

SAN BENITO COUNTY PLANNING COMMISSION

October 3, 2007

Minutes

PRESENT: Bettencourt, Machado, Tognazzini

ABSENT: DeVries, Scattini

STAFF: Principal Planner (PP) Byron Turner; Deputy Director of Public Works (DDPW) Arman Nazemi; Civil Engineer (CE) Art Bliss; Deputy County Counsel (DCC) Shirley Murphy; and Clerk Trish Maderis.

Chair Tognazzini opened the meeting at 6:04 p.m. as he led the pledge of allegiance to the flag and reiterated the standing rules of order.

DIRECTOR'S REPORT:

PP Turner presented the report in the absence of DoP Henriques who was attending a Planning Conference:

- General Plan Stakeholders report distributed to the Commissioners
- announcement: times and locations of the General Plan Update (public) meetings

PUBLIC COMMENT:

Chair Tognazzini opened, and then closed, the opportunity for public comment as there were no persons present to address matters not appearing on the agenda.

CONSENT AGENDA:

COMMISSIONERS MACHADO/BETTENCOURT MOTIONED TO APPROVE THE CONSENT AGENDA:

1. Acknowledge Certificate of Posting
2. Minutes of September 19, 2007

THE MOTION PASSED (3-0-2) WITH THE FOLLOWING VOTE: AYES: BETTENCOURT, MACHADO, TOGNAZZINI; NOES: NONE; ABSTAIN: NONE; ABSENT: DeVRIES, SCATTINI.

CONTINUED ITEM

3. Consideration of FY 2007-2008 Preliminary Allocation late submission. APPLICANT: Dan Roth ENGINEER: M H Engineering (Bill McClintock)

PP Turner gave the staff report, detailing the application dates, which are set by the Growth Management System Ordinance #751, which he read into the record. It was noted that the dates and times are specific; hours of the Planning Department were also noted. PP Turner said the applicant's request is for relief from the requirements of the Ordinance, since the applicant has claimed the applicant was ready for submittal and further that a courier/staff person had arrived at the office at 5:00 p.m. on the announced closure date, finding the Planning Department locked. PP Turner indicated the exact times the front door of the office was locked on September 4, 2007 (the well-noticed date for Preliminary Allocation applications being due), as well as listing factors such as personnel who were working in the building after hours and other entrances which were opened. PP Turner stated that no one was witnessed attempting entrance into the building at - or within 15 minutes after - 5:00 p.m. on September 4, 2007. PP Turner also stated that while it was an unfortunate situation, staff's recommendation was that the Planning Commission adhere to the Growth Management Ordinance.

Chair Tognazzini opened the public hearing.

Bill McClintock, 16075 Vineyard Blvd, Morgan Hill, said he was present as the engineer for the applicant. Mr. McClintock also said he was President of MH Engineering. "It's an unfortunate situation. We have a signed statement from our Administrative Assistant saying she had attempted delivery as previously stated. We made the attempt to be here at 5:00 p.m. The applicant was in a phone conversation with Mr. {Chuck} Ortwein {Senior Planner for the Department} at just before 4:00 p.m. on September 4, 2007 about issues regarding the application that were resolved with Chuck at that time. Dan Roth made the statement that we were bringing in the application. So it was noticed that we were coming. We recognize that there has to be a deadline. We made that attempt to bring it in. We had had issues ourselves with soil engineers and getting applications completed and signed. The Administrative Assistant said there was traffic on San Benito Street, but she thought she was here by five o'clock. There is a lot of time and energy putting those applications together. I don't see anybody here that's opposed from the other development community who would say, 'Hey, we don't think it's fair.' If I were on the other side, I would be open to having somebody say they were here at 7:00 p.m. The Ordinance does say it has to be filed on the day and I didn't hear Brian Curtis say there was a deadline. I guess there was some notice of that was a time deadline, but I think the Ordinance does speak to the day. I think there is some room - some discretion that the Planning Commission would have in accepting this application. If you do accept the application, I think it's a win-win situation in that you would assume that the projects getting the higher scores after scoring would be the better projects than those getting the lower scored. So if these applications come in with one or both score high enough to get an allocation, then the County wins because they get a better project. I think that's what it should be about - the fairness of getting an application in on a certain time would be an issue with other developments and developers. I don't see them here. I don't know if there was a public notice on this meeting for us to be here or not. I'm sure there were articles in the paper or something that would say we were going to be here with hat in hand asking for permission to file this application," Mr. McClintock said.

