

SPECIAL MEETING of the ROSS TOWN COUNCIL TUESDAY, OCTOBER 6, 2015

1. 6:30 p.m. Commencement.

Present: Mayor Katie Hoertkorn; Council Member P. Beach Kuhl; Council Member Elizabeth Robbins; and Attorney Thomas Brown representing the Town.

2. Posting of agenda.

Town Clerk Linda Lopez reported that the agenda was posted according to government requirements.

3. Open Time for Public Expression - None

4. a. 90 Sir Francis Drake Boulevard, Consideration of Appeal of Construction Penalties

Public hearing for the Town Council to consider the appeal of Mr. Michael Board, owner of the subject property, challenging the amount of penalties, late charges and interest determined by the Building Official for construction delays pursuant to Ross Municipal Code Section 15.50.070.

b. 90 Sir Francis Drake Boulevard, Construction Penalties Assessment and Lien

Public hearing for the Town Council to consider whether to authorize an assessment and lien against 90 Sir Francis Drake Boulevard (APN 072-151-06) pursuant to Ross Municipal Code Section 15.50.100 and Cal. Gov. Code Section 54988 in the amount of the construction delay penalties, late charges and interest determined by the Town Council. This hearing will depend upon the outcome of the above appeal hearing

The Council acknowledged receipt of the staff report and underlining supporting materials submitted by staff as well as the materials submitted by the appellants. Council Member Kuhl noted that he received a phone call from Attorney Len Rifkind about 10 days ago, but it did not relate to any further information.

Len Rifkind, attorney for property owner, appreciated the Council's efforts and believed when the Council hears all testimony and evidence that the Council will exercise discretion. Staff presented its case that seems pretty simple. The letter dated September 15th, outlined nine grounds that were beyond the owners reasonable control and these nine grounds should be considered. The ordinance is clear that its purpose is to ensure safety and construction practices. There is no issue of safety. All permits were issued and finalized. To enforce reasonable time limits for construction is what they are talking about. The ordinance states reasonable, which means the Council can exercise discretion. Also, provide mechanism to complete construction in a reasonable amount of time and make sure the neighbors quality of life is being maintained, such as noise, traffic, and associated impacts. He empathized that no material has been submitted where there is complaints by neighbors or some overwhelming impact on this neighborhood, which is a goal of the ordinance. In absence of such information, it is important the Council exercise their discretion. The delays that occurred were beyond the owner's control. In terms of the nine grounds discussed such as stop work order or red tag, it

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was issued due to the problem with the roof. It was approximately 8 to 10 inches mismatched at the top of the roof because the roof was built according to the plans and the plans did not comply with the as built situation. There was no intentional conduct and they will demonstrate that the red tag that lasted for 99 days should have never been issued. They cut off that 8 to 10 inches of roof that was mismatched. Later on during the course of the red tag, the bathroom was discovered as well as the windows. The windows were clear and did not have divided light. When this red tag was issued, the Town Manager informed the contractor that the house could not be winterized, no work could occur. The owner made several phone calls that were never returned by staff. The sidewalk is a huge issue. They went from replacing some broken squares due to tree roots to replacing 110 ft. of sidewalk, 6 ft. wide that wrapped around the property. The price of that project went from \$400 to \$22,000. Then there was a sewer lateral, which took longer to address. The Fire Department approved the fire code requirements then at final, the Fire Department asked for more items, which should have been addressed during the initial approval. The owner was told that he needed to truck the water in from Sonoma County and it would be a problem if MMWD water was used for the pool. There was a delay with the pool fencing. He suggested that the Council consider 80 days of weekends and holidays between July 23, 2014 and April 2, 2015 when finalized. He believed the Council has discretion when no one can work on weekends and holidays. Consider an 80-day credit for weekends and holidays.

Bob Haggett, former Ross Building Inspector, discussed the stop work order that was issued. He explained that he was directed by former Town Manager Rob Braulik to issue the stop work order due to the discrepancy in the roof. He indicated that the owner needed to tighten up his place and screen it in as quickly as possible, which was in direct contrast of what former Town Manager Braulik desired. There was no concern for the well being of the property, it was to just shut down the project. He was trained to be helpful, to get the job done and on time.

