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NAPA COUNTY BOARD OF SUPERVISORS Board Agenda Letter

TO: Board of Supervisors
FROM: Hillary Gitelman - Director
Conservation, Development & Planning
REPORT BY: Heather McCollister, Principal Planner , 299-1348
SUBJECT: Public Hearing - Appeal - Gamble v. Miller-Sorg

RECOMMENDATION

Consideration and possible action regarding an appeal filed by Farella Braun and Martel on behalf of their client, Tom Gamble, of a decision by the Zoning Administrator on July 31, 2006, to approve a minor change to the approved tentative map (P06-01097) for the Villa Berryessa subdivision (95071-SUB). The modification would adjust the approved lot configuration, adjust the overall layout and street alignment, decrease the amount of grading work, and relocate the water intake system to comply with the applicable conditions and mitigation measures approved by the Napa County Board of Supervisors in 1997. Additionally, some conditions of approval require minor changes in the timing of implementation; however, the ultimate determination for substantial compliance with the approved tentative map is generally made at the time the Board of Supervisors approves the final map. In this case, the applicant has requested a formal determination for the minor changes to the approved tentative map. The project is located on a ±141.84 acre parcel, on the north side of Pope Canyon Road approximately 1500 feet west of its intersection with Berryessa-Knoxville Road within a PD (Planned Development) zoning district and an area designated UR (Urban Residential) by the Napa County General Plan (Assessor's Parcel Number #019-080-003), Napa, CA.

ENVIRONMENTAL DETERMINATION: Addendum to a Supplemental Mitigated Negative Declaration to Environmental Impact Report - FEIR-038 prepared (State CEQA guidelines 15164 for minor changes to the project as approved by the Villa Berryessa Use Permit (95070-UP) and Tentative Map (95071-SUB)). The proposed minor change to the approved map does not constitute a substantial change to the project that would require major revisions to the prior environmental document due to the involvement of new significant environmental impacts. Also, no substantial changes in circumstances under which the project would be undertaken and no new information of substantial importance have occurred that might necessitate additional review. An explanation of the decision not to prepare an additional environmental document is contained in the Addendum pursuant to State CEQA Guidelines Section 15164.

(CONTINUED FROM OCTOBER 17, 2006)

EXECUTIVE SUMMARY

This hearing before the Board is to consider an appeal of the Zoning Administrator's July 31, 2006 decision to

approve (P06-01184-TMREV) a minor change to the approved tentative map (#95071-UP) regarding a subdivision near Lake Berryessa. The proposed changes to the approved tentative map and use permit were initiated last summer following discussions with county staff and state and federal agencies. During these discussions it was evident that minor changes to the lot configuration, street layout and pad elevations would reduce the environmental impacts, protect the site resources (minimize impacts to streams and reduce the amount of total site grading) and would result in a final project design that would comply with the requirements of state and federal agencies.

In March 2005, the Zoning Administrator approved a use permit minor modification pertaining to the above described changes. That decision was subsequently appealed, and the Board of Supervisors upheld the Zoning Administrator's approval in February, 2006. Following approval of the use permit modification, the request for a minor tentative map revision was filed and processed. At the July 31 hearing, evidence from staff, the applicant and their representatives, and the appellant was presented. Based on the evidence presented, the Zoning Administrator found that the proposed project met the definition of a minor tentative map revision; that the prior tentative map approval was still valid as a result of the tolling provisions of County Code and the Subdivision Map Act; and, that an prior Public Works Director determination of a timely final map filing was not subject to review or interpretation by the Zoning Administrator. The Zoning Administrator's decision, if upheld by the Board, would modify the tentative map, permitting the applicant to move forward to bring the final map application to the Board for review and approval at a later date. The appeal hearing was originally scheduled for October 17, 2006 and continued to December 12, 2006 at the mutual request of the appellant and the project applicant.

In the appeal, the appellant has argued that the Zoning Administrator erred in that: 1) The tentative map expired on June 24, 2004; 2) even if a development moratorium (also referred to as tolling) commenced on May 24, 2004, the moratorium has expired without the project sponsor submitting a new final map; and 3) the Zoning Administrator approved modifications to the tentative map that were not minor. These arguments have been responded to in the Background section below.

