



COUNTY OF SAN MATEO
Inter-Departmental Correspondence

PLANNING AND BUILDING DEPARTMENT

DATE: August 10, 2009
BOARD MEETING DATE: August 25, 2009
SPECIAL NOTICE/HEARING: 300 feet
VOTE REQUIRED: Majority

TO: Honorable Board of Supervisors

FROM: Lisa Grote, Director of Community Development *L.G.*

SUBJECT: Consideration of (1) a Coastal Development Permit and Certificate of Compliance, Type B, to legalize a 17,900 sq. ft. parcel, pursuant to Section 6328.4 of the County Zoning Regulations and Section 7134 of the County Subdivision Regulations, respectively, (2) a Use Permit, Coastal Development Permit, and Design Review Permit to construct a new single-family residence and septic system, pursuant to Sections 6227.b.5, 6328.4, and 6565.3 of the County Zoning Regulations, respectively, (3) a Variance to allow a 20-foot front yard setback and 35-foot rear yard setback where 50 feet is required for each, pursuant to Section 6531 of the County Zoning Regulations, (4) a Grading Permit to perform approximately 175 cubic yards of fill and approximately 13 cubic yards of excavation, pursuant to Section 8602.1 of the San Mateo County Code, and (5) certification of a Mitigated Negative Declaration, pursuant to the California Environmental Quality Act, on a parcel located within the Community Open Space Conservation (COSC) Zoning District on the west side of Avenue Alhambra, between Palma Avenue and Francisco Street, in the unincorporated El Granada area of San Mateo County. This project is appealable to the California Coastal Commission. This is an appeal by the applicant of the Planning Commission's decision to deny requested permits for parcel legalization and construction of a single-family residence.

RECOMMENDATION

1. Approve the certification of the revised Mitigated Negative Declaration.

2. Grant the applicant's appeal and approve the Coastal Development Permit and Certificate of Compliance, Type B, legalizing the parcel, by making the required findings and adopting the conditions of approval listed in Attachment J from the staff report to the Board of Supervisors dated June 29, 2009.
3. Uphold the Planning Commission's decision to deny the Coastal Development Permit, Variance, and Use Permit for a new single-family residence, by making the findings for denial included in Attachment J from of the staff report to the Board of Supervisors dated June 29, 2009.

BACKGROUND

On July 14, 2009, the San Mateo County Board of Supervisors considered the appeal of the applicant, Jim Irizarry, of the San Mateo County Planning Commission's denial of various applications for permits for the proposed project, including a Coastal Development Permit and Certificate of Compliance, Type B, to legalize a parcel located on the Burnham Strip, as well as permits for the construction of a single-family residence at the property. Based on information provided by staff and evidence presented at the public hearing, the Board of Supervisors continued this item to August 25, 2009.

The approval of the Coastal Development Permit to legalize the parcel through the issuance of a Certificate of Compliance, Type B, contributes to the Livable Communities 2025 Shared Vision because it is consistent with the County's land use regulations, including the Subdivision Regulations, General Plan, Zoning Regulations, and Local Coastal Program. The property is located within the urban Midcoast, near existing commercial and residential uses.

DISCUSSION

The Board of Supervisors continued the consideration of this project so that staff could: (1) research the application of Section 6227.b.6 of the Community Open Space Conservation District (COSC) Zoning Regulations; (2) research the history of the subject parcel; and (3) research the CoC, Type B, on the property formerly owned by Antoinette Licata.

1. **Research regarding the application of Section 6227.b.6 of the Community Open Space Conservation District (COSC) Zoning Regulations, to parcel legalization projects and the position of the Coastal Commission regarding whether the subject parcel existed in December 1981.**

Section 6227.b.6 states that a "division of land" shall be permitted in the COSC District subject to the securing of a use permit in each case, "except that no residential uses shall be permitted on a parcel recorded after December 1, 1981." A report dated June 29, 2009, notes that the Office of the County

Counsel had advised that the intent of the regulation is “to prevent residential uses on parcels created after 1981.” The report notes County Counsel’s conclusion that the subject parcel was created by recorded deed in 1949 (at the time of the division of its parent parcel) and that residential use on the subject parcel is therefore permissible under Section 6227.b.6 subject to the granting of a use permit.