Ken Casper, contractor, explained that he was the second contractor on the job and he was in charge of the framing and finish. There was an issue with the roofline. The adjacent ridges did not match up. It was 10 inches higher than the front ridge. On the plan, it indicated to tie in, not match the ridgeline. He was given an elevation and target and none of them were accurate. The Town issued a red tag. The building needed to be tightened up and winterized. He was trying to secure the job. There was a temporary fence that needed to be erected and they needed to tarp off the place. Also, the side walls needed to be covered to keep the rain out and a temporary fence was needed to keep the pool locked off from the public. The former building official threatened him with being arrested if he stayed on the job site. The intent was to winterize the property.

Michael Board, applicant/property owner, stated during the red tag period, he sent multiple emails to staff in regard to the issue. Months passed and he was told to go back to the original plan and the red tag would be lifted dated September 22. He agreed to fix the roof and do whatever it took to get the red tag lifted.

Contractor Casper described the damages to the property from not being winterized. He explained that everything was damp. He took a few months for the project to dry out. There was discrepancy in what was built and done, but everything was structurally sound. What is important to note is that there were discrepancies that they agreed to fix and it still was pushed

out several months. Attorney Rifkind asked the Council to give 30-days to allow the project to dry out.

Mr. Board noted that he left several voice messages and emails and staff responded several days later. Attorney Rifkind is asking the Council to give 15-days in terms of the delay for staff's response time. He then discussed the sidewalk and asked for a 60-day credit for that item. Contractor Casper stated that the actual work that took place for demo to finish that sidewalk was seven working days. Mr. Board noted that the original scope of work was to remove and replace the uplifting parts of the sidewalk, which was about six squares.

Attorney Rifkind indicated that there was a 45-day delay for the sewer lateral. Also, there was a delay for the firewall that was needed between the garage and house. Mr. Board explained that there was never a call out for the firewall on the plans. Then it was indicated that sprinkler heads needed to be reconfigured. Also, change the pipes from plastic to metal. Attorney Rifkind stated that these items should have been noted at the time of the first inspection by the fire department, so they estimate 30-days on the firewall and 20-days on the sprinklers. He then asked if they are entitled to notes that staff makes in connection with this hearing and notes from the Council, since this is a public hearing. Town Attorney Thomas Brown responded that the answer would be no. Attorney Rifkind felt if it is relevant to this hearing he would want to read the notes. Town Attorney Brown provided his answer, which is Attorney Rifkind is not entitled to staff's or the Council's notes. Attorney Rifkind requested a 50-day delay for the firewall and for the additional sprinklers required.

Trenor Askew, real estate investor/private lender, explained what he witnessed during the course of the project. He made his final payment to the contractor on December 8th, 2014, when the project was substantially completed. After issuing the previous payment on August 15th, the primary outstanding work was the concrete in front of the house including the sidewalk. He added that Mr. Board was highly focused on this project and spent the majority of his time over the last two years working diligently attempting to complete the project. The delays were not the result of lack of financing. There were many occasions when Mr. Board called him with questions and concerns about the responsiveness from Town staff and Fire Department. As a third party witness to this project, please consider carefully that even without these fines, Mr. Board will lose a majority of his life savings. He felt the delays were beyond Mr. Board's control such as the rainy season, use of custom or imported materials, highly specialized subcontractors, numerous design changes, and access difficulties.

Mr. Haggett stated that the Building Department was going through such a state of flux and if it outlined six squares of concrete that is what should have been addressed, not to come back later with additional items. Mr. Board would address the items and then the Town would come back with more items that needed to be addressed. He felt Mr. Board got strung out at the end. It was an absolute mess with no assistance from the Town. He asked the Council to take into consideration the items that were not included in the original scope of work.

Attorney Rifkind added that there was no intent to delay. Mr. Board tried hard to complete the project. The project was basically completed on December 2014, and the lender indicated that the last payment to the contractor was on December 2014. The Council has discretion to cancel

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the penalty all together. He felt the Council has discretion not to impose \$1,000 per day fine, which is very high. In conclusion, they counted 349-days from the nine items outlined plus 80 more days and staff suggested 223-days over. He further desired a brief rebuttal after hearing from members of the public.

Contract Building Official Sal Lucido discussed page three of the staff report in regard to grounds for appeal and the first point of appeal is the stop work order. They took Mr. Rifkind's September letter and reiterated the points and provided their response. He then directed the Council's attention to a Powerpoint presentation to more clearly illustrate the stop work order, including the response to the red tag.