FISCAL IMPACT

Is there a Fiscal Impact? No

ENVIRONMENTAL IMPACT

ENVIRONMENTAL DETERMINATION: Addendum to a Supplemental Mitigated Negative Declaration to Environmental Impact Report - FEIR-038 prepared (State CEQA guidelines 15164 for minor changes to the project as approved by the Villa Berryessa Use Permit (95070-UP) and Tentative Map (95071-SUB)).

The proposed minor change to the approved tentative map does not constitute a substantial change to the project that would require major revisions to the prior environmental document due to the involvement of new significant environmental impacts. Also, no substantial changes in circumstances under which the project would be undertaken and no new information of substantial importance have occurred that might necessitate additional review. An explanation of the decision not to prepare an additional environmental document is contained in the Addendum pursuant to State CEQA Guidelines Section 15164.

BACKGROUND AND DISCUSSION

This hearing before the Board is to consider an appeal of the Zoning Administrator's July 31, 2006 decision to approve a minor change to the approved tentative map (#95071-UP). The proposed changes to the approved use permit and tentative map were initiated in the summer of 2005 following discussions with county staff and state and federal agencies. During these discussions it was evident that minor changes to the lot configuration, street layout and pad elevations, which would reduce the environmental impacts, protect the site resources (minimize impacts to streams and reduce the amount of total site grading), would result in a final project design that would meet the requirements of state and federal agencies.

The application history is as follows:

- | In 1973, a re-zoning (R-57273) from WR (Watershed Resource) to PC (Planned Community) and a use permit (U-207273) to establish a 103 unit mobile home park was denied by the Board.
- | In May 1977, the County received an application for a re-zoning from WR to PD (Planned Development) with a General Plan amendment and a use permit application for a 211 unit mobile home park, 109 enclosed boat storage spaces and other accessory uses.
- | In April 1978, the Board approved a General Plan amendment and re-zoning and referred the use permit application back to the Planning Commission to set conditions based on a revised development plan.
- | In March 1979, the Board formally adopted Ordinance 593 for the rezoning, approving a mobile home park, boat and trailer storage, medical facility, chapel and heliport.
- | Between 1980 and 1982, correspondence between the applicant and county indicates that the applicant was working on adjustments and minor revisions to the approved project.
- | In October 1982, a minor modification to the project was approved for a 202 double wide mobile home site, 120 RV storage spaces, future medical office, chapel and heliport.
- | In 1989, an application was submitted that would subdivide the proposed mobile home park to create 170 units and the applicant was informed that a re-zoning would be required.
- | In 1991, a re-zoning application was submitted, and in 1994, the Board approved the re-zoning request.
- | In 1995, a revised project was submitted in the form of a new tentative map and planned development application to create 132 lots.
- | In 1996, the Planning Commission denied the use permit application and the subdivision (tentative map), and then later, on appeal, the Board approved the use permit application and the tentative map of the subdivision with some modifications.

The applicant submitted a final map and other documents in June 2004, prior to the June 24, 2004 expiration of the tentative map. Public Works found this to be a timely and good faith submittal that triggered the tolling provisions set forth in Napa County Code section 17.18.010(c)(1) and State Subdivision Map Act subparagraphs (b) and (f) of Government Code section 66452.6.

On July 15, 2004 the Planning Department reviewed the final map submittal and made the preliminary determination that the map submitted was in substantial conformance with the approved tentative map, with minor changes. [Fn[1]] .

After submitting permits to the various state and federal agencies, it became evident to the applicant that additional minor adjustments to the map and use permit would be required to conform to the regulations of these state and federal agencies. The applicant revised the original final map submittal in September 2004. [Fn[2]] Planning staff reviewed these changes and made a preliminary determination that the revised final map submittal was still in substantial conformance with the approved tentative map. However, staff determined that a minor modification to the use permit was required for the other items specified in this application.

The applicant submitted a formal request for a minor modification to the use permit in March, 2005. On November

23, 2005, the Zoning Administrator approved a minor modification to the use permit after conducting a noticed public hearing. The Zoning Administrator's action did not modify or approve the subdivision map. On February 28, 2006 the Board of Supervisors, on appeal, approved the minor changes to the approved use permit.

