



Agenda Item No. 3a.

Staff Report

Date: October 8, 2015

To: Mayor and Councilmembers

From: Joseph Chinn, Town Manager
Sal Lucido, Contract Building Official
Amanda Charne, Assistant Town Attorney

Subject: 90 Sir Francis Drake Boulevard - Revised Findings and Approval of Resolution

Recommendation

Adopt Resolution No. 1919 containing revised findings which conform to the Council's decision on the appeal hearing held October 6, 2015 regarding construction delay penalties at 90 Sir Francis Drake Boulevard.

Background and discussion

On October 6, 2015, the Council held a public hearing to consider the appeal of Mr. Michael Board, owner of the subject property, challenging the amount of penalties as calculated per the Town's "Time Limits for Completion of Construction Ordinance" (Ross Municipal Code, Chapter 15.50) based on the construction delay of 253 days.

After hearing testimony and evidence from staff, Mr. Board, Mr. Board's attorney and several witnesses, the Council deliberated on the merits of the appeal. The Council determined that a credit of 105 days was merited due to circumstances beyond the control of Mr. Board and his representatives. The Council directed staff to revise the findings contained in the proposed resolution to reflect the decision of the Council and the evidence at the hearing.

Approval of the attached resolution will constitute the Town's final determination of the amount of the construction delay penalties upon the property.

Under state law, the resolution must be adopted by the affirmative vote of three members of the Town Council.

Fiscal, resource and timeline impacts

The penalties will contribute to the general fund and offset unanticipated and additional staff costs in securing completion of this project and costs associated with the appeal process.

Alternative actions

The Town Council could provide further direction on the findings.

Environmental review (if applicable)

Exempt per 14 Cal. Code Regs. § 15061(b)(3).

Attachments

- Resolution No. 1919

TOWN OF ROSS

RESOLUTION NO. 1919

A RESOLUTION OF THE TOWN OF ROSS REGARDING THE APPEAL OF AND DETERMINATION REGARDING THE FINAL AMOUNT OF CONSTRUCTION DELAY PENALTIES, LATE CHARGES AND INTEREST FOR 90 SIR FRANCIS DRAKE BOULEVARD, ROSS, CALIFORNIA (APN 072-151-06)

The Town Council of the Town of Ross hereby finds, determines, orders and resolves as follows:

Section 1. Recitals.

1. Ross Municipal Code, Chapter 15.50, Time Limits for Completion of Construction requires property owners seeking to improve their properties to complete construction in a reasonable amount of time as provided in the Code in order to ensure that neighborhood quality of life is maintained and that activities associated with construction, such as increased noise, traffic and associated impacts, are managed in a reasonable way.

2. There exists certain real property within the Town of Ross known as 90 Sir Francis Drake Boulevard, Ross, California 94957 (APN 072-151-06) (the "Property"), which according to the tax records of the Town, is owned by Michael Board (the "Owner").

3. On October 8, 2012, the Town Council approved Variance and Design Review No. 1897 for a 559 square foot second story addition within the main roof form of the residence, new shed dormers and windows, repairs to the garage and pool house, and modifications to the pool patio area on the Property, subject to certain findings and conditions, including a landscape plan and sidewalk repair to be approved by staff (the "Project").

4. On January 23, 2013, a building permit (permit no. 17716) was issued to the contractor of record, Armada Construction, on behalf of the Owner for initial remodeling (including kitchen, bath, dormers, and roof) related to the Project at the Property.

5. Based on the Project's original valuation of \$204,974, the construction was required to be completed within 15 months, by April, 23, 2014, under the provisions of Chapter 15.50 of the Municipal Code.

6. During construction, the design review was amended and the scope of work changed (building permit nos. 17796, 17920, 18050, 18144, 18206) thereby increasing the Project valuation to \$523,000. The revised construction completion deadline was determined to be July 23, 2014.