Elise Semonian, former Ross Senior Planner, explained the south elevation that showed how the dormer was extended beyond the last gable. She did not find what was built as acceptable. Under all the circumstances with the roofline, she agreed it was an error that occurred, but it was an unfortunate error that the architectural drawings did not match the structural plans. What was actually built was not acceptable to staff. The stop work order occurred because the project did not comply with the zoning, and only the Building Inspector can issue a stop work order. In order to make the back elevation look like what was approved, they had to increase the height of the roof so all those elements came together because it looked strange. They came up with reasonable ways to keep the project from being delayed from that unfortunate error in the roof height. They did not have to change the floor plan much to make the corrections to the dormers, but it made the interior space lower, so it was an awkward space.

Contract Building Official Lucido discussed page six of the staff report in regard to a January emailed question about winterizing the project and the answer was yes. The intent of the stop work order is not to create an unsafe situation. He then discussed response time by staff and explained that inspection hours were in the mornings of Tuesday, Wednesday, and Thursday or by appointment. Ms. Semonian indicated she preferred to contact Mr. Board in writing rather than contacting him by phone.

Contract Building Official Lucido discussed item four, which was a condition item that allowed staff to direct the level of replacement in regard to the sidewalk. An encroachment permit was issued by the Town Engineer. From previous Council meetings, quite a bit of replacement was required. In regard to the sewer lateral replacement was a condition of design review approval that must comply with all sanitary district and this was beyond control. A new ordinance took place and it is hard to put a number on just how much delay that caused, and Council has discretion on how much credit is given in that regard.

Ruben Martin, Ross Valley Fire Department Inspector, explained their record of management system used, which is based on their occupancy detailed report. Based on this project there were 34 action items, or items inputted into the computer, but according to their records only a total of five inspections were made on the project. During the fire sprinkler inspection done on April 10th, 2014, it was noted on their plans that additional coverage to the attic area above the garage needed to be added for fire sprinklers or the garage needed to be sealed off so there would be no access for storage. There was not proper attic coverage in January. The fire sprinkler permit was issued on October 2013, and the condition of approval states that all

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sprinkler systems in Ross must be monitored by an off site monitoring company. Further delays for the fire alarm and their letter indicated that they must be able to hear the fire alarm bell throughout the entire house at a certain decibel. To achieve that requirement, they suggested another fire alarm bell or the applicant could connect with the smoke detectors, so options were provided to the applicant.

Contract Building Official Lucido discussed the pool water issue in regard to a moratorium. Ms. Semonian called MMWD and options were available such as connecting to a fire hydrant, so there was no prohibition. When she called MMWD she received an answer immediately.

Mayor Hoertkorn opened the public hearing on this item.

Peter Nelson, Circle Drive resident, has attended many hearings over the past several years in regard to assessment of fines and is struck that in this case the full amount is being assessed. This is excessive. In previous cases, there is an issue related to traffic on narrow roads, noise disturbance, and vegetation. The general appearance of the property from the road has not been objectionable. It seems appropriate as outlined on page ten of the staff report that the Council has discretion to modify these fines given the urban busy nature of this site.

There being no further public testimony on this item, the Mayor closed the public portion of the testimony and brought the matter back to the Council for discussion and action.

Council Member Kuhl asked staff about the choice of issuing a stop work order or notice of correction, is that a discretionary matter with the Building Official. Contract Building Official Lucido responded in the affirmative. He explained that it was non-compliant with the approved plans. Council Member Kuhl discussed the sidewalk changes and desired clarification. Contract Building Official Lucido heard testimony that six squares needed to be replaced and the plans indicated at the direction of staff. An encroachment permit was issued for the sidewalk. The requirement has always been to replace uplifted and damaged sidewalk along the frontage. Ms. Semonian added that there was a change in personnel from the beginning, so a different person was reviewing the plan and at the end of the project more was required than what was required in the beginning.

