



COUNTY OF HUMBOLDT

For the meeting of: 4/9/2019

File #: 19-430

To: Board of Supervisors

From: DHHS: Public Health

Agenda Section: Public Hearing

SUBJECT:

Appeal of the Division of Environmental Health's Denial of On-site Wastewater Treatment System Permit Application Submitted Dec. 18, 2018 by Mike McEnry for River Bar Road, Fortuna, CA. Assessor's Parcel Number (APN) 204-331-003

RECOMMENDATION(S):

That the Board of Supervisors:

1. Open the public hearing and receive testimony of the Division of Environmental Health (DEH) staff, the appellant, any affected persons and/or the testimony of their respective agents;
2. Receive public comment;
3. Close the public hearing;
4. Based on the evidence and testimony received, affirm DEH's action; and
5. Direct the Clerk of the Board to give notice of the decision to the permit applicant, the Director of DEH, the Director of the Building Division, and any other interested party.

SOURCE OF FUNDING:

Public Health Fund

DISCUSSION:

This is an appeal of Humboldt County Department of Health and Human Services, Public Health Branch, DEH acting on behalf of the Health Officer's denial of an On-site Wastewater Treatment System (OWTS) permit. The denial was made because the proposed OWTS design did not meet the minimum 50-foot property line setback requirement and no consent for a reduced setback was granted by the adjoining property owner.

Humboldt County Code (HCC), Title VI, Division 1, Chapter 2, Section 612-3 provides for any affected party to request a hearing to appeal DEH's action.

On Feb. 4, 2019, DEH and the Board of Supervisors received a Notice of Appeal from Dustin Owens, attorney for Mike McEnry (Appellant), in accordance with HCC Section 612-3(a) and (b) requesting a hearing in the matter of an OWTS permit application denial for the property located at River Bar Road,

Fortuna, CA APN: 204-331-003 (Attachment A).

On March 21, 2019, DEH pursuant to HCC section 612-3(c) issued and mailed out the Notice of Appeal Hearing to all affected persons including the Appellant and to all adjoining properties. DEH also caused the Notice of Appeal Hearing to be published in the Times Standard on March 22, 2019 and March 29, 2019 (Attachment B).

Pursuant to HCC 612-3(d), your Board is not limited to the evidence provided as part of this report and may receive evidence, including testimony of the Health Officer, property owner or their representatives, other competent persons, and from any person affected by DEH's action at this appeal hearing. Any person affected may also be represented by counsel. In addition, the Health Officer and any persons affected by DEH's action may cross-examine any of the testifying witnesses.

At the conclusion of the appeal hearing, your Board may either affirm the action of the Health Officer, deny the permit application, or grant a variance to the setback requirement. Absent any significant new information not contained in this staff report, DEH staff is recommending that your Board affirm DEH's action and deny the appeal.

Background:

Appellant is the owner of the subject parcel since April 10, 2015 (Attachment C - Quitclaim Deed). The project is located on a 108-foot by 155-foot parcel, approximately 0.38 acres (Attachment D - Project Map). The Van Duzen River is located south of the subject parcel. The parcel is zoned Agricultural Exclusive (AE) and is located in a Flood Zone.

On Dec. 12, 2017, DEH received a water well construction permit application, including signed property access authorization for APN 204-331-003. On Dec. 18, 2017, DEH received an anonymous complaint alleging unpermitted installation of an OWTS on the same parcel. DEH visited the site and observed a new building under construction and active installation of an OWTS that did not meet minimum setbacks to property lines and, potentially setbacks to a neighboring domestic well. DEH took photographs of the construction (Attachment E).

After reviewing DEH's files, DEH determined that no permit existed for an OWTS for the subject parcel. Consequently, on Dec. 20, 2017, DEH sent a Notice of Violation to Mr. McEnry requiring him to obtain an OWTS permit (Attachment F), and referred the construction of the new building to Humboldt County Planning and Building Department.

On Feb. 23, 2018, the Humboldt County Building Division issued a stop work order in response to the unpermitted construction (Attachment G).

On March 26, 2018, DEH received a building permit referral from the Humboldt County Building Division. On September 18, 2018, the building permit referral was returned unapproved because no OWTS permit application had been received (Attachment H).