On July 12, 2006, the applicant submitted a formal request for the determination of the minor change to the approved tentative map. On July 31, 2006, the Zoning Administrator heard the item and granted approval on August 3, 2006.

A timely appeal was filed and the appeal hearing scheduled for October 17, 2006, at which time the hearing was continued to December 12, 2006 at the mutual request of the appellant and the project applicant. In the appeal, the appellant has argued that the Zoning Administrator erred in that: 1) The Tentative Map expired on June 24, 2004; 2) even if a development moratorium commenced on May 24, 2004, the moratorium has expired without the project sponsor submitting a new final map; and 3) the Zoning Administrator approved modifications to the tentative map that were not minor. These arguments are responded to below.

CURRENT STATUS AND ACTIONS REQUESTED BY THE BOARD OF SUPERVISORS: The Department of Conservation, Development, and Planning recommends that the Board of Supervisors adopt a motion of intent to deny the appeal and uphold the Zoning Administrator's decision to approve the minor change to the tentative map, and request that County Counsel prepare findings for adoption at a subsequent date. As the Zoning Administrator hearing was not recorded electronically or by a certified court reporter, the Board should conduct a de novo hearing on appeal pursuant to Code Section 2.88.090.A.

STATED BASIS FOR THE APPEAL AND STAFF RESPONSE: The following 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 the Board review the appeal for additional details.

Appeal Ground 1: The Tentative Map Expired on June 24, 2004.

The California Government Code §66410 et seq. (the "Map Act") and the Napa County Code, Title 17 ("the Code") allow tentative maps a maximum life span of seven years (see Code §17.18.010 & 17.18.020). The county approved the project's tentative map on June 24, 1997, and subsequently granted five years of extensions. The tentative map therefore expired seven years later on June 24, 2004.

The project sponsor submitted a final map application on the deadline of June 24, 2004. The county has the authority to issue this final map, or to reject it, but the project sponsor can not submit a new final map application now that the tentative map has expired (see Map Act §66452(d)).

Appellant claims that the Zoning Administrator's decision to allow modifications of an expired tentative map relied upon the incorrect legal assumption that the project sponsor's submittal of a Joint Aquatic Resources Permit Application, or "JARPA," on May 24, 2004, put into effect a development moratorium" under the Map Act (see Map Act §66452(b)(1)).

Appeal Ground 2: Even if a Development Moratorium Commenced on May 24, 2006, the Moratorium has Expired without the Project Sponsor Submitting a New Final Map.

On May 24, 2004, under the JARPA, the project sponsor submitted applications for three separate permits. Even if the mere submittal of these permit applications, without the elapse of any reasonable amount of time for the agencies to respond, is deemed a development moratorium, that moratorium has expired.

Staff response to Appeal Grounds 1 and 2:

Appellant contends that the tentative map is invalid because it has expired. Staff disagrees with the appellant's position. The tentative map has not expired because the expiration date has been (and continues to be) tolled in accordance with the provisions of Napa County Code section 17.18.010(C) and State Subdivision Map Act subparagraphs (b) and (f) of Government Code section 66452.6.

A. The statutory definition of "development moratorium" applies in this instance.

Subparagraph (b)(1) of Government Code section 66452.6 provides that the life of a tentative map "shall not include any period of time during which a development moratorium, imposed after approval of the tentative map, is in existence. However, the length of the moratorium shall not exceed five years."

Subparagraph (f) of Government Code section 66452.6, in relevant part, defines a development moratorium as follows:

(f) For purposes of this section, a development moratorium includes a water or sewer moratorium, or a water and sewer moratorium, as well as other actions of public agencies which regulate land use, development, or the provision of services to the land, including the public agency with the authority to approve or conditionally approve the tentative map, which thereafter prevents, prohibits, or delays the approval of a final or parcel map.

Appellant contends that it is an open legal question whether, after submitting applications for permits required for a final map to issue, the delay by agencies in processing and granting such permits is an "action" that qualifies as a development moratorium under the statute.