Council Member Kuhl discussed the change in the ordinance in regard to the sewer lateral. Contract Building Official Lucido responded that there was a change in the ordinance and the new ordinance would apply. Council Member Kuhl asked staff if the stop work order indicated remove or apply for something different. Contract Building Official Lucido has not seen the actual stop work order. He believed it simply indicated out of compliance with the plans, which would prompt the contractor or applicant to immediately contact the Town. October 23rd the stop work order was issued and Ms. Semonian sent a formal email on October 29th. Contract Planner Ali Giudice noted that correspondence occurred between the Town and applicant about the stop work order because work was continuing and staff outlined what additional information was required. Attorney Rifkind pointed out that the applicant was surprised that the stop work order was issued. There is no debate that plans were not followed and the Building Official had discretion.

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Council Member Robbins asked staff when the sewer lateral was completed and the sidewalk repair. Contract Building Official Lucido responded that on February 23rd a permit was issued for the sewer lateral replacement and it was approved on April 14, 2015. In terms of the sidewalk repair, an encroachment permit was issued on August 21, 2014 and completed on October 2014. Council Member Robbins desired an explanation from staff of what took place between December and project final in April. Ms. Semonian responded that additional landscape screening needed to be completed and they were waiting for an elevation certificate as well as awaiting approval from other agencies.

Mayor Hoertkorn discussed significant changes to the plans as approved, which was the reason for the stop work order. Ms. Semonian agreed the work was not being completed in accordance with the plans. Mayor Hoertkorn asked staff about the 99 days and desired the reason and if that timeline is normal. Ms. Semonian added that this project was not normal, it seems there was a lot of periods of time when nothing was being done. In general, there were periods of time that nothing occurred at the property.

Mr. Martin explained that it is standard to have a one-hour separation from the garage to living space. Once they created the attic space into a walk-in storage room, there was a clear opening that was uncovered between the garage and living space. Mayor Hoertkorn asked, in general, who is responsible to know the codes. Mr. Martin stated that the fire code is very convoluted. He has been in fire service for almost 20 years and he takes responsibility of knowing the fire code and the intent of the fire code. Contract Building Official Lucido noted that architects, builders and engineers are supposed to know the codes. Also, sprinkler requirements have been around for a long time. Staff has no control over the order of work. Staff only responds to inspection requests. A lot of work is done in parallel so it is not necessarily adding all these days together to get the total credit, so maybe some of the credits should be combined in parallel. Ms. Semonian added that the sidewalk was cracked and in poor condition. She expected it to be patched or repaired in sections. The plan took a lot of time, the construction itself did not take long, but getting the plan approved took some time. The original conditions of approval required the broken sidewalk to be repaired, which was a minor requirement than what was eventually required.

Attorney Rifkind pointed out that it is a mechanical room not a storage room in terms of the additional fire requirements. Contractor Casper explained that no one provided him a correction notice in regard to the firewall. There was a sprinkler set of plans approved and a list of requirements. He was never provided a correction notice or a discussion. He added two more sprinklers and built a separation wall. The mechanical room is located in the attic.

Attorney Rifkind stated that this is a complex situation. There should not be surprises later on once a building permit is issued. This was a gross miscarriage of justice. There is now 110 ft. of sidewalk. This was absolutely an expansion. He heard a general statement that no work was being done during certain periods of time, but there is no actual evidence to support such statement. In summary, this is a very difficult decision. Mr. Board added that he did not come into this project to chase his tail. He has constructed several other houses and now he is basically bankrupt from this project.

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Council Member Robbins felt the stop work order was the big problem. There was a big chunk being built not according to the plans. There was nothing inappropriate with the stop work order. Council Member Kuhl added that a stop work order may not have been the best judgment, but it was under the discretion of the Building Official.

Council Member Kuhl felt that something could have been done to protect the project so the amount of drying out period could have been less. Council Member Robbins added that there was some confusion in regard to winterizing the project during the stop work order. She also stated that it is not clear in her view that the Town was not responsive. The Council agreed.

Council Member Kuhl added that there was a lack of communication in regard to the sidewalk. Council Member Robbins did not believe the sidewalk held up the project.

Council Member Kuhl expressed concern for the fact that a new sidewalk was installed and then the applicant had to address the sewer lateral. He is not sure if that justifies some delay. Requirements changed from the sanitary district and he cannot give a specific number of days in terms of credit. Council Member Robbins agreed to provide a credit in regard to the sewer lateral.