Dan Roth, 240 Cole Road, Aromas, told the Commissioners he was the owner/applicant and was making the request for consideration of the late submittal. "We hired Bill (McClintock) to do the maps for our subdivision. He had everything completed. I did meet with Chuck Ortwein a week before the deadline. We went over the project together. He liked what he saw. He said that we would probably score very well. The only holdup we had the soils report from Earth Systems that came together on the last day. Mr. McClintock had everything completed well in advance. The only thing I needed to do on the 4th was stop and sign the application and give a check for the application fee. Which I did at about a quarter to four on that day. I talked to {the Administrative Assistant} who was bringing the plans down. She said she would be leaving there in 10 minutes which would have been just before four o'clock. At that time I proceeded down to do some business at the property. It was probably a little after four that I called Chuck {Ortwein} and I let him know, after we discussed some other questions I had, that MH was bringing the plans down. It is my understanding that Michelle when she got here at five o'clock, the door was locked, and she returned to sit in the vehicle and cried. I think in hindsight if she had been more assertive, and rattled the door, someone would have let her in. But she sat there and she cried and she left. If this was a next day thing where we were late, we wouldn't even be here. But the fact that Chuck knew we were coming, and we made every attempt. I noticed when I came from Morgan Hill at 25 the traffic was particularly backed up on that day. So I think Michelle probably got backed up in that. I would appreciate your consideration of accepting the application. It is a nice project," Mr. Roth said.

Commissioner Bettencourt asked Mr. Roth if the Administrative Assistant had a cell phone? Mr. Roth said he did not know. Mr. McClintock spoke from the audience, "I think she expected to be there by five o'clock and happened to be late. It's hard to argue that staff might not be correct about locking the door after 5:00 p.m. 5:06 p.m. or 4:30 p.m. is that the difference in your mind of having a late application."

Mr. Roth reiterated that the traffic that day was particularly 'horrific' coming from Morgan Hill.

Commissioner Bettencourt then asked PP Turner about the deadline for submitting applications, saying he thought the deadline was actually on a holiday (*it was on a Saturday*) and so the deadline was extended through Tuesday, September 4, 2007 (5:00 p.m.) as Monday September 3rd was a legal holiday. Commissioner Bettencourt noted that the applicant would not have been ready if the deadline had not been extended; Mr. McClintock agreed. Mr. Roth said, "Everything on MH end had been completed. The hold up was Earth Systems. When I talked to them a week prior, they said, 'Don't worry, we will have everything done on the 4th.' So there wasn't the rush to have it done. They let it go until the last minute." Mr. McClintock compared the ordeal to that of one on a football field: 'when you've gone 99 yards in a mad rush, then fumble on the 1-yard line'.

Commissioner Bettencourt then asked DCC Murphy if the Commissioners have the ability to waive the deadline in response to the appeal. DCC Murphy advised, "There is not a waiver provision in the Ordinance. I don't believe you do have the power and to attempt to do so even though there is no one in the audience tonight (to object), it could raise procedural due process challenges from other potential applicants who might believe that if they could have gotten applications in after 5:00 p.m., they might have been able to make it." She gave the example of having an application signed at 4:45 p.m., and not bothering to come in as they could not meet the 5:00 p.m. deadline. "You don't know what may be lurking out there that others may argue would be their case and that they might have been treated unfairly to not get the waiver. This would not be a matter set for a public hearing, so the notice would have been an agenda posted on the door. I would not have confidence that everyone who might have a potential claim has been noticed," DCC Murphy. Commissioner Bettencourt restated that there was no waiver provision in the Ordinance, and asked if the appeal could be taken to the Board of Supervisors. DCC Murphy responded that any member of the public could approach the Board just as had been done with the Commissioners in this matter. "My advice would be that in order to procedural due process challenges even at the Board level, the Board should amend the Ordinance to include a waiver process and have standards for application; what factors could be used to convince the Supervisors to grant a waiver," DCC Murphy said. "Absent that kind of guideline, I would not recommend that they just do an ad hoc waiver."

