



**COUNTY OF SAN MATEO
ENVIRONMENTAL SERVICES AGENCY**

Date: May 29, 2002

Set Time: 10:00 a.m.

Hearing Date: June 18, 2002

To: Honorable Board of Supervisors

From: Marcia Raines, Director of Environmental Services *M. Raines*

Subject: STATUS REPORT: Consideration of an appeal to the Planning Commission's decision to approve a Coastal Development Permit, a Resource Management/Coastal Zone Permit and a Stable Permit to allow legalization of a 4-horse stable, tractor shed, agricultural barn, replacement of one 8,000-gallon water tank with two 5,000-gallon water tanks, a mobile home as an affordable housing unit, 126 sq. ft. storage shed adjacent to the stable and an approximately 720 sq. ft. top-story enclosure to the existing main residence. The project is located at 1589 Higgins Canyon Road in the unincorporated Half Moon Bay area of San Mateo County. This project is appealable to the California Coastal Commission.

PROPOSAL

The project involves legalization of a 4-horse stable, a tractor shed, an agricultural barn, replacement of one 8,000-gallon water tank with two 5,000-gallon water tanks, designation of a mobile home as an affordable housing unit, 126 sq. ft. storage shed adjacent to the stable and an approximately 720 sq. ft. top-story enclosure to the existing main residence.

The project is located at 1589 Higgins Canyon Road and is within the Higgins-Purisima County Scenic Corridor.

STATUS SINCE APRIL 16, 2002 PUBLIC HEARING

The Board of Supervisors considered the appeal of the Planning Commission's approval of the project at the January 15 public hearing. The item was continued for 90 days to allow time for payment of fees by the applicant, and allow staff time for investigation of sewage disposal and water supply issues and for verification of compliance of the main house with approved plans. On April 16, 2002, the Board of Supervisors again considered the appeal. The Board continued the item for 90 days to allow staff to determine a final list of items to be legalized, the applicable application and investigation fees due, and a revised list of recommended conditions of approval.

On April 17, 2002, staff from the Planning and Building Division and Environmental Health Division met with the applicant's attorney, Mr. Ted Hannig. During this meeting, staff outlined, in detail, the various steps that Mr. Braun needed to take in order to resolve all outstanding issues. These included filing a revised application and plans to include all items to be legalized and taking steps to resolve outstanding issues regarding water well and septic systems on the subject property.

Subsequently, Mr. Braun met with the project planner on May 2, 2002, to discuss the various steps that needed to be taken. Mr. Braun also met Dean Peterson of the Environmental Health Department on May 7, 2002, to discuss the steps he needed to take to resolve the outstanding well and septic issues. The Environmental Health Department issued a letter to Mr. Braun, outlining, in writing, the outstanding issues and steps required for their resolution (see Attachment A).

On May 16, 2002, Mr. Braun submitted a revised application and plans to the Planning Division, including the final list of items to be legalized. Mr. Braun, as of date of writing this report, has not addressed the issues raised by the Environmental Health Department.

OUTSTANDING FEES

The applicant's attorney submitted a letter dated May 6, 2002 to County Counsel regarding limitations for collection of investigative fees (see Attachment B). County Counsel will provide a response to the letter at the public hearing.

ALTERNATIVES

The Board has the following courses of action:

1. Continue the item for 90 days to allow additional time for the applicant and staff to resolve all outstanding issues.
2. Drop the item from your agenda to be renoticed and reheard.
3. Continue the item to June 25, 2002, and direct staff and County Counsel to draft findings for denial and to pursue abatement of work done without permits.

VISION ALIGNMENT

The proposal to legalize several structures, including mobile home as an affordable housing unit, keeps the commitment of offering a full range of housing choices and Goal Number 9: housing exists for people at all income levels and for all generations of families. This proposal contributes to this commitment and goal by providing a designated affordable housing unit.