Testimony and documents presented at the July 14, 2009 hearing by interested members of the public stated that the issuance of a Certificate of Compliance, Type B (CoC, Type B), should be considered a “division of land” for purposes of Section 6227.b.6 of the COSC Zoning Regulations and that the effective date of parcel creation would be the date the CoC, Type B, is issued. Therefore, according to this approach, if the Board of Supervisors decides to approve the CoC, Type B, the effective date of parcel creation would be 2009 (the date of recording the CoC, Type B) and residential uses on the parcel would not be permissible per Section 6227.b.6 of the COSC Zoning Regulations.

Pursuant to the direction of this Board, Planning staff, assisted by the Office of the County Counsel, has conducted extensive research regarding how Section 6227.b.6 came to be incorporated into the COSC Zoning Regulations and has inquired of Coastal Commission staff regarding its view of the legal effect of issuance of CoCs, Type B.

Historical Background of COSC Regulations

Staff research included review of the original COSC Zoning Regulations (adopted in 1980), a Coastal Commission staff report pertaining to a 1981 request by the County to amend the COSC Zoning Regulations to permit single-family residential uses (among other proposed amendments to the Local Coastal Program), and an ordinance adopted by the Board of Supervisors in 1982 that amended the COSC Zoning Regulations (Attachments A, B, and C, respectively). Based on this review, staff and County Counsel have concluded that Section 6227.b was incorporated into the COSC Zoning Regulations through the following process:

- a. The original COSC Zoning Regulations were adopted in 1980 and did not contain Section 6227.b.6. Thus, as originally adopted, the COSC Zoning Regulations did not allow residential uses in the COSC District under any circumstances.
- b. In 1981, the County proposed various amendments to the existing Local Coastal Program (LCP), including one to allow single-family residential uses within the COSC District. In the Coastal Commission staff report, dated November 20, 1981, that discussed these proposed amendments, Coastal Commission staff noted that the County asserted that the amendment to

allow this use was needed to ensure an “economic use” for privately-owned properties in this zoning district.

- c. As described in the staff report, Coastal Commission staff did not recommend approval of the requested LCP amendment to allow residential uses as a permitted use in the COSC Zoning District. While Coastal Commission staff recommended denial of the proposed amendment, it stated that if the Commission was inclined to approve the amendment, it might consider doing so conditionally, subject to the following:
- (1) Modify the text of the regulations to make residential use a conditional, rather than permitted, use and to “specify that no subdivision could occur which would increase residential development potential.”
 - (2) Modify the COSC Regulations to allow only one single-family residence for parcels less than 40 acres in size, in order to maintain consistency with the residential density for the “General Open Space” designation established by the Land Use Plan, (i.e., 1 unit per 40-160 acres). The report acknowledges that no site in the COSC zone actually meets this density criterion.

The Commission did, in fact, approve a modification to the text of the COSC Zoning Regulations to make residential uses a conditional use and to provide that divisions of land would be allowed but that no residential uses would be allowed on parcels recorded after December 1, 1981. (It appears that this was the date on which the Coastal Commission approved the amendment.) Likewise, the text was modified to incorporate the density criteria recommended by Commission staff.

Based on the information discussed above, it appears clear that the Coastal Commission’s intent in approving the amendments to the COSC Zoning Regulations was to limit the residential development potential of the Burnham Strip by restricting such development to parcels that existed, of record, as of December 1, 1981.

Coastal Commission Staff Views Regarding Parcel Legality

In order to determine the view of Coastal Commission staff regarding whether the subject parcel existed and was recorded as of December 1, 1981, Planning staff sent the Coastal Commission a letter dated July 20, 2009. In that letter, Planning staff asked for the Coastal Commission’s view regarding whether the approval of a Certificate of Compliance, Type B, such as is proposed in this case, constitutes a new land division/creation of a new parcel or simply a change in the legal status (from illegal to legal) of an existing parcel.