On Dec. 13, 2018, an OWTS permit application and design was received by DEH (Attachment I). The proposed design by A.M. Baird Engineering & Surveying, Inc. (A.M. Baird) stated the design is based

on an “inferred” mutual setback reduction. A.M. Baird based this inference on documentation in DEH’s files for a property line setback reduction to accommodate an existing septic system on the adjoining parcel, APN 204-331-002 (Attachment J). No OWTS Variance Application was submitted with the proposed septic design. The proposed design did not meet the minimum fifty (50) feet horizontal setback distance to property lines and the affected neighboring property owner did not provide signed consent for the reduced setback distance proposed in the design.

On Jan. 7, 2019, DEH advised Mr. McEnry in writing that the OWTS permit application was denied (Attachment K).

Appellant’s Arguments & Analysis:

Appellant’s Notice of Appeal raised various arguments to support his request for a variance. The following discussion will address the arguments raised in this appeal.

Appeal Issue 1: Construction of Residence. All permits are signed off and ready to be issued pending approval of the OWTS.

DEH staff has reached out to the Building Division and is informed that the Building Division issued Plan Check comments on or around April 5, 2018 to Appellant (Attachment L). DEH staff was also informed that Appellant has not responded to these comments and as such, the Building Division has not yet completed their plan check review.

Appeal Issue 2: Setback Consent. Appellant contends that the variance for the adjoining property, APN 204-331-002, was intended to apply to Appellant’s property.

Appellant acknowledges in his Notice of Appeal that the property owner for APN 204-331-002 disputes his interpretation that the variance also applied to his property (Attachments A & J) and that no consent for a setback reduction was given. DEH staff also understands that the property owner for APN 204-331-002 is not willing to consent to a variance. Appellant also acknowledges in his Notice of Appeal that the other neighboring property owner for APN 204-331-004 is willing to grant a variance for a payment of \$100,000.

Given that there is a dispute between these two property owners as to the interpretation of the variance for APN 204-331-002, the legal interpretation of this variance should be resolved by the Court. DEH staff is unaware of any pending litigation between Appellant and the property owner for APN 204-331-002. Staff recommends that your Board defer the legal interpretation of the variance. However, DEH staff interprets the variance to apply only for the benefit of APN 204-331-002 as there were no explicit reciprocal benefits stated.

Pursuant to HCC section 612-3(f), your Board may grant a variance to this setback requirement regardless of whether the variance for APN 204-331-002 would apply to Appellant’s property.

Appeal Issue 3: Septic Design Proposal. Appellant provided a septic design proposal prepared by a licensed professional engineer.

The proposed septic design by A.M. Baird is based on an “inferred” mutual setback reduction and the proposed design places the leach fields at least 10 feet from the property line between the subject parcel and APN 204-331-002. A.M. Baird septic design does not provide an alternate leach field location. As such, the proposed septic design is dependent on the legal interpretation of the variance for the setback reduction. As discussed above, the legal interpretation of the variance for APN 204-331-002 should be addressed and resolved by the court.

Appeal Issue 4: Buildable Parcels/Negative Consequences. Appellant contends that he will suffer “extreme and unfair negative consequences.”

Appellant contends that if no approval is given for the septic system, then he would suffer extreme and unfair negative consequences including significant financial cost spent on the existing construction. Appellant asserts that the subject parcel would be “unbuildable” and the parcel would ultimately become a nuisance to the county and neighboring parcel owners. Appellant also asserts that failure to approve the design would treat Appellant and the neighboring parcel owners disparately.

As noted above, DEH and Building Division staff determined that the construction of the structure and septic system was installed without permits. DEH and Building Division have been working with Appellant to obtain the necessary permits. However, based on the size of the parcel and a failure to obtain a variance from any of the adjoining neighbors, the proposed septic design fails to comply with the setback requirements. Any negative consequences suffered by Appellant is a result of his own actions by failing to apply for the appropriate permits or approvals before commencing construction.

As for any potential nuisance, it is the property owner’s responsibility to maintain their property to be free from any nuisance and if a nuisance exist, then the property owner is responsible for the abatement of such nuisance that exists on their property.

Appellant assertion that DEH has improperly treated Appellant disparately is without any factual basis. DEH staff has treated all permit applicants the same with respect to the setback requirements as indicated in the variance obtained for APN 204-331-002.