Chair Tognazzini commented that it seemed it should never have been heard by the Commissioners. "If we don't have the ability to waive, what's the point of talking about it?" DCC Murphy said it had been placed on the agenda as the question was raised during the public comment period at the last meeting and under the Brown Act, no response could be made to an inquiry during that time, but must be placed on a scheduled agenda in order for discussion to occur.

Mr. Roth said, "If that is the case, I find it disappointing that when I talked to DoP Henriques, he suggested that I come before the Planning Commission because he had told me they did have the power to accept the application. Had I known that wasn't the case, we wouldn't have wasted our time at the two meetings." DCC Murphy stated that the matter had not been discussed with her by DoP Henriques, and was unaware of any discussion between DoP Henriques and the applicant. "Had he spoken with me, I would have provided the advice just given the Commission," she said.

Mr. McClintock said he did appreciate what DCC Murphy said, but thought that there was precedence from the past when other applications had been accepted. "If we can bring that information back, would that qualify (to have this one accepted)?" Mr. McClintock asked. "Would that have any effect on your decision? Obviously your Ordinance doesn't have the provision to waive, but there may be some precedence that we could rely on to help us. PP Turner said he was unaware of any such precedence that could apply here. DCC Murphy said she, too, was unaware of such precedence. Chair Tognazzini said such discussion was not germane to the current situation. "The bottom line is this is just a discussion of what your dilemma is, and we could sympathize, but that's about all we could do," Chair Tognazzini said.

Commissioner Machado asked, “What you are talking about is a similar situation from the past?” Mr. McClintock said, “Yes, I had heard that there was, and not knowing the Ordinance would not allow us to go forward, we didn’t pursue researching that. But I would be happy to do so. Just one further point: MH Engineering has been in Hollister since 1978 and it’s unfortunate that the sewer moratorium that happened in Hollister slowed us down, and we lost a manager we relied heavily on down here, and it’s not as efficient to service this area, but we do feel responsible for the clients we do have to come down here and do the best we can. We are in a good relationship with our Office Manager from the past (Brian Curtis) and he is very knowledgeable about the community and he supports us. I would like the opportunity to do a bit of research, and if we find that we can find the precedence, I would write you a letter and say, “This happened on such-and-such a year, would that make a difference?”

Chair Tognazzini determined – with a response from DCC Murphy – that if something had been done inappropriately in the past, a precedent would not have been established. “A mistake made would not cause it to be repeated,” Chair Tognazzini concluded. DCC Murphy said there was never a requirement to continue to violate an Ordinance on the basis of a mistake. She reiterated that she was unaware of any instance when an application deadline was waived. “The only circumstance I can recall is when the Commission and the Board decided to make changes to the Ordinance and extended the application period for that year to allow people to amend their applications to adjust to the new standards,” DCC Murphy informed. PP Turner agreed, saying, “Yes, that was because of amendment to the entire Ordinance. In fact we had two cycles in one year at that time, but that is the closest thing as far as practices that we know. Before the current staff, I am not able to attest to practices that took place then. We have not accepted late applications whether it was one minute or a week late since this current staff has been managing the program.”

Commissioner Bettencourt said that, as a Commissioner, he was not interested in setting a precedent. “If we allow this applicant to go beyond the deadline, a precedent would be set and that could cause the County to face lawsuits. I can’t go in that direction.”

Commissioner Machado said, “There is no vote, but what bothers me is: if you believe what staff says – which I do – and the applicant has agreed, then the clock is whatever may be. If we abide by what was said here, then it was past the hour. What really bothers me, what do you tell the last applicant that couldn’t make the deadline or the cut? That’s the one that will be furious – regardless of the quality of the product (application) is that last person who could say, ‘Yeah, I would have made it if it wasn’t given up to somebody that was late in their application’. So that’s the hard part.”