ATTACHMENTS

- A. Letter sent to the applicant by the Environmental Health Department (dated May 9, 2002).
- B. Letter sent to County Counsel by applicant's attorney (dated May 6, 2002).

MDB:kcd - MDBM0827_WKU.DOC

RECOMMENDED
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J. Matthe
.....
COUNTY MANAGER



HEALTH SERVICES AGENCY

ATTACHMENT A

May 13, 2002

Oscar Braun
1589 Higgins Canyon Road
Half Moon Bay, California 94019

via fax (650) 726 - 2799

Subject: Health issues -1589 Higgins Canyon Road, Half Moon Bay (APN 064-370-130)

Dear Mr. Braun:

I spoke with you on Monday, May 6, 2002, about how you can legalize a water connection and septic system that serve a trailer that exists on your property. At this time I agreed to detail the steps that I believe you need to take to achieve approval for these items by Health. I believe that this letter covers all pertinent issues, however, these are complicated issues and I have probably omitted some points and recommend that you employ experienced contractors and/or consultants to avoid any potential pitfalls.

Water Supply

1. **Water tanks - OK – based on conversations with you and my observations.**
2. The water quantity for the domestic water well was documented at 3.02 gallons a minute by Health. This is not an adequate quantity of water to serve the second dwelling (5.0 gallons a minute is required) as per Section 4.68.190 (see the enclosed copy of the well ordinance) of the SMCOG. To correct this situation using the existing domestic well:
 - a. Submit an application and the appropriate fee to Health for a pump test.
 - b. Perform a pump test. This test must be witnessed by Health, and an appointment test must be made at least 24 hours before the test.
 - c. A record of the pump test must be kept and submitted to Health (me). This record must show:
 - i. Readings of both the distance to water in the well casing from the top of the casing the pumping rate at fifteen-minute intervals for no less than four hours.
 - ii. The water level before pumping begins.
 - iii. The "draw down" distance.
 - iv. The parcel number, address, and name of the owner.

PUBLIC HEALTH AND ENVIRONMENTAL PROTECTION DIVISION

Board of Supervisors: Mark Church • Rose Jacobs Gibson • Richard S. Gordon • Jerry Hill • Michael D. Nevin • Health Services Director: Margaret Taylor

455 County Center • Redwood City, CA 94063 • PHONE 650.363.4305 • TDD 650.573.3206 • FAX 650.363.7882

<http://www.smhealth.org>

- v. The name, address and phone number of the person performing the test.
 - vi. Recovery time if performed.
3. The distance to all septic components must be corrected as mentioned on the next page.

Onsite Wastewater Treatment and Disposal System

For the septic system to comply with San Mateo County Ordinance Number 03740 (a copy is enclosed) the following actions are required:

1. An application for a site review and percolation test must be submitted to Health along with the appropriate fees. Copies of application forms and the fee schedule are enclosed.
2. A site review is required to determine if the area proposed for testing can actually be used for septic system installation. A map of the area with elevation contour lines is useful but not required at this stage.
3. Once the site review has been done, a percolation test must be performed.
 - a. Three percolation test holes are located in the primary area and three in the expansion area.
 - b. Health will recognize old tests done in the area as long as they were approved by health at the time and their location can be determined.
 - c. An authorized percolation tester must perform the test and presoak. A list of authorized percolation testers is enclosed. Any state of California Registered Environmental Health Specialist, Geologist, Civil or Soils Engineer can be authorized to perform this work once they have submitted copies of their current registration to Health.
 - d. Health Staff must witness the presoak and test. Call (650) 363 – 4305 at least 24 hours in advance to make an appointment.
 - e. As part of this test an 11' deep hole must be excavated to demonstrate that there is no water in or within three feet of the depths at which the septic system will operate.
 - f. The measurement of water level differences must be done with equipment approved by Health.
 - g. Readings must be recorded on triplicate percolation test forms available from Health (enclosed).

