

Attachment A
Discussion

PLN060127
REF130084

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ATTACHMENT A
Proof of Access Ordinance
(PLN060127/Inland and REF130084/Coastal)

Background

In 2006, the Board of Supervisors made a referral to the Director of Planning to develop regulations addressing the County's role, or lack thereof, in civil disputes regarding whether or not proposed development is allowed within the terms of an applicable private access agreement/easement. This referral was reinforced in the 2010 General Plan, Policy C-3.6 which states:

“The County shall establish regulations for new development that would intensify use of a private road or access easement. Proof of access shall be required as part of any development application when the proposed use is not identified in the provisions of the applicable agreement.”

Resource Management Agency – Planning (RMA – Planning) staff began developing the ordinances (Coastal and Inland) by meeting with the community. The Planning Commission considered earlier drafts of ordinances and provided direction to staff for revisions on November 9, 2011, December 14, 2011, and January 25, 2012. On September 11, 2013, the Planning Commission recommended approval of a Proof of Access ordinance with a minor clarification to the definition of “Private Road Agreement” to deal with the circumstances in which there is a dispute concerning an unrecorded right of access.

On December 17, 2013, the Board of Supervisors considered adoption (or resolution of intent to adopt the ordinance in the Coastal Zone) of the ordinances recommended by the Planning Commission. After receiving staff's presentation and public testimony, the Board continued the item to allow more time for staff to work with the community to address concerns raised at the hearing. Following the December 17th Board hearing, staff met with the Permit Streamlining Task Force, sent a memo with suggested revisions to the chair person of each Land Use Advisory Committee for distribution to their members, and provided the same memo and suggested revisions to other members of the public that have commented on the ordinance during the process.

Overview

Current practice is for staff to request documentation that verifies ownership and identifies land use restrictions (e.g. easements). Property owners within 300 feet of the subject property are notified of a hearing along with posting the property and placing a legal ad in the newspaper. If there has been a dispute, the applicant was required to provide proof of access before taking the matter to hearing. When a dispute remained unresolved, staff has applied a condition for consideration by the Appropriate Authority that requires resolution prior to issuance of any permits or filing a map.

As drafted, the ordinances would require an applicant for a discretionary permit involving use of a private road to submit a copy of documentation showing a right to access, such as a recorded easement or designation on a recorded subdivision map. An applicant for a discretionary permit will also be required to provide documentation, upon application, that notice has been provided to all Interested Parties to the access or easement. Following the required notification, any one of the Interested Parties may file a written objection to the use of the Private Road for the proposed development.

If no objection is received, the application would proceed under the usual terms. If an objection is received and the Appropriate Authority finds that a substantive dispute exists as to the use of a Private Road, the Appropriate Authority may impose a condition upon approval requiring a showing of proof of access. If added, the condition would require proof, in the form of a written agreement among the interested parties resolved personally or through other avenues, including but not limited to mediation, arbitration, or a court judgment, and such condition would need to be satisfied prior to issuance of grading or building permits or filing of a final map as applicable.

The following table is a summary comparison of how this issue is address currently versus how it would be addressed under the proposed ordinances:

	CURRENT PRACTICE	PROPOSED
<i>Documentation</i>	Required as part of Application.	No Change
<i>Dispute</i>	One person	No Change
<i>Notice</i>	300 Foot mailing list	All property owners abutting an easement
<i>Hearing</i>	Resolve before setting the matter for hearing	Appropriate Authority considers issues at a hearing
<i>Condition</i>	Recommended by staff when there is an unresolved dispute.	Appropriate Authority must make finding and add a condition based on substantial evidence.

The Planning Commission recommends approval of the ordinances as drafted, which is supported by a number of Community members and organizations. This approach reflects compromises reached in community meetings and at the Planning Commission hearings after considering a range of approaches (Options):

1. Require resolution of disputes prior to approval of entitlements;
2. Application of a condition that requires formal resolution of disputes following approval of entitlements but before issuance of permits or recordation of final maps (the recommended option); and
3. Approval of Permits based on the “ability to access a property” as demonstrated through an easement, deed, or similar document and leaving arguments over the “intended use of the easement” to other avenues of resolution.

There are pros and cons to all three approaches in addition to supporters and objectors to each option. The Planning Commission determined that Option 1 could lead an applicant to spend a significant amount of time and money to resolve a dispute without a guarantee that their permit would ultimately be approved. Option 3 was not ideal because it would not have accomplished the goal of separating the County from civil disputes amongst neighbors and, if a resolution could not be obtained otherwise, it would leave the burden to bring corrective action on the objector rather than the applicant for the project.

