

INTEROFFICE MEMO



County of San Bernardino

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Tom Herrin
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TO San Bernardino County Planning Commission

SUBJECT **BONIFACIO REGIS (APN: 0436-152-30)**
SCHEDULED FOR PLANNING COMMISSION HEARING ON JANUARY 23, 2014

This matter is the continuance of a Planning Commission hearing commenced on December 19, 2013, which was the appeal of a staff decision to rescind Tentative Parcel Map (TPM) 18137.

Factual and Procedural Background

The Commission will recall that a 35-acre parcel was subdivided in 2006 into four 2.5 acre parcels with a 25-acre remainder. The current application seeks to divide the 25-acre remainder parcel into four 2.5 acre parcels with a 15-acre remainder. Because of a familial relationship between the successive subdividers, staff determined that the recording of the Parcel Map would constitute a violation of the Subdivision Map Act (SMA). More specifically, because of the familial relationship between the successive subdividers and due to the fact that the subdivision and the proposed subdivision are contiguous, the County must count the total number of lots created by the 2006 subdivision and the lots that would be created by TPM 18137 in determining whether a Parcel Map, which is used for the creation of four or fewer parcels, is allowed. Following this analysis, staff reached the conclusion that if the Parcel Map for TPM 18137 was approved, it would create eight 2.5-acre lots with a 15-acre remainder from the original 40-acre property. As a result, approval of the Parcel Map for TPM 18137 would result in a violation of the SMA. Therefore, on August 22, 2013, staff rescinded the approval of TPM 18137. The applicant appeals this rescission.

At its hearing on December 19, 2013, the Planning Commission raised additional questions about the SMA and its application to this development, so staff recommended the continuance of the hearing in order to respond. The Planning Commission concurred and granted the continuance to January 23, 2014.

Operation of the Subdivision Map Act

A question was raised as to when the land division to which the SMA is concerned occurs; more specifically, whether it occurred with the approval of the TPM or occurs with the recording of the Parcel Map. Staff is of the opinion that strictly for purposes of the SMA, the property is not subdivided until the Parcel Map is recorded. This is a significant question in this matter since it was the request of the applicant submitted on May 30, 2013, for the Parcel Map to be approved and recorded, that triggered the evaluation that led to the

County's refusal to record the Parcel Map. At that point in time, the subdivider (Regis Trust) was in the type of close relationship with the previous subdivider (Liza Lee Angus Regis) that the SMA prohibits. Because of this request for an approval, the County was also mandated to evaluate its previous approval of the TPM, given that the property ownership was now "locked" into place. With the applicant requesting formal action, the TPM was also scrutinized and found defective for the same reason under the SMA.

In addition, the Development Code requires compliance with the SMA at the time of the approval of a TPM. Each tentative map is to be evaluated after the initial processing and the application is deemed complete for its compliance and consistency with the SMA. Development Code § 87.02.040(a)(1). The reviewing authority shall approve a TPM only if certain mandatory findings can be made, including:

The proposed subdivision, its design, density, and type of development and improvements conforms to the regulations of this Development Code and the regulations of any public agency having jurisdiction by law.

Development Code § 87.02.060(a)(1)(H).

Further, a TPM is only available for maps that propose the creation of four or fewer parcels. Development Code § 87.02.050(a)(2).

Acceptance of Processing of Illegal Subdivision

One might question why the County accepted and processed the application for the TPM in the first place, since the issue of ownership might have been apparent then, or at least became obvious as processing of the application proceeded.

Part of the explanation for this was provided by the County Surveyor Tom Herrin at the hearing on December 19, at which he explained that his office was not in favor of the approval of the TPM, but that this opinion was transmitted to Planning on the surveyor's standard approval form, the implication being that Planning inadvertently approved despite the substance of this communique. Additionally, the Development Code does not give staff the discretion to summarily reject applications that are otherwise correct as to form and are submitted with the requisite fees. During the processing of applications, it is not uncommon for staff to provide input to the applicant about the prospects of the proposal; and with rare exception, applications are not submitted to the proper review authority until staff can recommend approval. But even if staff cannot reach such an opinion, the applicant is free to pursue the process through to completion, including through all administrative appeals and to the courts.

Not to diminish the legal significance of the SMA violation, this project otherwise satisfied the County's development criteria. Moreover, staff cannot preclude the sale of property while under evaluation. In this matter, the subject property could have been vended to another in an arms-length transaction so as to forestall the application of the SMA that now exists. Of course, those options were foreclosed when the applicant requested that the County take formal action and approve and record the Parcel Map.

Mitigation of Fee Expenditure

One of the questions raised during the December 19 hearing was whether some means could be made available to accommodate a legal subdivision of the subject property without a forfeiture of the processing charges paid by the applicant to date.

The overarching governing principle is that the Board of Supervisors has retained to itself the exclusive authority to waive or refund fees. County Code § 16.0231. Thus, any suggestion as to waiving or refunding fees is not within the jurisdiction of the Planning Commission.

Alternatives to maintain the viability of the project without requiring a resubmittal are considered in the next section.

Ramifications of Alternatives

As with all other appeals brought before it, the Planning Commission's options are to either deny the appeal or uphold the appeal. Staff believes that the ramifications of each action can be summarized as follows.

Denial of the Appeal. If the Planning Commission denies the appeal, the rescission of the TPM issued by staff is confirmed. The applicant has appeal rights to the Board of Supervisors, and if an adverse decision is rendered, may petition the courts for redress. Regardless, subdivision of the property could be sought by way of a new application, either for a Tract/Final Map if the ownership of the subject property remains the same, or possibly by a Parcel Map if new owners unrelated to the current owners make the application. A new application would require the payment of processing fees per the County's fee schedule, although processing would be simplified if the same or a similar subdivision were sought.

Grant the Appeal. If the Planning Commission grants the appeal, the rescission of the TPM does not become effective. The applicant could submit the Parcel Map to the surveyor for approval and recording; but without a change of the facts which led to staff's recommendation to rescind the TPM, it is unlikely that such an approval could be recommended. Per section 87.01.070 of the Development Code, the surveyor's decision is subject to appeal to the Planning Commission and then, if necessary, to the Board of Supervisors. If new, unrelated ownership submits the request that the Parcel Map be approved and recorded, it would be evaluated as required under the code. Assuming all other facts remain the same (and without intending to suggest a decision), such a submittal would likely be approved.

Conclusion

In conclusion, the additional evaluation of the project and its status has not caused staff to reconsider its recommendation, which remains as presented to the Planning Commission on December 19, 2013, to wit:

RECOMMENDATION: That the Planning Commission:

- 1) **DENY** the appeal; and
- 2) **UPHOLD** the rescission of the conditional approval of TPM 18137.