



Legislation Text

File #: 2023-0172, **Version:** 1

To: Sonoma County Board of Supervisors

Department or Agency Name(s): Permit Sonoma

Staff Name and Phone Number: Marina Herrera, Planner III, (707) 565-2397

Vote Requirement: Majority

Supervisorial District(s): Fifth

Title:

1:45 P.M. File No. ORD19-0011, Appeal of Planning Commission's denial of Appeal to uphold a Legal Non-Conforming Use Determination of the subject property's historic use as a public trail extending over the parcel.

Recommended Action:

Hold a public hearing and adopt a Resolution denying the appeal and uphold the Planning Commission's decision denying the appeal and upholding staff's determination that a legal non-conforming use exists on the subject parcel. (Fifth District)

Executive Summary:

This report represents an appeal of the Planning Commission's decision to deny the appeal of a Legal Non-Conforming Use Determination issued on the property located at 17448 River Lane, Guerneville, AP: 071-220-068. On December 3, 2021, Permit Sonoma issued a Legal Non-Conforming Use Determination in accordance with Sonoma County Code Chapter 26 Article 94 (Nonconforming uses). An appeal to Permit Sonoma's determination was filed and scheduled before the Planning Commission. On December 1, 2022, the Planning Commission denied the appeal unanimously (5-0-0 vote). An appeal of the Planning Commission's decision was filed on December 12, 2022.

Discussion:

Legal Non-Conforming Use Determination

On November 25, 2019, the Russian River Recreation and Park District filed an Ordinance Determination (File No. ORD19-0011) requesting a legal nonconforming use determination of the subject property's historic use as a public access point to the Russian River, specifically to an area locally known as Vacation Beach. The current use of the property is substantially unchanged and no new development, uses, or structures are proposed. Permit Sonoma determined the pertinent documents, including 16 public affidavits submitted with ORD19-0011, on file with Permit Sonoma, and available historic zoning maps, collectively substantiate the historic use of the property as a public access point to the Russian River.

Non-Conforming Uses, Article 94

The purpose of Article 94 of the Zoning Code is to recognize the legality of a present land use that does not conform to current zoning regulations, but did conform to zoning regulations and were legal uses at the time the use commenced. The complete section of Article 94 has been included as Attachment 9.

The Non-Conforming Use Determination was analyzed under Article 94, Legal Non-Conforming uses. The application documents, including affidavits submitted by the public and available historic zoning maps, collectively substantiate the historic use of the subject parcel as a passive recreation area and that the use has not ceased or been closed for more than a year.

Historic Zoning

Ordinance 230, adopted in 1945, established zoning districts in the County. Pursuant to Ordinance 230, unincorporated areas in the County that were not zoned under one of the zoning districts established in the Ordinance were designated as “U” Districts. Per Sections 12.2(a) and 14.1(b) of Ordinance 230, public uses were allowed in the U District. Ordinance 230, did not include the subject property in any of the specific zones created by the Ordinance, meaning that the U District applied to the Property and public uses were allowed on the property. Therefore, the public’s use of the Property as a public trail did not violate the zoning designation established in 1945 and was a legally established use in compliance with zoning at that time.

In 1961 Sonoma County Ordinance 698 re-zoned the Property as R1-Single-Family Residential. A Use Permit is required to authorize public access trails in the R1 zoning district. The Property has been zoned for R1 since 1961. Therefore, the public’s use of the Property does not conform with the current R1 zoning designation and can continue only if the use is determined to comply with the zoning regulations that were in place at the time the use began, or if a use permit application is submitted and approved.

Summary of Affidavits

An affidavit submitted by Herbert A. Genelly Jr. indicates that the public used the property as a public trail to access Vacation Beach during his family’s ownership of the property from the early 1900’s to 1953. An affidavit submitted by Xenia Zabelin, a resident of the vacation beach subdivision since 1951, further substantiates the generational and continuous use of the property as a public trail to access Vacation Beach since the beginning of her residency in 1951 and continuing at least through 2019 when she submitted her affidavit. An affidavit submitted by Jack Bushgen, a former employee of Citizens Utility, who began his employment with the utility company in 1988, confirms that the subject property was used as an access point to the Russian River since at least 1988. Affidavit submitted by Ed Fortner, the General Manager of Sweetwater Springs Water District (property owner) states that to the Water District’s knowledge the subject property has been used as a river access point since the District’s acquisition of the property in 1992. Table 1 below lists all 16 public affidavits submitted with the application on file with Permit Sonoma.