Chair Tognazzini asked PP Turner: “In the packet, there is a notice: Attention: Preliminary Application submittal period.” Was that circulated?” PP Turner provided an overview of the posting process, including the fact that an e-mail was sent to all Engineers, including MH, with the information. The posting at the Planning Department had been ‘before July 2007’, he said. Chair Tognazzini said, “Well, if everybody got the information, then the application was even more late, as this says: 4:30 p.m.” Mr. McClintock said that information had not been on the application.

Ms. Maderis said, "I've been at the Planning Department since the inception of the Growth Ordinance and we have never accepted an application past the deadline. We have accepted applications after 4:30 p.m., as the office was still open and people may have gotten tied up in traffic. Brian Curtis was one of them, but we were still open and doing business with the public as it was before 5:00 p.m. This notice I personally posted on the front window in June, 2007 and I also e-mailed to all Engineers from the mailing list of all the Engineers. This is our 7th year in the Ordinance."

Chair Tognazzini closed the public hearing as there were no others present to address the matter.

Chair Tognazzini noticed that while the Commissioners may individually sympathize with the applicant and his Engineer, there is not a waiver process to be considered.

Mr. Roth said, "Then we will have to wait until next year. My Dad was a Planning Commissioner here for 10 years, and I appreciate all your hard work – and that's a lot."

REGULAR AGENDA

4. Consider canceling November 21, 2007 regular meeting

Clerk Maderis said she wanted to bring it to the Commissioners that the November 2007 meeting was scheduled for the day before Thanksgiving. She noted that a Special Meeting could be called if the need would arise. Commissioner Bettencourt said his only concern was that with skipping a meeting, the next agenda was very heavy. Chair Tognazzini reminded that a Special Meeting was always an option.

COMMISSIONERS BETTENCOURT/MACHADO MOTIONED TO CANCEL THE NOVEMBER 21, 2007 REGULAR PLANNING COMMISSION MEETING. THE MOTION PASSED WITH THE UNANIMOUS AFFIRMATIVE VOTE OF ALL COMMISSIONERS PRESENT; DeVRIES AND SCATTINI WERE ABSENT.

5. Consideration of 2008 Meeting Calendar

Clerk Maderis advised the Board has adopted the calendar for their program of work for 2008. She identified meetings which would be on or near holidays and might need special consideration: January 2, 2008. Clerk Maderis said that the staff is anticipated to be in that date, but many are using accrued time the week before for Christmas. "The day after Christmas is the day we typically put the packets together. Right now we do not see a very heavy agenda for January 2 and those items could be easily held to the second meeting in January. The other meeting would be July 2, 2008. Two days before July 4." She went on to explain that there is generally a motorcycle rally in Hollister at that time, and it was unknown what buildings might be utilized for public safety services; therefore, the meeting scheduled close to July 4 is typically cancelled.

Commissioner Machado said it was his understanding that the motorcycle rally may be scheduled for a week later in (July 11 – 12- 13, 2008).

Clerk Maderis reminded that the meeting originally scheduled for January 1, 2007 had been cancelled, and further that the reduced staffing level of the previous week before the meeting was cause for concern as the staff reports need to be circulated to various agencies.

Commissioner Bettencourt suggested it might be beneficial to consider canceling the July 16, 2008 meeting. Discussion ensued which suggested that the July 16, 2008 would not present a problem.

COMMISSIONERS MACHADO/ BETTENCOURT MOTIONED TO ADOPT RESOLUTION 2007-005, EXCLUDING THE JULY 2, 2008 CANCELLATION, WHILE RETAINING THE JANUARY 2, 2008 MEETING DATE CANCELLATION. THE MOTION PASSED WITH THE UNANIMOUS AFFIRMATIVE VOTE OF ALL COMMISSIONERS PRESENT; DeVRIES AND SCATTINI WERE ABSENT.

CONTINUED ITEMS ~ COMMISSION ACTION

PUBLIC HEARING ITEM

6. San Benito County Hillside Ordinance/Design Review Workshop:
Continued discussion and review options as directed by Planning Commission.

PP Turner presented the staff report, noting this was a high priority for the Board of Supervisors. "We're hoping to get something to them soon," PP Turner said.