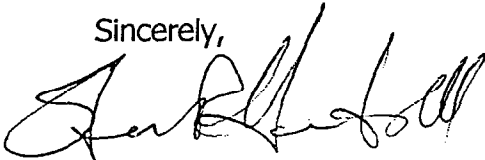
4. Once test results have been generated as above an average stabilized rate shall be determined by Health. The size of septic drainfield will be determined using this rate and the directions listed in B (8) of the performance standards (part of ordinance).
5. An application (form enclosed) for a septic permit, three sets of plans, and a septic system installation permit fee (new) must be submitted to Health.
 - a. Plans shall be drawn to scale and show slopes, wells, proposed and existing drainfields, buildings, driveways, water lines, percolation test and other features in the vicinity of the proposed drainfield and expansion area.
 - b. Septic System component specifications shall be listed on the plan – there are specific requirements for the tank, rock, risers, valve, and pipe.
 - c. An authorized installer shall be listed on the application in the contractor section, and shall sign the permit application. A list of authorized installers is enclosed.
 - d. If any of the drainfields are in areas that exceed 20% in slope a geotechnical report is required and must be reviewed and approved by the County Geologist before a permit can be issued.
6. The existing septic system that was installed without permits may be legalized by Health if the above work has been done, applications received, fees received, plans approved by Health and if the system meets all Ordinance requirements. The following list has some of the issues to be addressed;
 - a. The tank must be approved by Health. Only concrete tanks are approved by Health unless there is no access for a boom truck, in which case a plastic tank may be used if it is approved by Health. You told me on May 6, 2002, that the tank was plastic. Since there is good access to this site you will need to install an approved concrete tank.
 - b. The tank must have two risers that extend above grade for access. I only saw on riser.
 - c. If the tank is in an area subject to vehicular traffic it and the risers and lids will have to be traffic rated.
 - d. The tank closer than 100 feet to the well and must be relocated to meet this and all other required setbacks. The tank installation must be inspected by Health before it is covered.

- e. Drainfields must have observation pipes at the end of each drainfield – these pipes must be in the drainfield trench and extend from the bottom of the trench to above grade. See Ordinance for more detail.
- f. Each existing drainfield trench must be shown to have been constructed to meet all setbacks and with approved materials. All drainfields will have to be staked out on the ground and the ends of each one excavated so that observation pipes can be installed. Health will need to inspect the drainfields at this point to determine if the drainfield installation meets code in all other aspects.
- g. The valve will also need to be inspected to see if it is an approved model.

I believe these are the issues that need to be addressed by Health as far as your septic system and water supply are concerned. If any other issues arise concerning these items I will let you know immediately. The Septic Ordinance, Well Ordinance, this letter, applications, lists of authorized installers and percolation testers are enclosed in the envelope that I am sending via mail. If you need these things immediately they can be picked up in person at our office from 7 AM to 6 PM Monday through Thursday.

If you have further question you can reach me at 363 – 4798.

Sincerely,



Steven R. Hartsell
Program Supervisor

CC: Dean Peterson, Director of Environmental Health; Miroo Brewer, Planner III;
Miruni Soosaipellai, Deputy County Counsel

William R. Warhurst
Of Counsel

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*ADMITTED IN NEVADA & CALIFORNIA
**ADMITTED IN CONNECTICUT ONLY

May 6, 2002

COPY

Miruni Soosaipillai, Esq.
County of San Mateo, County Counsel
Hall of Justice and Records, 6th Floor
400 County Center
Redwood City, CA 94063-1662

Re: *Appeal of Planning Commission decision to approve development permits
for 1589 Higgins Canyon Road (PLN1999-00079)*

Dear Ms. Soosaipillai:

As directed by the Board of Supervisors at the hearing of this matter on April 16, 2002, Terry Burnes and Ted Hannig have been meeting on a variety of matters. Mr. Burnes suggested to Mr. Hannig that it would be helpful if we outlined certain legal issues in a separate letter to County Counsel. Accordingly, this letter briefly addresses the statute of limitations for collecting investigative fees that the Board of Supervisors has assessed our clients, Oscar and Andrea Braun. This letter also explains our contention that because the second (older) well on the property was in existence on April 14, 1987, the County may not assess any fees regarding that well.