7. Final Town written approval for the Project did not occur until April 16, 2015, when the Project complied with all Town Council conditions of approval, including final inspection by the

Ross Valley Fire Department and Town Planning Department. The Building Department Final date of April 2, 2014 was used to determine penalties. The Building Official calculated that the construction had been delayed by 253 days beyond the applicable time limits stated in Chapter 15.50 of the Ross Municipal Code.

8. On May 29, 2015, the Town Building Official provided the Owner written notice that the construction delay had incurred penalties in the amount of \$163,000 and demanded payment of said penalties, less the deposit of \$6,169, in the remaining amount of \$156,831. The notice further provided that payment was due within 30 days to avoid late payment penalties and interest, and if payment was not received within 45 days, the total amount would become a lien on the Property.

9. On June 4, 2015, the Owner, through legal counsel, filed a timely appeal of the demand for monetary penalties relating to the time limits for completion of construction.

10. The appeal hearing was originally scheduled for August 13, 2015. The Town Council decided to continue the hearing in order to properly review the materials submitted by the Owner and to provide the Owner and his attorney additional time to prepare for the hearing.

11. The Owner, through his attorney, submitted additional grounds for appeal on August 13, 2015 and revised them again on September 18, 2015 to include the following grounds:

- (i.) Stop Work Order Improperly Issued;
- (ii.) Drying Out Period;
- (iii.) Town's Slow Response to Mr. Board's Request for Assistance;
- (iv.) May, 2014. Sidewalk and Disability Access Improvements Sidewalk Project;
- (v.) Unanticipated Work: Sewer Lateral;
- (vi.) Unanticipated Work: Fire Code Compliance (fire wall);
- (vii.) Unanticipated Work: Additional Fire Sprinklers;
- (viii.) Unanticipated Work: Pool Water;
- (ix.) Unanticipated Work: New Exterior Garage Fence; and
- (x.) Other policy considerations, including compliance with the purpose of the ordinance, town focus, the legality of the fine structure and whether the Town Council has a conflict of interest.

12. Staff provided the following response to each of the Owner's arguments on whether he was prevented from complying with the construction time limit for reasons beyond the control of himself and his representatives. Specifically:

- (i.) Stop Work Order Improperly Issued: On October 23, 2013, a Stop Work Order was placed on the Project. The Stop Work Order resulted from the Project's noncompliance with Condition #1 of the Variance and Design Review No. 1897 that the project comply with the construction plans dated September 25, 2012 as approved by the Town Council on October 8, 2012 (as amended March 14, 2013). In particular, the Project's second story addition failed to conform to the main roof form of the residence and there were changes to the dormer design and the windows. The changes to building height and dormer design were elementary parts

- of the design review approval. Pursuant to Condition #23 of the Variance and Design Review No. 1897, failure to comply in any respect with the conditions or approved plans constitutes grounds for Town Staff to immediately stop work related to the noncompliance until the matter is resolved. In particular, staff needed to assess whether the changes necessitated further Town Council design review approval, or whether the changes were in “substantial conformance” with the plans and could be administratively approved. The failure to comply with the conditions or approved plans constituted grounds for Town Staff to immediately stop work due to the noncompliance until the matter was resolved. Revised plans for the construction changes were submitted by the Owner on January 14, 2014. The Town timely processed and administratively approved the plans, lifting the Red Tag on January 30, 2014 and issuing a building permit for the revised work on February 2, 2014.
- (ii.) Drying Out Period: Installing and maintaining framing members with the proper moisture content is a code requirement and the responsibility of the contractor to properly secure the site and protect the framing during the rainy season. A project with a stop work order does not relieve the contractor of this responsibility to secure and maintain the site.
 - (iii.) Town’s Slow Response to Mr. Board’s Request for Assistance: The incomplete phone records provided by Mr. Board failed to demonstrate that staff did not timely respond to his inquiries or that any alleged staff delays caused his construction project to be delayed.
 - (iv.) May, 2014. Sidewalk and Disability Access Improvements Sidewalk Project: Condition #34 of the Variance and Design Review No. 1897 states “All cracked, broken or uplifted sidewalk fronting the property shall be replaced prior to project final. The property owner shall maintain 4 feet of clearance on the sidewalk at all times, even after project final.” Two Council Members commented on the disrepair of the sidewalk fronting the Property during the October 8, 2012 public hearing on the Project. (See October 8, 2012 Minutes, p. 37.) Further, the Town Council’s approval of Variance and Design Review No. 1897 was expressly conditioned upon “sidewalk repair to be approved by staff.” (See October 8, 2012 Minutes, p. 38.) The sidewalk repairs should have been anticipated. The Owner is responsible for timing the construction of the Project and could have met with staff in 2012 to determine the extent of the sidewalk replacement requirements. It is the property owner’s responsibility to meet all code requirements such as disability accessibility.
 - (v.) Unanticipated Work: Sewer Lateral: Pursuant to Condition #25 of the Variance and Design Review No. 1897, the Project must comply with all requirements of all utilities including, but not limited to, Ross Valley Sanitary District, prior to project final. Condition #25 further required that letters confirming compliance be submitted to the building department prior to project final. Had the Owner completed construction by the deadline of July 23, 2014, the new sewer lateral requirement would not have applied to the Project. At the time the Owner was constructing the new sewer lateral there were still other items of unfinished work at