However, in *California Country Club Homes Association, Inc., et al., v. City of Los Angeles, et al.*, (1993) 18 Cal.App.4th 1425, at page 1434, the Court discusses the background of how the definition of development moratorium was legislatively changed to include conditions where outside public agencies prevent the preparation and filing of a final map (citing *In re Eastport Associates* (1991) 935 F. 2d 1071). Previously, the definition did not include the period during which an outside agency's acts or omissions prevented the developer from filing a final map. The court's recognition of the significance of this legislative change supports the general concept that processing an application is "an action", no matter how long the processing takes.

Even the guide on the Subdivision Map Act relied upon by appellant (Curtin, Daniel J. and Merritt, Robert E., *California Subdivision Map Act and the Development Process*), although not legally binding authority, opines that an agency's failure to act after an application has been filed requesting a permit would constitute a development moratorium. The authors, however, qualify that opinion by stating the failure to act must be limited to some "reasonable time." The authors' "reasonable time" component, however, injects an uncertainty which does not exist in the statute. How would the starting period of a moratorium be determined? What may be a reasonable delay for one agency may not be a reasonable delay for another. Fixing a period of three to six months, as appellant suggests, is not reasonable given that some agencies may take years to process an application as the Legislature obviously recognized in allowing development moratorium related tolling of tentative map expirations for up to five years. Certain agencies are notoriously slow in processing applications. A project sponsor is not (nor should be) burdened with predicting or measuring what would be a reasonable delay in an agency's failure to act.

B. Government Code section 66452.6(b)(3) provides for tolling relating to a moratorium that is imposed even shortly before the expiration of a tentative map.

Subparagraph (b)(3) of Government Code section 66452.6 provides: "Once a development moratorium is terminated, the map shall be valid for the same period of time as was left to run on the map at the time that the moratorium was imposed. However, if the remaining time is less than 120 days, the map shall be valid for 120 days following the termination of the moratorium."

Based on this provision, the applicant is not prohibited from submitting a JARPA application one month before the expiration of the tentative map as appellant contends. Nothing in the law requires the applicant to "leave time" in the applicant's own processing period for public agencies to act. The processing time by public agencies, in accordance with the law, constitutes development moratorium for tolling map expiration purposes. The clock stopped when the JARPA application was submitted. The time spent processing the JARPA does not count. When the clock starts again, if less than 120 days remains (as is the case here), the tentative map shall remain valid for an additional 120 days.

C. The tolling period has not expired.

As of the time this report was prepared, the County is not aware of any public agency actions that effectively terminated the tolling period and commenced the 120-day period referenced in Government Code section 66452.6 (b)(3). A mere request by a public agency for additional information does not constitute a formal denial, but instead would constitute part of the communication between the applicant and the agency that may ordinarily occur in processing the application. A formal denial as an action that by itself prevents, prohibits or delays the approval of the final map would not terminate the moratorium-related tolling period (although it may for all practical purposes terminate the project).

Regarding the September 7, 2005 Regional Water Quality Control Board Order that appellant raises, that Order is a conditioned certification requiring approvals by other public agencies yet to be obtained which the project sponsor advises has been applied for and has been actively and continuously sought.

Appeal Ground 3: The Zoning Administrator Approved Modifications to the Tentative Map that were not Minor.

Appellant also argues that even if the tentative map had not expired, the Zoning Administrator exceeded his authority by approving modifications to the tentative map that meet neither the statutory nor the common sense definition of "minor". The Code allows the Zoning Administrator to approve only "minor changes" to a tentative map (§17.26.0040).

The Code defines minor change as a modification to the tentative map that involves a change of lot lines, lot shape, lot dimensions, street alignment, width or grade, grading proposals, or other elements that do not change the basic design or improvements required in the tentative map and the conditions thereof" (Code §17.02.380). In addition, the Code states that a "proposal that will significantly alter the configuration of the proposed lots is not a minor change" (id.)

Here, the modifications change the lot lines of all 100 parcels of the project. Appellant argues that changing the lot lines of all 100 parcels inherently "significantly alter(s) the configuration of the proposed lots..." (Code §17.02.380) in direct violation of the Code, presumably just because of the number of parcels involved.

Appellant also argues that, by modifying the conditions of approval of the tentative map to require compliance by the project sponsor with revisions to the project's use permit, the Zoning Administrator changed the "basic design" of the project because his decision will now allow stick built homes rather than mobile or modular homes. Appellant claims that the "basic design" of the stick built homes is very different than modular homes. Modular

homes improve a lot with a concrete pad, and stick built homes attach improvements to the land beyond a mere concrete pad.