It may be convenient to discuss these issues on the phone or in person, so please feel free to contact me once you have reviewed this letter. I have not included copies of any of the referenced documents because I believe you have all of them. Please let me know if my assumption is incorrect.

Statute of Limitations to Collect Investigation Fees

On January 15, 2002, the Board of Supervisors first considered an appeal of the Planning Commission's approval of the Brauns' project. Among other matters, the Board directed the Planning & Building Division to collect "all fees due for planning, building and environmental health permits and approvals, including all applicable investigation fees and penalties due for construction without permits." (Memo to Board of Supervisors from Marcia Raines, March 27, 2002; see also letter by Marcia Raines to Oscar Braun, February 11, 2002.)

Director Raines identifies three types of "investigation fees" and has proposed assessment amounts accordingly. I will review these fees by the same categories.



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Investigation Fees Incident to Building Permit Fees. Assessment of these fees is governed by the San Mateo County Uniform Construction Administration Code section 9041. This section applies only to the Construction Codes for San Mateo County. (UCAC, §§9041, 9011, 9010, 9015.) Investigation fees are assessed as a “reasonable measure” of the costs to the County in identifying and investigating work commenced without first obtaining required building code permits. (§9041, ¶1.)

“Whenever any construction or work for which permit is required by this code ... is started ... without the prescribed permit having first been obtained, an investigation fee in the amount of ten times the prescribed permit fee shall be added to the permit fee, and *shall be collected at time of application for the permit.* Such investigation fee shall be collected for each separate and distinct permit required for a specific project. ... The maximum investigation fee ... as to any individual permit shall be” \$3,000. (UCAC, §9041, ¶2; emphasis added.)

As noted in the first paragraph of this section, the Board of Supervisors has already determined that the building permits were due when the Braun’s applied for legalization of their structures.¹ Section 9041 is consistent with the Board’s decision. Thus, any investigation fees owed were also due when the Braun’s applied for their permits.

In the language of the law, the failure to pay the investigation fees is a “completed wrong.” Accordingly, any action by the County to collect such fees accrued on the date the fees were due. (*City of Santa Cruz v. Pacific Gas & Electric Co.* (2000) 82 Cal.App.4th 1167, 1178.) Accordingly, we disagree with County Counsel Casey’s answer to a question posed by Supervisor Church at the hearing on April 16, 2002. Mr. Casey said he viewed the nonpayment of fees as a continuing wrong that was not subject to any statute of limitations.

By prearrangement, Mr. Braun met with planner Laura Thompson on September 15, 1998, at 10:00 a.m. in the Planning Department conference room to review and file his permit application. You may be aware that Sheriff Deputy DelPorto interrupted their meeting and told Ms. Thompson to leave the conference room, thus preventing Mr. Braun from filing the application at the time Ms. Thompson had scheduled for him. Pursuant to court proceedings, the Braun’s did file the application for stable permit, negative declaration, resource management district permit, and coastal development permit on December 2, 1998, and received a receipt

¹ The County formally describes what the Braun’s applied for this way: “Consideration of a Coastal Development Permit, a Resource Management/Coastal Zone Permit and a Stable Permit to allow legalization of a 3-horse stable, tractor shed, agricultural barn, replacement of one 8,000-gallon water tank with two 5,000-gallon water tanks, and a mobilehome as an affordable housing unit.” (County of San Mateo Environmental Services Agency, Planning and Building Division, Item #6/Braun, Regular Agenda, “Executive Summary,” November 14, 2001.)

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from the County. They received formal notice from the County of the planning process by notice dated December 7, 1998.

The statute of limitations is three years for "An action upon a liability created by statute, other than a penalty or forfeiture." (Code Civ. Proc., §338(a).) The statute of limitations is one year for an action upon a statute for a penalty or forfeiture. (Code Civ. Proc., §340(1).) In either case, the County is now barred from pursuing any action to collect these fees.