the Project, including landscaping, MMWD project-sign off, and correcting the location of the HVAC unit.

- (vi.) Unanticipated Work: Fire Code Compliance (fire wall): It is the responsibility of a property owner and its contractor to build a structure that meets the Fire Code requirements. As stated in the Staff Report for Variance and Design Review No. 1897, Ross General Plan 5.3 required that buildings should be designed to be fire defensive. (Staff Report – Agenda Item No. 21 by Ms. Semonian, dated Sept. 26, 2012, p. 14.) Condition #29 of the Variance and Design Review No. 1897 states that the Project is required to comply with all requirements of the Ross Valley Fire Department. Ross Valley Fire Department made five inspections on the Project and noted the fire wall requirement in April 2013.
- (vii.) Unanticipated Work: Additional Fire Sprinklers: Condition #30 of the Variance and Design Review No. 1897 expressly required sprinklers to be installed in the residence. Corrections were issued when the Fire inspectors identified noncompliance with the building and fire codes. The sprinkler issue was noted by inspectors in April 2014.
- (viii.) Unanticipated Work: Pool Water: It is unclear how a miscommunication regarding whether water supplied by Marin Municipal Water District could be used to fill a swimming pool caused a delay of 30 days. The Owner was advised to and should have confirmed the requirements with Marin Municipal Water District.
- (ix.) Unanticipated Work: New Exterior Garage Fence: A barrier fence is required as a pool safety code requirement. The applicant was undecided whether to keep and repair the pool versus demolishing it. He decided to keep the pool which required compliance with the pool safety requirement. The applicant was advised in the Spring of 2014, not 2015, that there were numerous pool safety requirements that must be met if he kept the pool. An additional 3' segment of fence was required to complete the pool barrier in addition to repairs to the existing fence.
- (x.) Other policy considerations, including compliance with the purpose of the ordinance, town focus, the legality of the fine structure and whether the Town Council has a conflict of interest:
 - a. Purpose of the ordinance: There is a legislative presumption of harm to the community due to long delays in the completion of construction. There is no need for the Town to show specific harm to neighbors.
 - b. Town's focus: The record shows that the Town's focus in this matter has been securing code compliance based on approved plans and conditions, not revenue collection.
 - c. Legality of fine structure: Government Code Section 36901 authorizes a city legislative body to impose fines for violations of local ordinances in an amount not to exceed one thousand dollars (\$1,000). The construction delay penalties set in Ross Municipal Code Chapter 15.50 represent the Town

Council's legislative determination that construction delays exceeding 120 days (which includes a 30-day grace period) are the most egregious and merit the highest penalty tier of \$1,000 per day.

- d. Conflict of interest: The executive and judicial functions are not improperly vested in a single body in violation of due process. While the Town of Ross exercises quasi-judicial authority in considering this appeal, executive functions have been delegated to the Town Manager. The Council has no direct authority over subordinate staff, including the building official whose decision is being appealed from. Moreover, the administrative fines represent a very small percentage (approximately 2%) of the Town's overall roughly \$8 million budget. Therefore, The Town Council does not have a financial conflict of interest preventing it from acting as the appeal body.

