Game. Due to the location, on a bend in the creek, Mr. Martinelli was concerned that bank erosion would be likely if left in its current condition and the addition of a structure in the setback would necessitate invasive work in the streambed in the future. Mr. Martinelli suggested the applicant complete a streambed restoration project and wait through one winter season before applying for the use permit exception.

Mr. Patrino accordingly applied for and completed a 1602 Lake and Streambed Alteration Agreement where he removed nonnative, invasive plants and replaced them with native riparian species. Willow cuttings and other native shrubs were planted along the toe of the slope. The project was completed prior to the 2005-2006 winter, where extensive rains produced widespread flooding throughout the valley. The plantings remained intact and without additional degradation to Dry Creek. The project received final clearance from Fish and Game in May of 2006.

During the floods of the 2005-2006 winter, the high water mark was actually significantly below where the estimated top of bank was designated. With the completion and maintenance of the streambed restoration project, it is not anticipated that the addition of the garage will negatively impact Dry Creek or parcels downstream of the Patrino property.

On September 20, 2006, the Planning Commission unanimously approved Mr. Patrino's project and praised his commitment to being a steward to Dry Creek and for working through the permitting process to ensure a superior project.

**BASIS OF APPEAL AND STAFF RESPONSE.** The following discussion outlines the basis of the appeal as contained in the appellant's submittal. For convenience, staff has numbered each issue and provided a summary, but recommends that Board members review the appeal for additional details.

**Appeal Ground 1:** Approval of this use permit will cause significant cumulative impacts to salmon stream habitats by causing loss of riparian vegetation and habitat and potentially allowing pollutants to enter the creek.

**Response:** Appellant has raised the above arguments for the first time on appeal. Appellant has not made any showing as to why he could not have presented these new arguments at the Planning Commission hearing on September 20, 2006. During the Planning Commission hearing, appellant's main arguments were that (1) the health of the waterway depends on maintaining the natural sinuosity of the stream, and (2) obstructions to waterways deflect high flows and endanger other property owners. He did not raise any concerns over potential harm to aquatic life, water pollution, or loss of riparian vegetation. Nor did he argue that an EIR should have been prepared instead of a negative declaration. The Planning Commission, after considering Mr. Stephen's comments and the entire record, adopted the negative declaration, finding that there was no substantial evidence as a whole that the project would have a significant effect on the environment. Mr. Stephen's new arguments are untimely and should therefore be denied on this basis.

Even if the Board were inclined to consider the new issues raised by Mr. Stephens (loss of riparian vegetation, harm to aquatic life, human activity close to the stream causing pollution to water quality), this new evidence, is insufficient to meet the "fair argument" standard. See Response to Appeal Ground 3 below for further discussion on the fair argument standard.

Most importantly, the Department of Fish and Game, which has primary jurisdiction over streams, supports the project. Based on suggestions of Department of Fish and Game, the applicant entered into a 1602 Lake and Streambed Alteration Agreement and engaged in a streambed restoration project that included removal of nonnative, invasive plants and the addition of native riparian species under supervision of the Napa County Resource Conservation District (RCD). The restoration project was monitored and approved by biologist from

RCD. Willow cuttings and other native shrubs were planted along the toe of the slope. Mr. Patrino in fact went beyond the requirements of the project-- although he was requested to include 50 feet of plantings along the bed, he included approximately 80 feet of plantings. The project was completed prior to the 2005-2006 winter, when extensive rains produced widespread flooding throughout the valley. The plantings remained intact without further degradation to Dry Creek, and the project received final clearance from the Department of Fish and Game in May, 2006. Evidence was presented at the Planning Commission hearing that other property owners in the area stabilized riparian banks by using unnatural, nonnative measures such as water heaters and cars. Mr. Patrino took environmentally superior measures to stabilize the bank. There is simply no relevant, credible evidence that the project would negatively impact riparian vegetation or habitat, or pollute the water-- in fact, environmental review revealed no "critical habitat" or wetlands on the site that would be impacted by the project as verified by the Napa County environmental sensitivity maps.

**Appeal Ground 2:** Placing a building close to the stream does not allow for the stream in high water years to have room for high flows, diverts high water flows, creates high flow velocities, and causes more erosion on neighboring properties.

**Response:** In order for the Planning Commission to grant an exception to the Conservation Regulations, substantial evidence must be submitted that supports each of the six findings necessary to receive approval. The applicant must justify that the project will not require significant grading, will blend with the existing terrain, minimize the removal of existing vegetation or replace vegetation with appropriate materials to mitigate environmental impacts, and finally to minimize any disturbance to streams and watercourses.

In the current case, there is no credible evidence that the structure will alter the flow or velocity of the creek, or that wildlife and aquatic life will be harmed. Rather, the proposed design will minimize impacts to the site. The project will be located on a previously disturbed area that is graveled and has been used for parking since the construction of the existing residence. The garage will have a workshop above the garage to further minimize impacts to the site. The site is flat and no retaining walls are proposed or necessary for the construction of the garage.

As discussed in the first response, Mr. Patrino undertook measures to increase bank stabilization. By completing the bank restoration program, the result was not only increased bank stabilization, but an increase in native plant species and an overall benefit to the health of Dry Creek in this location. Moreover, any disturbance to the stream during the bank restoration was reduced by implementing best management practices such as the installation of silt fences and straw hay bales as required by the Public Works Department.

There is no evidence that neighboring properties will be harmed by construction of the garage. As Mr. Patrino testified during the Planning Commission hearing, the bank along the Patrino property is 12 to 18 inches higher than the bank on the opposing side of creek, so that the vineyard across the bank would flood before the water ever reached the top of the bank on the Patrino property. Moreover, the property survived the heavy floods of winter 2005-2006, with the plantings remaining intact.