After the Board of Supervisors hearing on December 17, 2013, staff provided another opportunity for interested parties to review and make comments on the Proof of Access Ordinance. Meetings were held with the Permit Streamlining Task Force Committee members and other comments were received in response to the Land Use Advisory Committee, and interested parties outreach.

Clarifications and other Considerations

Recognizing and balancing varying opinions on a preferred approach, staff has attempted to incorporate certain edits to the ordinances for clarification:

- The definition of Proof of Access was removed from the body of the ordinance and replaced with a definition in the definitions section;
- A definition of “Subordinate Access” was added to clarify the term already used in the ordinance.
- The requirement to meet with parties to the applicable easement and attempt to gain written concurrence was removed. Removing this requirement would not prohibit an applicant from taking such an action if they wanted to be diligent but it would not require this effort by County regulation if an Applicant was willing to wait and see if an objection is received following the required noticing;
- Required findings for “Proof of Access” were added to clarify the four different scenarios. Those findings include:
 - The project is exempt from the ordinance;
 - No objection was filed;
 - An objection was filed but there is substantial evidence that the proposed development is allowed under the terms of the easement; or
 - The Proof of Access condition was added to the Permit.
- A section that allows extension of approved permits, or a stay of expiration of the permits during court proceedings regarding proof of access was added;
- Exemptions from the ordinance were added to include:
 - The first Single Family Dwelling on a lot
 - Projects with access from public roads only
 - Private Roads for emergency access only
 - Projects that do not result in “intensification”
 - Projects subject to approval by a road maintenance governing structure such as a home owners association where such governing structure has provided permission for the project; and
 - Routine and ongoing agricultural uses.

In addition to the changes that were made, there were three comments considered where staff is not recommending changes to the ordinances:

1. Remove or clarify the role of owners of property abutting lands subject to a Private Road Agreement from the definition of "Interested Party" (Section 21.64.320.C.5.b of the proposed ordinance).

RESPONSE: Owners of property "abutting" a Private Road are not parties to the Private Road Agreement but they do have certain abutter's rights that could be affected by intensification of the Private Road.

2. Change the definition of "Proof of Access" to include a majority vote or approval from a majority of Interested Parties to the easement as one of the evidence standards.

RESPONSE: The Planning Commission considered this approach and determined that each property owner has different interests and this would remove the ability to identify unique rights that may not be afforded other property owners. As a compromise, the applicant is allowed to proceed to hearing and an objector must provide substantial evidence such that a majority of the Appropriate Authority agrees to add a condition. In addition, there are significant logistical issues with determining what a majority is given the various ways that property ownership is held and there are potential legal issues with ignoring the minority opinion. If no condition is added, the objector has the burden of proof through the same means afforded the applicant (agreement, mediation, court, etc).

3. Provide an exemption for Accessory Dwelling Units (or caretaker's units and senior units in the Coastal Zone).

RESPONSE: The Planning Commission discussed this issue and recommended limiting the exemption to the first single family home only. Proliferation of Accessory Dwelling Units on a Private Road could result in significant intensification of that road (e.g. rentals) and therefore should not be exempt.

Conclusion

With the help of the public, the ordinances have been clarified and improved since the December 17, 2013 Board hearing. The ordinances before the Board are the result of a number of meetings and compromises that have taken place over the course of two years. While there may still be some opposed to the ordinance as drafted, it seems highly unlikely that everyone can be satisfied with any one of the options introduced earlier given the significant division of opinions on this subject.

Primary remaining concerns include that these ordinances could:

- Provide an avenue for one person/neighbor opposed to a project to significantly delay or stop development by objecting to the use of a private road thus necessitating a lengthy and expensive resolution process.

- Force an applicant to bring legal action against all of the parties to an easement (neighbors) if the issue cannot be resolved by other means.

The Planning Commission was concerned with a single objector stopping the process all together (Option 1). They also felt that the burden should not rest on an objector when they did not initiate the application (Option 3). As a compromise, Option 2 was drafted to provide an applicant with a decision on a permit before investing time and money on dispute resolution. Overall, the general approach (Option 2) remains the recommended path. Staff believes that all of the changes respect the intent established by the Planning Commission in their recommendation.

Staff is recommending that the Board adopt the inland ordinance as drafted, and adopt a resolution of intent with respect to the coastal ordinance. Should the County become aware of flaws or abuse of the ordinances at some point in the future, direction could be given to repeal or revise the ordinance as needed.

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