13. On Tuesday, October 6, 2015, the Town Council held a duly noticed public hearing to consider the Owner's appeal of the construction completion penalty, and to consider whether the construction delays occurring at the Property constituted a public nuisance pursuant to the Ross Municipal Code § 15.50.070, and the amount of the construction delay penalties, late charges and interest.

14. In reviewing the written submittals by Town Staff and the Owner (through his attorney) as well as all the testimony and evidence submitted at the hearing, the Town Council determined that a credit of 105 days is merited due to circumstances beyond the control of the Owner and his representatives. Specifically:

- (i.) Stop Work Order: Although the Council determined that the Stop Work Order was properly issued, the timing of the Stop Work Order in late October 2013 and its continuance over the holidays in November and December of 2013 resulted in some delay beyond the control of the Owner due to reduced staffing.
- (ii.) Drying Out Period: There appears to have been miscommunication or confusion about whether the Owner and its General Contractor were permitted to winterize the Project to protect it from winter rains. Clarification that winterization was allowable under the Stop Work Order was not provided until after rains had already begun. This resulted in delays while the Project dried out.
- (iii.) Sidewalk and Disability Access Improvements Sidewalk Project: The scope of the sidewalk repair project increased. The Owner only expected to replace defective portions of the sidewalk and to maintain a 4-foot clearance. Instead, a greater length of sidewalk replacement with a 6-foot clearance was required.
- (iv.) Unanticipated Work: Sewer Lateral: On January 1, 2015, Ross Valley Sanitary District added a new requirement for sewer laterals to meet a pressure test or to be replaced. This unanticipated work required the Owner to replace a 35-foot sewer lateral that cut into both the newly pored 6-foot sidewalk and into Sir Francis Drake Boulevard.
- (v.) Unanticipated Work: Additional Fire Sprinklers: Although it is the responsibility of

the architects and contractors who design and build a project to understand the applicable fire safety requirements, the Town Council believes that this Fire Code requirement was confusing based on the usage of the attic space.

15. Subtracting the 105 days of credit from the Building Official's original calculation of 253 days of delay, the Town Council determines that the Project resulted in a remaining unexcused delay of 148 days. The Town Council finds that the 148 days of delay were not caused by circumstances beyond the control of the Owner or his representatives for the reasons provided by staff in subsection 12, above, except as modified by the findings set forth in subsection 14.

16. Under Ross Municipal Code Section 15.50.070 (Ordinance 579), the applicable penalty based on 148 days of delay shall be calculated as follows:

Tier	Days Past Deadline	Days	Daily Fine	Penalty
1	1st 30 Days	30	\$ 0	\$ 0
2	Day 31 to the 60th Day	30	\$ 200	\$ 6,000
3	Day 61 to the 120th Day	60	\$ 400	\$ 24,000
4	Day 121-Completion	28	\$ 1,000	\$ 28,000
	Total	148		\$ 58,000

Section 2. Decision.

1. The facts set forth in Recitals, Section 1, of this Resolution are true and correct.
2. The Town Council hereby GRANTS IN PART and DENIES IN PART the Owner's appeal.
3. The Town Council hereby finds that construction delays on the Property constituted a public nuisance pursuant to Ross Municipal Code § 15.50.070.
4. The Town Council hereby determines that the construction delay penalties shall be \$58,000, less the deposit of \$6,169, for a remaining balance of \$51,831.
5. The Town Clerk is directed to certify to the adoption of this Resolution and transmit copies of this Resolution by certified mail, return receipt requested to the Property Owner, and to cause a certified copy of this Resolution to be placed permanently in Town records.

The foregoing resolution was duly and regularly adopted by the Ross Town Council at its special meeting held on the 8th day of October, 2015, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

Kathleen Hoertkorn, Mayor

ATTEST:

Linda Lopez, Town Clerk