**Appeal Ground 3:** The environmental determination under the California Environmental Quality Act (CEQA) is inadequate and an environmental impact report (EIR) is necessary based on a fair argument that the project may have a significant impact on the environment. The health of the waterway depends on maintaining the natural sinuosity of the stream and that obstruction to waterways deflects the high flows and endangers other property owners and aquatic life.

**Response:** Mr. Stevens did not make the argument that an EIR is required before the Planning Commission, although he did discuss the "natural sinuosity" of the stream. The test for ascertaining whether an EIR or a negative declaration must be prepared is whether a fair argument can be made based on substantial evidence in the record that the project may have a significant effect upon the environment. "Substantial evidence" is defined by

case law as evidence that is of ponderable legal significance, reasonable in nature, credible and of solid value. (*Stanislaus Audubon Soc'y, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144.) Facts, reasonable assumptions predicated on facts, and expert opinions supported by facts constitute substantial evidence. On the other hand, the following do not constitute substantial evidence:

- | argument, speculation,
- | unsubstantiated opinion or narrative,
- | clearly inaccurate or erroneous evidence, and
- | evidence of social and economic impacts that do not contribute to, and are not caused by, physical impacts on the environment. (See Public Res.Code §§21080(3), 21082.2(c), 14 Cal.Code Regs. §§15064(f)(5), 15384.)

In the present case, there is no evidence of a fair argument that the project may have a significant effect on the environment. Appellant's comments are unsupported by credible, relevant evidence. No evidence was presented in the record that Mr. Stephens is a certified biologist or hydrologist. Nor was there any evidence that Mr. Stevens visited the site. Appellant's comments are mere arguments, unsupported by any relevant study or critical piece of information regarding this specific project.

Appellant has attached several documents to the appeal but has not explained their relevance to the Patrino project. One document, entitled "Analysis of St. Helena Comprehensive Flood Protection Study" is used as support for the statement that the "river today is changing and has changed repeatedly in the historic past in response to changing watershed characteristics." The document concerns the St. Helena flood protection project, which is more than ten miles from the Patrino parcel. It is unclear how this document supports any of the arguments raised in the appeal concerning the Patrino project. That study does not address the Patrino project and does not analyze how the Patrino project would affect wildlife or creek flow.

The appeal also includes as an attachment a letter from the Department of Fish and Game to the City of Napa regarding a City project known as the Hussey Ranch residential subdivision of 72 homes. In that letter, the Department of Fish and Game expressed concerns over the Hussey Ranch project, stating that a 35 foot setback for *that* project did not adequately protect the streams, riparian corridors, and fish and wildlife that reside there. The Department of Fish and Game requested that the Hussey Ranch applicant enter into a streambed alteration agreement. Unlike the Hussey Ranch project, Mr. Patrino's project is supported by the Department of Fish and Game. In light of Mr. Patrino's restoration efforts, the Department of Fish and Game is satisfied that aquatic habitat and riparian vegetation are sufficiently protected.

Mr. Stephens' appeal includes a map showing that the Patrino parcel is within flood "Zone A." From this, Mr. Stephens argues that because the garage is in within the flood boundary, the parcel is likely to flood and alter flows. Yet, the mere fact that a parcel is located within flood plain does not mean that construction on the site is prohibited, or that any project placed on the site will cause flooding or alter creek flow. County Code requires all new residential building in Zone A, as identified on the FEMA Flood Insurance Rate Maps, to have the finished floor of the building's living area elevated one foot above base flood elevation. For buildings used as storage, such as a garage, the buildings may be built at grade or below base flood elevation. FEMA has not established a base flood elevation for Dry Creek and has given authority to Napa County to review existing conditions on a project specific basis. Public Works reviewed the project and did not express any concerns over potential flooding.

Appellant cites to a recent case out of Marin County for the proposition that an EIR should be prepared (*Salmon Protection and Watershed Network v. County of Marin* (2006) 125 Cal.App.4th 1098). That case does not apply here because it dealt with categorical exemptions and mitigation measures. Marin County had allowed construction of a home within a stream setback, determining that the residence was categorically exempt from CEQA but imposing mitigation measures. The County had previously determined that the stream setback area was an area of 'critical concern.' The Court held that: (1) a categorical exemption could not apply to a project in

an area that the County had previously designated as an area of 'critical concern,' and (2) the county could not impose mitigation measures on a categorical exemption. The current project was the subject of a detailed initial study, and not a categorical exemption.

**CONCLUSION:**

The Conservation, Development & Planning Department implements the creek setbacks outlined in the Conservation Regulations and ensures compliance of development applications through review and analysis, which may allow the use of the exceptions provided for in the Conservation Regulations when warranted. Mr. Patrino has followed the path outlined by two separate agencies over the course of two years in order to achieve a project that has received support from the Planning Commission, the Department of Fish and Game, and members of the community. The Living Rivers Council showed no interest in this project until the very end of the process and has provided no compelling reason (no fair argument, no substantial evidence) that the Commission's action to approve this project was in error. Staff recommends that the Board adopt a motion of intent to deny the appeal and request County Counsel to develop findings accordingly.

**SUPPORTING DOCUMENTS**

- A . Appeal Packet
- B . Planning Commission Staff Report-Patrino
- C . Patrino Conditions of Approval
- D . Patrino Graphics
- E . Patrino Negative Declaration

CEO Recommendation: Approve

Reviewed By: Andrew Carey