In an email dated July 30, 2009, Ms. Ruby Pap, the District Supervisor for the Coastal Commission's North Central Coast District, forwarded correspondence from Ann Cheddar, Senior Staff Counsel for the Coastal Commission, wherein Ms. Cheddar shared her opinion regarding the legal effect of issuance of CoCs, Type B, in the Coastal Zone. Specifically, Ms. Cheddar states that it is the view of Commission legal staff that the issuance of a CoC, Type B, *creates*, for the first time, a *legal* lot division, since, prior to issuance of the CoC, Type B, the lot had not been legally created, and that issuance of a CoC, Type B, therefore requires a CDP:

With a subdivision (b) conditional certificate . . . the local government is acting with reference to a lot that was created illegally, without benefit of the government review and approval that was required at the time of its purported creation Under subdivision (b), a certificate of compliance creates for the first time with the issuance of the conditional certificate a legal land division. Because a legal lot is created at a time when the Coastal Act requirement for a permit for land divisions is in full force and effect, a coastal permit is required for the land division. In fact, a coastal development permit is required in all cases if a conditional certificate of compliance is being issued under subdivision (b) of Section 66499.35 because the certificate of compliance process was enacted in 1977, after the effective date of the Coastal Act.

Ms. Cheddar's correspondence reflects the view of Coastal Commission staff that a *legal* lot only comes into existence once a CoC, Type B, is issued and that the issuance of this certificate is a legal land division. Thus, in the instant case, the parcel would not be considered to have come into legal existence until the CoC, Type B, is issued.

Analysis

Whether an Illegally Created Parcel Exists Before Issuance of CoC, Type B

While asserting that the issuance of a CoC, Type B, creates, for the first time, a *legal* lot division, the above statement by Ms. Cheddar does not specifically address the question of whether the lot at issue was actually created (albeit illegally) and of record prior to December 1981. Whatever the position of Coastal Commission staff on this matter, the text of the Subdivision Map Act indicates that the issuance of a CoC, Type B, is intended to legalize ***a parcel created by a division of land that has already occurred.***

For example, Section 66424 of the Government Code, which defines the term “subdivision,” states that the term means “the division of land by any subdivider, of any unit or units of improved or unimproved land, or any portion thereof” Nothing in that definition requires that such a division be *legal* in order for a division of land to have occurred.

Similarly, Section 66499.34 of the Government Code, which prohibits the issuance or grant of development permits and approvals for unlawfully subdivided properties under some circumstances, recognizes that even unlawful subdivisions actually result in the division of land: “No local agency shall issue any permit or grant any approval necessary to develop any real property *which has been divided* or which has resulted from a division, in violation of the provisions of this division or of the provisions of local ordinances adopted pursuant to this division if it finds that the development of such real property is contrary to the public health or the public safety.”

In addition, Section 66499.35 of the Government Code, which addresses the process for obtaining CoCs, Type B, recognizes that an owner acquires an interest in the illegally divided property at the time the unlawful division takes place: “A local agency may, as a condition to granting a conditional certificate of compliance, impose any conditions that would have been applicable to the division of the property *at the time the applicant acquired his or her interest therein.*”

Finally, the County’s LCP itself (which has been certified by the Coastal Commission) recognizes that parcels subject to the legalization process have already been *created by some past action*. For example, the LCP states that “on undeveloped [illegal] parcels **created** before Proposition 20, on lands located within 1,000 yards of the mean high tide line, or the Coastal Act of 1976, on lands shown on the official maps adopted by the Legislature, a coastal development permit shall be issued to legalize the parcel if the parcel configuration will not have any substantial adverse impacts on coastal resources” LCP, § 1.29.d (emphasis added).

Given this statutory scheme, notwithstanding the lack of compliance with the County’s Subdivision Ordinance and the fact that a CoC, Type B, has never been issued for the parcel, it would be difficult to conclude that no land division occurred and that the subject parcel was not created in 1949 when property was conveyed from the parent parcel in fee simple to the State of California for the construction of Highway 1. It therefore appears clear that the instant parcel was created and existed prior to December 1, 1981.

Effect of Government Code Section 66424 on Parcel’s Separate Existence

Also, citing Section 66424 of the Government Code, Ms. Cheddar notes that separate parcels do not exist solely by virtue of the fact that they are separated

by a road, street, utility easement, or railroad right-of-way. Section 66424 of the Government Code, which defines the term "subdivision," provides, in relevant part, that "property shall be considered as contiguous units, even if it is separated by roads, streets, utility easement, or railroad rights-of-way." Section 66424, however, does not address the legal effect of conveying, in fee simple, property that severs a parcel, thereby dividing it into two or more separate parcels, which is the matter at issue.