Council Member Kuhl agreed that all items had to be brought up to code. Fire codes are difficult, but the contractors should know the codes. Council Member Robbins felt a fraction of 50 days should be given as a credit because they should know Town codes. She believed some points merit a credit, and she mostly goes by the Town rules and what makes sense. Council Member Kuhl pointed out the lack of neighborhood complaints, which is commendable. He considered a dilapidated house into a handsome structure, which should be considered. He wants delayed penalties to be enforced. They must make sure they send a message with their delay penalties so people understand for the good of the community they expect applicants to get the job done on time. On the other hand, he did not think that the Town's penalties should form an encumbrance on the economic viability of the project just because the project took longer than what was permitted by the regulations. He is inclined to reduce the amount of the penalty on an equitable basis, and he suggested an appropriate penalty would be \$50,000.

Mayor Hoertkorn felt this is extremely sad. She added that they have an obligation to the Town to follow the rules that are set forth. She is struck that the contractor is expecting the Town to inform him about the codes such as a firewall and sprinklers, which should be known. She agreed to provide some relief for the sidewalk. She felt badly about the sewer lateral but understands how that occurred. Nevertheless, it is sad situation. She supports the \$50,000 fine as suggested by Council Member Kuhl.

Council Member Kuhl stated that it takes three votes to grant an appeal, so all three must support. Town Attorney Brown responded in the affirmative. He stated that what is clear from the ordinance is that the Town has discretion to modify or reduce the penalty. Also, in making the decision, the Council must adopt findings. For the Council to make any decision, the Council must adopt a new resolution that is not in the packet before the Council tonight. He suggested that the Council provide direction to staff this evening once a decision is determined as well as provide some sense to staff what the basis would be. He hears equity is driving the decision.

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The Council must also make that decision in findings, which can happen by staff drafting a new resolution with those findings and memorialize the direction given. He suggested continuing that discussion and recommended that the Council try to connect the reduction to a credit, such that the number decided upon is reflected in findings. Typically, staff will draft a new resolution, memorializing the direction provided this evening to be brought back to the Council at another meeting for adoption.

Council Member Kuhl stated that the ordinance calls for the first 30-days to be free, the next 30-days is at \$200, and the next 60-days is at \$400. Council Member Robbins suggested crediting 113 days. Council Member Kuhl suggested the first 30-days is free, additional 30-days of delay at \$200 per day is \$6,000. Then 60 more days of delay at \$400 per day is \$24,000. There were 28 more days of delays at \$1,000 per day is \$28,000, totally \$58,000. The applicant is entitled to a credit for his deposit in the amount \$6,169, which leaves a penalty \$51,831.

Town Manager Joe Chinn stated that based on Council Member Kuhl's numbers, there is 105-days of credit, which would remove \$105,000. Town Attorney Brown stated that if there is a consensus among the Council based on the evidence provided tonight, staff can determine the findings that could then be brought back to the Council. He added that the process would be to provide a direction vote this evening. Because the Council is present on an appeal and that determination specified a certain number of delayed dates, it would make sense that the findings brought back would be drafted in terms of credit against that initial determination. Based on all evidence and arguments heard this evening, credit in the amount of \$105,000 would be justified and supported by the evidence.

Attorney Rifkind asked the Council if there is any possibility for the Council to address this matter later this week. Council Member Robbins suggested a special meeting before the regularly scheduled meeting on Thursday, October 8, 2015.

The Council took a short recess and then reconvened with further discussion.

Town Attorney Brown stated that it would be appropriate to agendize a special meeting for Thursday, being the adoption of the resolution setting forth the findings. Council Member Kuhl suggested putting over the lien portion of the item to the Council's November meeting. Town Attorney Brown recommended formally voting on the direction vote, which would be directing staff to prepare revised resolution setting forth the findings that would capture or memorialize the direction given this evening.

Mayor Hoertkorn asked for a motion.

Council Member Kuhl moved and Council Member Robbins seconded, to direct staff to prepare a revised resolution setting forth the findings that memorialize the direction given this evening, and schedule a Special Town Council Meeting on Thursday, October 8, 2015 at 5:30 p.m. Motion carried unanimously.

5. Adjournment.

Mayor Hoertkorn moved to adjourn the meeting at 10:28 p.m.

Kathleen Hoertkorn, Mayor

ATTEST:

Linda Lopez, Town Clerk