Investigation Fees Incident to Planning Permit Fees. Marcia Raines' fee assessment letter of February 11, 2002, states that "All planning permit fees [are] to be assessed [at] two times the permit fee amount." She labels this an "investigation fee." Although Ms. Raines cites section 9041 as authority for charging an investigation fee of ten times the building permit fee, Ms. Raines offers no authority for assessing planning permit fees at twice the permit fee amount. Planning staff has referenced, however, Board of Supervisor's Resolution No. 61978 as authority for such fees. Nevertheless, despite diligent search, I cannot locate any published ordinance of San Mateo County that describes this fee or incorporates any such resolution. Unless the County can supply statutory authority for the fee, it is unauthorized and should be dropped. (See Gov. Code, §25336, requiring that such fees "be adopted by ordinance"; see also Gov. Code, §§25120-25126, regarding the legal requirements to adopt an ordinance.)

If statutory authority exists for this assessment, it was clearly due either at the time the Braun's paid their planning fees on December 2, 1998, or attempted to pay their fees on September 15, 1998. By the previous analysis, such assessments are now time barred, if indeed they were ever due.

Investigation Fees Incident to Environmental Health Fees. Marcia Raines' fee assessment letter of February 11, 2002, also states that "All Environmental Health fees [are] to be assessed [at] three times the amount." She also labels this an "investigation fee." Ms. Raines offers no authority for her assessment of any such penalty, and I have found none.

Environmental health fees "shall also be charged upon review of plans for new construction, ...wells and septic tanks, ...land use and development." (SMC Ordinance Code, §5.64.070.) The same section lists all environmental health fees that the County may charge, including fees for soil percolation test, septic permits and site examinations. The section does include any provision for tripling the assessment fee or charging an "investigation fee." Unless the County can supply statutory authority for the fee, it also is unauthorized and should be dropped.



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Water Well Certification Fees

A water well was already in use on the Braun's property when they purchased the property in 1989. County staff has opined that the well "was probably installed before 1960." (Decl. of Steven R. Hatsell for Inspection Warrant Return and Inventory, Ex. A.)

The County is now assessing well construction and well certification fees for this well totaling at least \$2,748. (Memo from Marcia Raines to Board, dated April 10, 2002, p. 5.) It is our position that the Braun's may use this second well for domestic water supply to the affordable housing unit *without* any new permits, fees or regulatory involvement.

Ordinarily, everyone using a well as a domestic water supply must have a permit from the County Health Officer that complies with the provisions of the applicable chapter of SMC's Water Well Ordinance. (SMC Ord. Code 4.68.210.) Chapter 4.68 also sets the standards of construction for domestic well water supplies (4.68.240), including the water pressure (4.68.190) and obtaining a building permit certification for structures that will use the well water (4.68.180).

However, "*The requirements of this chapter shall not be applicable to wells existing on April 14, 1987.*" (SMC Ord. Code 4.68.220; emphasis added.) This means that no building permit is required to connect such water to a residence, and the County Health Officer does not certify such wells, because both of those requirements exist *only* in the ordinance chapter that does not apply to this well. Nothing in the Uniform Construction Administration Code requires a certification of any sort to connect well water to a building; as far as I can determine, that requirement exists only in the Water Well Ordinance, which is inapplicable to the Braun's second well.

Conclusion

We do not address here the issue of estoppel created, in part, by the County's statements and actions in connection with the court proceedings beginning December 3, 1998. We believe, however, that this could also be dispositive as to the fees the County is now assessing.



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I look forward to discussing these matters with you in detail. Please call me at your convenience.

Very truly yours,

HANNIG LAW FIRM LLP

A handwritten signature in cursive script that reads "William R. Warhurst".

William R. Warhurst

cc: Supervisor Mark Church
Mr. Terry Burnes
Thomas F. Casey III, Esq.