As discussed, Section 66424 simply provides that, in determining whether the Subdivision Map Act and local subdivision regulations apply to a proposed division of land at a specific point in time, local agencies consider parcels to be contiguous, even if separated by roads and streets. Thus, for purposes of Section 66424, units of property can be "contiguous," and still be separate legal (or even illegal) parcels. Nothing in Section 664424, however, purports to abrogate the ordinary effects of land conveyances that, for example, sever a parcel and thereby result in the creation of multiple units of land, even if the land conveyed is ultimately used to build a road or street.

Was the Subject Parcel "Recorded" Within Meaning of COSC Regulations?

As discussed above, and contrary to the position presently being advanced by Coastal Commission staff, it appears clear that the subject parcel existed as of 1949, when the parent parcel was divided into two units of land due to the conveyance of a portion of the parent parcel to the State of California for the construction of Highway 1. However, the key question here is whether the subject parcel was "recorded" prior to December 1, 1981, since, under the COSC regulations, only parcels recorded prior to that date may be used for residential purposes, subject to a use permit.

The term "recorded" is not defined in the COSC regulations, but it is ordinarily understood to refer to the process by which documents reflecting interests in land are filed with the County Recorder's Office. The chart set forth in Section 2 below, the grant deed by which a portion of the original 2.085-acre Souza parcel was transferred to the State, and a title report submitted by the applicant, lead to two possible results regarding when the subject parcel could be considered as having been "recorded" for purposes of Section 6227.b.6:

- a. On July 8, 1949, a grant deed was recorded by which Louise Souza granted approximately .751 acres of the original 2.085-acre parent parcel in fee to the State of California. This grant had the effect of physically bisecting the original parent parcel, leaving an eastern portion (the parcel that is the subject of this proceeding) of approximately .41 acres, and a westerly portion of approximately .92 acres. No evidence has been presented that a new property description for these remaining portions was recorded, thus the property description of record for the remaining property owned by Mrs. Souza consisted of the original 2.085 acres less the property

granted to the State. In other words, although the grant to the State may have had the effect of creating an eastern parcel and a western parcel, it appears that there was no separate property description recorded for these two portions at that time. Nonetheless, the property descriptions of all parcels resulting from the grant to the State could be discerned from documents of record in the Office of the Recorder upon filing of the grant deed in July of 1948.

- b. On August 16, 1996, three successive grant deeds were recorded by which the subject property was first granted by the Estate of Louise Souza to her heirs, and then from the Souza heirs to Craig Caron and Deborah Caron. The grant deed to the Carons included a property description by which the subject parcel was described by metes and bounds. As far as can be determined, this was the first time that a separate metes and bounds description was used to describe the subject parcel.

There is enough ambiguity on the face of Section 6227.b.6 that arguments could be made supporting a conclusion that the subject parcel was “recorded” in 1949 (in which case residential use could be considered, subject to a use permit and any other approvals required) or in 1996 (in which case a residential use would not be allowed). Given the history of the adoption of the COSC regulations, and the evident concern that Section 6227.b.6 was meant to prevent the creation of parcels in the future for residential use, staff continues to believe that the better view is that the subject parcel was “recorded” when the 1949 grant deed was recorded.

2. Planning staff research regarding the history of the parcel.

Staff has received documentation relating to the chain of title for the subject property. Based on this documentation, staff understands the relevant portions of the parcel’s history to be as follows:

Parcel (Size)	Action	Date
Parent Parcel: 2.085 acres	Dante and Sylvia Dianda and Giovanni and Adele Patroni grant Louise W. Souza the Parent Parcel	July 23, 1947
	Parcel 1: Approx. 0.66 acres	Conveyance in fee simple to the State of California of a strip of land used to construct the Cabrillo Highway, resulting in the creation of two separate parcels, one to the west (Western Parcel) and the other to the east of the Highway (Subject Parcel)
		July 8, 1949

Parcel (Size)	Action	Date
	Parcel 2: Approx. 1 acre	Souza retains ownership of Western Parcel
		Subsequently, parcel is subdivided and granted to James Viso (current property owner)
	Parcel 3: 17,900 sq. ft.	Souza retains ownership of Subject Parcel
		The parcel is granted by Ms. Souza's estate to Norman Souza and Lynette Souza-Gunda (heirs to Ms. Souza). On the same date, the property is granted from Ms. Souza's heirs to Craig and Deborah Caron (current property owners)
		August 16, 1996

For the Board's reference, staff has provided a CalTrans "Right-of-Way Record Map," dated 1948, showing the configuration of the original 2.085-acre parent parcel (Attachment D).