Appeal Issue 5: Relevant Law and Regulations. Appellant asserts that the permit denial is without any basis in law or regulations.

Appellant cites various County Code and county OWTS Regulations. The only issue in this appeal is whether a variance for the setback requirements should be granted and as such, Humboldt County OWTS Regulations and Technical Manual, filed with the County Clerk on Jan. 8, 2018, is the applicable regulation, specifically, Regulation 3.8.3 Variance Policy and Appendix E - OWTS Setback Requirements (Attachment M). HCC section 612-1(a) directs the Health Officer to issue regulations to carry out the provisions of HCC Title VI Division 1 Water and Sewage.

Appendix E of the Humboldt County OWTS Regulations and Technical Manual provides a table for minimum OWTS setback requirements. The table lists the minimum horizontal distance between a dispersal system and property lines for private water is 50 feet. The proposed septic design by A.M. Baird also provides a table that list minimum setback distances and it indicates a 50-foot distance between property line and disposal field.

Regulation 3.8.3 Variance Policy states: “If a proposed design cannot meet any standard contained in the Humboldt County OWTS Regulations and Technical Manual or applicable state policy, the application must identify the unmet standard. For DEH to consider a variance to any standard, the applicant must submit an OWTS Variance Application. Variances may be granted when the applicant can demonstrate that water quality will not be impaired and public health will not be impacted as a result of the variance. Variances cannot be granted to parcels within the Variance Prohibition Area(s).”

In evaluating an OWTS Variance Application, DEH reviews whether the adjoining neighbor consents to the requested variance because the variance would affect the neighbor’s ability to install a water well or other surface water feature due to the presence of the OWTS, i.e., adjoining neighbor’s ability to comply with setback requirements. In this appeal, Appellant did not submit an OWTS Variance Application.

The Variance Policy provides for an exception to the regulations issued by the Health Officer as required by HCC section 612-1(b)(4). Section 612-1(b)(4) states “[a]ny such regulations issued by the Health Officer shall:...(4) Provide for exceptions where a strict application of this division or local regulations issued by the Health Officer would inflict a substantial personal hardship upon the occupants of the building or place in question.” (Attachment L)

Based on the various arguments raised by Appellant relating to the various County Codes and Regulations cited, these arguments relate to the negative financial consequences that Appellant will suffer from the denial of the permit application. As discussed in Appeal Issue 4, the negative financial consequences are a result of Appellant’s own failure to apply for the appropriate permits prior to the start of construction.

Based on the foregoing, DEH staff recommend your Board affirm DEH’s action and deny the appeal. Installation of an OWTS affects development and use of the surrounding lands due to separation distances needed to protect public health and safety. A variance granted by your Board could prove restrictive for future development of the neighboring parcel, including improvements such as installation of a pool, water feature, or water well.

FINANCIAL IMPACT:

There will be no effect on the General Fund. The appellant has paid in full the appeal fee associated with this appeal. The Division of Environmental Health, Budget Unit 486, will cover any additional costs incurred by this appeal.

STRATEGIC FRAMEWORK:

This action supports your Board’s Strategic Framework by enforcing laws and regulations to protect

residents.

OTHER AGENCY INVOLVEMENT:

Humboldt County Building Division

ALTERNATIVES TO STAFF RECOMMENDATIONS:

1. Grant a variance to the provisions of Humboldt County Code Title VI Division 1 Sewage Disposal, or;
2. Grant a variance to the regulations issued by the Health Officer upon which the action under appeal is based.

DEH does not recommend either of these alternatives because the adjoining property owner did not provide authorization for a reduced property line setback to Mr. McEnry.

ATTACHMENTS:

- A. Notice of Appeal
- B. Notice of Appeal Hearing publication
- C. Quitclaim Deed
- D. Project Map
- E. Inspection Photos
- F. Notice of Violation
- G. Order to Stop Work
- H. Building Division Referral Response
- I. OWTS Permit Application and Proposed Design
- J. Variance for APN 204-331-002
- K. Letter of Denial of OWTS Permit Application
- L. Building Division Plan Check Comments
- M. Applicable County Codes

PREVIOUS ACTION/REFERRAL:

Board Order No.: n/a

Meeting of: n/a

File No.: n/a