Table 1. Affidavits submitted to Permit Sonoma

Affidavit Name & Date	Affiliation	Year Cited*
Herbert A Genelly Jr.	Previously owned (until 1953) & Family of original Subdivision	Early 1900’s
Richard Deering (8/9/2019)	Russian River Resident since 1966	1940’s
Nick Mironov (10/4/2019)	Vacation Beach user	1950
Vera Mironov (10/7/2019)	Vacation Beach user	1950
Katherine Meyer (10/2/2019)	Vacation Beach user	±1950

Xenia Zabelin (10/3/2019)	Resident of the Vacation Beach Subdivision as of 1951 Generational use of Vacation Beach	1951
Laura Clemens (11/14/2019)	Generational use of Vacation Beach	1955
Laura Gilfether (9/15/2019)	Family owned property in Vacation Beach Subdivision 17754 Orchard Avenue since the 1930's Generational use of Vacation Beach	Over 50 years ±1969
Margaret Dodderer (9/29/2019)	Generational use of Vacation Beach	Over 60 years ±1959
Vic Teshin (11/14/2019)	Vacation Beach user	1955
Jack Bushgen	Citizens Utility (previous property owner) employee	1988
Ed Fortner	Sweet Water Springs Water District (current property owner)	1992
Hans Bruhner (11/11/2019)	Property owner within the Vacation Beach Subdivision as of 2003	2003
John Harreld (10/4/2019)	Property owner and full-time resident of Guerneville	2004
Howard & Suarez (9/12/2019)	Property owners within the Vacation Beach Subdivision since 2014	2014
Angelina Lavroushin (10/21/2019)	Generational use of Vacation Beach	Not specified.

General Plan Land Use and Zoning

The General Plan Land Use Designation on the parcel is Urban Residential (UR).

Zoning on the parcel is Low Density Residential (R1), B6 1 DU (1 dwelling unit per 1 acre), Floodway (F1), Floodplain (F2), Local Guidelines 116 Corridor (LG/116), Riparian Corridor (50 foot structural setbacks, 50 foot agricultural setbacks), Valley Oak Habitat (VOH)

Surrounding Land Use and Zoning

The subject parcel is located in the Vacation Beach Subdivision in Guerneville located east of the Russian River corridor. The Vacation Beach subdivision is a residential subdivision comprised of single-family residences while surrounding zoning consists of Low Density Residential.

Issues Raised in the Appeal

The appeal letter is provided as Attachment 3. The issues are addressed in chronological order as much as

practical; some topics overlap.

1. Incorrect Interoperation of Historic Zoning

The appellant states that Permit Sonoma incorrectly interpreted the Historic Zoning designation on the subject property because prior to 1961 a permit would have been required to substantiate a legal use of a public trail passive recreation area on the subject property.

Staff Comment

Prior to 1961, Ordinance 230 adopted in 1945, Section 7.1 classified unincorporated areas of the County not included under the terms of Ordinance 230 as U-Unclassified District. Per Section 12.2(a) of Ordinance 230 the U district allowed uses permitted within any A, K, R, R-R, C or H-1 districts. Per Section 14.1(b) of Ordinance 230, public uses were allowed as permitted uses within the A-Agriculture District. Therefore, prior to 1961 the use of the subject parcel as a public trail or 'passive recreation area' was a permissible use and would not have required a Use Permit.

2. Historic and Continuous Use of Property is not substantiated

The appellant states that application documents do not substantiate a historic or continuous use of the property as a passive recreation area.

Staff Comment

The Legal Non-Conforming Use determination was analyzed under Article 94. The application documents, including affidavits submitted by the public and available historic zoning maps, collectively substantiate the historic use of the subject parcel as a passive recreation area and that the use has not ceased or been closed for more than a year.

3. Permanence excludes non-conforming use

The appellant states that granting a non-conforming determination provides permanence of the use.

Staff Comment

A non-conforming use determination is not a land use entitlement. Pursuant to Section 26-94-030 of the County Code, a nonconforming use that ceases for a continuous period of one year shall be considered terminated.

4. Environmental Considerations

The appellant states that the property is in an environmentally vulnerable location and that a non-conforming use determination does not require the owners to provide trash or laboratory facilities.

Staff Comment

Staff's Ordinance Determination does not involve the approval for any new structures including a septic system, new land uses, or changes to the property.

5. Fire

The appellant states that fire safety information should be included in the application.

Staff Comment

The Property will continue to be served by the Russian River Fire Protection District. The Nonconforming Use Determination does not involve the approval of any new structures, land uses, or changes to the property.

6. Inadequate Notification of and/or Approval by Regulatory Stakeholders

Staff Comment

Staff's Ordinance Determination does not propose any new structures, new land uses, or physical changes to the property. Approval from the Army Corps and North Coast Regional Water Quality Board is not required because the determination will not result in any discharge of dredge or fill material into the Russian River. Referral to the Native American Heritage Commission is not required because the determination does not authorize any land disturbance or excavation, thus no harm to cultural resources, if any are buried on the subject property, will occur. Approval from Fish and Wildlife is not needed because the determination will not result in any of the following: diverting or obstructing the flow of the Russian River, changing the bed/bank of the river, using material from the river, disposing of material into the river, or harming any protected species or critical habitat.