In addition to the informal Chain of Title, the applicant provided a complete Chain of Title (Attachment G).

3. Research regarding the details of the CoC, Type B issued on properties formerly owned by Antoinette Licata.

At the Board hearing of July 14, 2009, Lennie Roberts, of the Committee for Green Foothills, presented documents from the County's approval of a CoC, Type B, at properties formerly owned by Ms. Licata (properties now owned by Charles Viso, located to the west and east of Cabrillo Highway immediately south of the subject parcel). Ms. Roberts directed the attention of the Board to a condition of approval that states the following:

"[Condition No. 2:] No structures may be constructed on the .91-acre portion of the parcel which is zoned COSC (APN 047-251-040) due to its substandard building site. Use of this portion of the parcel will be reviewed in the context of the total parcel. Possible uses for this portion of the parcel include accessory uses to any structural development of the CCR portion (APN 047-252-230) of the parcel, such as a parking lot, agricultural or a public recreational use. The recorded Certificate of Compliance will include this condition."

Based on information presented by Ms. Roberts, the Board requested staff to research the intent of this condition of approval as well as any potential application to the proposed project.

Planning staff has reviewed the case file for the Certificate of Compliance, Type B (CC 90-16 and CDP 90-48) for these properties. In 1993, Planning staff determined that the Licata properties to the east and west of the Cabrillo Highway were considered to be one parcel (see Attachment E for Licata staff report). Therefore, Planning staff at the time determined that only the property conforming to the required minimum building site (the western parcel) should be developed, limiting the non-conforming property to accessory uses only. To date, the western parcel has not been developed, with no development applications pending.

The circumstances surrounding the Licata application differ in a significant way from those presented by the current application. In Licata, the owners owned land on both the west side and the east side of Highway 1, and, as noted above, these parcels were treated as one for development purposes. Thus, there existed the flexibility to condition the CoC, Type B, in a manner that directed development to the western portion of the property (zoned CCR) while requiring that the eastern portion remain free of structures altogether. This condition was included notwithstanding that the COSC would conditionally allow certain structural uses besides single-family residences. In the instant application, the owner owns only property in the COSC, thus there is no option to direct structural development to a non-COSC zoned portion of the property, as was the case with regard to the Licata application. Therefore, the Licata decision is not precedent on the issue of whether a single-family residence should be allowed in this case.

Further, as stated above, it is staff's view that Section 66424 of the Government Code, which simply provides that land subject to the subdivision requirements of the Subdivision Map Act includes "contiguous units of land," even if separated by a roadway, does not assist in answering the question of whether the subject parcel was "recorded" in 1949, or at some later point in time. The very fact that a CoC, Type B, is needed is a recognition that subdivision requirements were not followed in 1949, when a de facto subdivision occurred. As discussed above, however, the fact that the parcel must now be legalized does itself establish that the parcel has not been "recorded" for purposes of Section 6227.b.6.

FISCAL IMPACT

Nominal cost to Planning and Building Department to monitor compliance with conditions of approval for the Certificate of Compliance, Type B.

ATTACHMENTS

- A. Original COSC Zoning Regulations (adopted in 1980)
- B. Coastal Commission Staff Report, dated November 20, 1981
- C. Ordinance Amending the COSC Zoning Regulations (adopted in 1982)

- D. CalTrans "Right-of-Way Record Map," dated 1948
- E. Zoning Hearing Officer Staff Report (Licata Project), dated May 20, 1993
- F. Notice of Public Hearing Continuation, July 16, 2009
- G. Chain of Title, dated July 22, 2009
- H. Email from Ruby Pap/Ann Cheddar, CA Coastal Commission, July 30, 2009
- I. Grant Deed (Souza to Caron), August 16, 1996
- J. Findings and Conditions of Approval of Certificate of Compliance from Attachment A of Board of Supervisors Staff Report, dated June 29, 2009
- K. Findings and Conditions of Approval for Project Alternative (Proposed Project) from Attachment B of Board of Supervisors Staff Report, dated June 29, 2009