"We have the direction to rescind or repeal the Ordinance; however, it is to be replaced. There is no desire to leave a hole, and giving no protection at all. There are both CEQA and practical reasons for protecting the hillsides." He went on to say the lack of flexibility and having meaningful definitions were major sources of concern with the current Ordinance.

Some issues and the applicable areas for enforcement were described as follows:

- current Ordinance not applicable to current lots of record, only new major subdivisions with five or more lots
- too strict for development requirements, e.g., height requirements
- no regard for visibility
- in general, just a cumbersome document difficult to interpret and enforce
- not linked to slope, but to what is visible

Changes proposed:

- designer view instead of requiring strict guidelines
- use GIS to determine where designer view should be required
- use design/review to ensure appropriate development, not prohibit it

Goal of new Ordinance: balance interests of community and property owner. It should be interpreted without imposing arbitrary limits on heights, size, or other design characteristics; to ensure each lot is developed with consideration of topography, location, and vegetation, incorporating reasonable hillside mitigation measures – including landscaping, building materials and color palate.

Next steps were listed as:

- identification of areas for design/review
- refining the language of the Ordinance
- potential field trip to study the areas
- presentation to the Board of Supervisors

PP Turner then identified various locations and the recommendations for each, together with the results of the recommendations:

- flat lands not considered as this is determined to be essential for hillsides
- the corridors of Highways 25, 156 and 101 were described

Considerable discussion ensued regarding the recommendations as PP Turner explained the methodology for the analysis for change in the Ordinance. Other questions were asked, and included the subjects of

- high density
- several definitions
- when design/review 'kicks in'
- protection against density-limiting zoning
- sizes of acreage under discussion in relation to the changed Ordinance
- number of properties affected
- 'all about visibility'
- placement of observation points
- possibility of not limiting just to 5+ units, but all proposed units/building permits of the designated areas
- need for less subjectivity and more objectivity
- Fairview corridor is to be considered and reported to the Commission

DCC Murphy reminded of the need for a public hearing on the Commission recommendation to the Board, with that body having another public hearing before adoption; she further explained the process if the Board decides to make changes to the recommendations.

7. San Benito County Agricultural Building Exemption Ordinance Workshop
Review of existing Ordinance, discuss proposed options and draft amendments to current Ordinance.

PP Turner presented the staff report, noting the 'Ag exempt' Ordinance revisions. He advised that the Planning Staff has revised the portion of the County Code that exempts agricultural structures from a building permit. "Almost everyone agrees there have been many abuses of the current Ordinance," PP Turner said.

Presenting a summary of the changes proposed to the Ordinance as detailed, including the limitations of size and {impact/building} fee schedule. PP Turner cautioned that the exact format of the Ordinance must be reviewed and approved by County Counsel prior to being heard by the Board of Supervisors.

The Commissioners engaged in lengthy discussion with staff regarding the changes proposed to the Ordinance.

COMMISSIONER MACHADO OFFERED RESOLUTION NO. 2007-07, RECOMMENDING APPROVAL OF AGRICULTURAL EXEMPTION REVISIONS, INCLUSIVE OF THE FINDINGS AND CONDITIONS CONTAINED THEREIN. COMMISSIONER BETTENCOURT SECONDED THE MOTION, WHICH PASSED (3-0-2) BY THE FOLLOWING VOTE: AYES: BETTENCOURT, MACHADO, TOGNAZZINI; NOES: NONE; ABSTAIN: NONE; ABSENT: DeVRIES, SCATTINI.

INFORMATIONAL – NON-ACTION ITEM

Commissioner Announcements ~ Reports ~ Discussions

None

ADJOURNMENT

ON A MOTION BY COMMISSIONERS BETTENCOURT/MACHADO, WHICH PASSED UNANIMOUSLY BY THE UNANIMOUS AFFIRMATIVE VOTE OF ALL COMMISSIONERS PRESENT – WITH DeVRIES AND SCATTINI ABSENT, CHAIR TOGNAZZINI ADJOURNED THE MEETING AT 7:50 P.M. TO THE SCHEDULED REGULAR MEETING OF THE COMMISSION OF OCTOBER 17, 2007

*Minutes transcribed by:
Judi Johnson*

*Attest:
Byron Turner
Principal Planner*