7. Politics shall not be involved in decisions

The appellant states that discussions with the following government offices California State Senator, Mike McGuire; California State Assembly, Ed Sheffield; and local County Supervisor, Lynda Hopkins and the California State Lands Commission in this matter influenced staff's determination. Additionally, that a Commissioner met with members of the public advocating for the use and the appellant was not afforded equal opportunity or purview as to what was discussed.

Staff Comment

Discussions between members of the public and government agencies and/or elected officials had no bearing on staff's decision in the legal non-conforming use determination or the Planning Commission's decision.

8. Planning Commission Hearing

The appellant states that the aerial map shown at the Planning Commission Hearing is an inaccurate representation of property boundaries. Furthermore, the appellant claims that this matter should have been heard at a joint meeting by the Planning Commission and the Board of Zoning Adjustments.

Staff Comment

The use of an aerial map from the County's GIS mapping system is standard practice at Public Hearings as it provides a visual of the project area for those Commissioners, Supervisors and/or members of the public who are not familiar with the location of the project. Aerial maps tend to include neighboring parcels due to their proximity to the subject parcel. The Planning Commission is the appropriate Planning Agency Hearing body to hear the appeal.

Environmental Determination

This legal nonconforming use Determination is not subject to the California Environmental Quality Act ("CEQA"). According to Section 15060(c) of the CEQA Guidelines, an activity is not subject to CEQA if any of the following conditions apply:

- A) The activity does not involve the exercise of discretionary powers by a public agency;
- B) The activity will not result in a direct or reasonably foreseeable indirect physical change in the environment; or
- C) The activity is not a project as defined in Section 15378.

The legal nonconforming use determination does not involve the exercise of discretionary powers. Staff has no authority to impose conditions on nonconforming use determinations and has to approve these determinations if the facts presented meet the requirements outlined in Section 26-94-010 of the Zoning Regulations. In this case, staff conducted a ministerial determination that the requirements in Section 26-94-010 and affirmed the nonconforming use. Therefore, no discretionary powers were used, and the determination is not subject to CEQA according to CEQA Guidelines Section 15060(c)(1).

Additionally, the nonconforming use determination is not subject to CEQA because it will not result in a direct or reasonably foreseeable indirect physical change in the environment. The determination does not authorize any alterations to land, modifications to the existing use, new land uses, or any structures. Therefore, the determination will not result in a direct or reasonably foreseeable indirect physical change in the environment and is not subject to CEQA according to CEQA Guidelines Section 15060(c)(2). Therefore, under either section 15060(c)(1) or 15060(c)(2), the nonconforming use determination is not subject to CEQA.

Staff has determined that even if this determination were subject to CEQA, the determination would be categorically exempt from CEQA under Sections 15301, Existing Facilities, and 15061, Common Sense Exemption, of the CEQA Guidelines. According to Section 15301, the operation of existing facilities “involving negligible or no expansion of use” are exempt from CEQA. Since at least the 1940’s, the subject property has been continuously used as a public facility - namely as a public trail. There will be no expansion of use or new uses as part of the determination because the determination will only recognize the existing use. Therefore, this determination qualifies for the exemption for Existing Facilities.

According to Section 15061(b)(3) “Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA.” The determination does not propose any structures, new uses, or development. The determination only recognizes an existing land use. Therefore, it can be seen with certainty that there is no possibility that the determination will have a significant effect on the environment and the Common Sense exemption applies. Therefore, even if the determination is subject to CEQA, the determination is exempt from CEQA pursuant to CEQA Guidelines Sections 15301 and 15061.

Strategic Plan:

N/A

Prior Board Actions:

N/A

FISCAL SUMMARY

Narrative Explanation of Fiscal Impacts:

N/A

Narrative Explanation of Staffing Impacts (If Required):

N/A

Attachments:

Att 1 ORD19-0011 Board of Supervisors Resolution

Att 2 ORD19-0011 Ordinance Determination issued December 3, 2021

Att 3 ORD19-0011 Appeal letter dated December 12, 2022, including subsequent Amendments and Documentation

Att 4 ORD19-0011 Planning Commission Staff Report Packet, December 1, 2022

Att 5 ORD19-0011 Aerial Map

Att 6 ORD19-0011 Application Submittals

Att 7 ORD19-0011 Affidavits

Att 8 ORD19-0011 Public Comments Through March 3, 2023

Att 9 ORD19-0011 Article 94, Legal Non-Conforming Code Section

Att 10 ORD19-0011 Staff Presentation

Att 11 ORD19-0011 Applicant Presentation

Att 12 ORD19-0011 Appellant Presentation

Related Items “On File” with the Clerk of the Board:

N/A