Staff response:

Napa County Code 17.26.040.B authorizes the Zoning Administrator to approve minor changes to the approved tentative map if the changes meet the definition of a minor change. In making his decision, the Zoning Administrator indicated that the proposed changes to the tentative map could be deemed minor changes based on Section 17.02.380 which do not affect the overall concept, density, intensity or environmental impact of, or substantially alter or delete any environmental mitigation measure for the project. Because these individually minor changes per lot also cumulatively meet the definition of minor change, the action of the Zoning Administrator should be upheld.

Attached for reference is the staff report for the Zoning Administrator's hearing which contains the revised conditions of approval for the use permit. Suggested changes to the timing of the conditions of the tentative map have been made, which ultimately will be decided by the Board when the final map is heard before the Board.

Based on the evidence present at the hearing, the Zoning Administrator found the proposed changes satisfy the criteria of a minor change to the tentative map. The overall concept of the project did not change. It remains a 100 lot subdivision for single family home development and is subject to the requirements of the approved use permit concerning project design. The density of the project is unchanged. Also, the intensity of the project is unchanged, because the changes do not increase number of lots or the size of the dwelling units. In some cases the adjusted lots are smaller and in some cases larger in order to avoid trees and reduce the amount of grading. On the proposed larger lots, the requirement of non-disturbance areas means that no increase in the development area of such lots is proposed. The street layout is altered, but streets are in substantially the same location as that of the original map, and access the same proportions of the subject property previously evaluated and approved for development. Likewise, intensity is not increasing because those areas of the subject property set aside as open space are effectively the same under both tentative maps. The revised map actually contains more open space areas than the original map. Lastly, the revised project is environmentally superior to the originally approved project. The minor changes to the overall layout provide an alternative design to sedimentation and filtration basins which improves upon the original design and fully mitigates runoff to better protect the water quality of Lake Berryessa. The location of the approved water intake system has been revised to further safeguard the Lake and to reduce the amount of grading and tree removal. Viewed cumulatively, these individually minor changes significantly reduce impacts on environmental resources such as trees, wetlands and other waters when compared to the original tentative map, and include an increase in the area of wetland mitigation required by State and Federal Agencies. Please refer to the attached Addendum. The changes in site work are described in the table below.

Site Grading and Areas of Disturbance:

	Original	Modified
Area of Disturbance	49.93 ac.	37.0 ac.
Wetland Impact	3,549 s.f.	69 s.f.
Total Lineal Feet of Impacts to "Other Waters"	5,392 feet	3,683 feet
Total Square Feet (Acreage) of "Other Waters Impacted"	10,315 s.f. (0.24 ac)	7,749 s.f. (0.18 ac)
Cut	432,700 cy	710,000 cy
Fill	878,340 cy	710,000 cy
Import Fill	<u>445,640 cy</u>	<u>N/A</u>
TOTAL EARTHWORK	1,756,860 cy	1,420,000

RECOMMENDATIONS: Staff recommends the Board adopt a motion of intent to DENY the appeal, upholding the Zoning Administrator's decision based on the conclusions in the above staff report, and information presented in the record. The Board should continue the hearing to a date determined by the Clerk of the Board to allow preparation of findings by County Counsel.

[1] The final determination of map conformity is made by the Board of Supervisors when the final map is brought before them.

[2] Minor changes to the map are authorized in County Code, Section 17.26.040.B if approved in accordance with that section.

SUPPORTING DOCUMENTS

- A . Appeal Application
- B . Staff report-Zoning Administrator Hearing
- C . Application for Minor Change to map
- D . Addendum to a supplemental Mitigated Negative Declaration to Environmental Impact
- E . Minor Change Approval Letter from Zoning Administrator
- F . Graphics-Approved Tentative Map and Proposed Minor Changes to the Map
- G . Revised Conditions of approval for the Use Permit and recommended changes
- H . Application Permits to various agencies
- I . Letter dated Sept 27, 2006 from Applicant's (Miller-Sorg Group) attorney

CEO Recommendation: Approve

Reviewed By: Andrew Carey