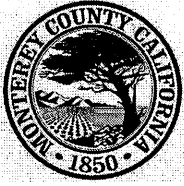


Attachment B

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Monterey County

Item No.

Board Report

Board of Supervisors
Chambers
168 W. Alisal St., 1st Floor
Salinas, CA 93901

Legistar File Number: 20-1024

December 09, 2020

Introduced: 11/25/2020

Current Status: Agenda Ready

Version: 1

Matter Type: General Agenda Item

Public hearing to consider an appeal by Vista Nadura LLC and Nader Agha from the September 30, 2020 determination of the Monterey County Planning Commission that the Vista Nadura Subdivision application (Agha/PLN990274) for a Standard Subdivision dividing a 50 acre parcel into 20 lots ranging in size from 1.1 acres to 8.5 acres is incomplete.

Project location: 8767 Carmel Valley Road, Carmel Valley Master Plan (APNs 169-011-009-000, 169-011-014-000, and 169-011-015-000).

Proposed CEQA Action: Application completeness determination is not a project per Section 15378 of the California Environmental Quality Act Guidelines.

RECOMMENDATION:

It is recommended that the Board of Supervisors:

- 1) Accept and consider the appeal by Vista Nadura LLC and Nader Agha of the Monterey County Planning Commission's incompleteness determination for the Vista Nadura Subdivision application (Agha/PLN990274);
- 2) Adopt a motion of intent determining when/if the Vista Nadura subdivision application (Agha/PLN990274) was deemed complete; and
- 3) Continue the hearing to January 26, 2021 and direct staff to return with a resolution with findings and evidence to support the Board's determination.

PROJECT INFORMATION:

Property Owner: Vista Nadura LLC

Applicant: Vista Nadura LLC (successors to Durell and Nader Agha)

Representative: Paul Hart

APNs: 169-011-009-000, 169-011-014-000, 169-011-015-000

Zoning: LDR/2.5-D-S-RAZ

Parcel Size: Approx. 50 Acres

Plan Area: Carmel Valley Master Plan

Flagged and Staked: No

SUMMARY:

Vista Nadura LLC (the application was made in the name of Durell and Nader Agha) owns a 50-acre parcel of land located north of Los Arboles Road in mid Carmel Valley. County records show that on August 26, 2002, Durell and Nader Agha ("applicant") submitted an application for a Standard Subdivision to create 20 lots ranging in size from 1.1 acres to 8.5 acres (PLN990274, known as the Vista Nadura Subdivision). The matter currently before the Board of Supervisors is to consider if the project application is incomplete or should have been deemed complete, and if so when. This

determination of application completeness is not a decision on the project. When and if the application is determined complete, if applicant desires to continue pursuing the application, the County will process the application, which would include environmental review and bringing the application to public hearing before the appropriate County decision makers.

Upon request of the applicant for an opinion that the Vista Nadura subdivision application was or should have been deemed complete prior to October 16, 2007, the Deputy Director of RMA issued a letter on April 1, 2020 reviewing the history of the application and reiterating the basis for staff's longstanding determination that the application is incomplete. (**Attachment B**). The April 1, 2020 letter provided a right of appeal of the incompleteness determination pursuant to Government Code section 65943(c). On August 3, 2020, Mr. Paul Hart, representing Vista Nadura LLC, filed an appeal to the Planning Commission of the April 1, 2020 determination.

Government Code section 65943 requires that the appeal be heard within 60 days of submission of the appeal. The Planning Commission timely heard the appeal on September 30, 2020 within the 60-day requirement. After testimony and Commissioner deliberation, the Planning Commission unanimously voted to adopt a resolution denying the Vista Nadura appeal of staff's incompleteness determination. The Commission determined that the Vista Nadura subdivision application (Agha/PLN990274) was not deemed complete prior to October 16, 2007 and continues to be incomplete pursuant to Government Code Section 65943 (CA Permit Streamlining Act). (**Attachment D**, Planning Commission Resolution No. 20-031.)

This matter comes to the Board on appeal by Vista Nadura LLC and Nader Agha from the Planning Commission's determination. (**Attachment C**.) This staff report outlines options for the Board. Staff recommends that the Board adopt a motion of intent and continue the hearing to a date certain for staff to return to the Board with a resolution supporting the Board's direction. Options for the application completeness determination include the following:

- Option 1. Determine that the application was incomplete prior to October 16, 2007 and remains incomplete;
- Option 2. Determine that the application was deemed complete by operation of law as of September 26, 2002; or
- Option 3. Determine that the application was deemed complete on a date prior to 2002, such as September 2, 2001 as proposed by appellant.

This staff report will outline the facts pertinent to the various options. The chronology and supporting documentation are attached to Attachment A to the staff report (citations will refer to attachments to **Attachment A** where applicable).

DISCUSSION:

Procedural Issues

The first issue raised in this appeal is whether the Board of Supervisors has jurisdiction to hear the appeal. County staff recommends that the Board accept and consider the appeal. Government Code section 65943 requires counties to provide a process for appeal of a determination that an application is incomplete and requires a final written determination on the appeal within 60 days of receipt of the

appeal, unless the applicant agrees to extend the time. The Planning Commission decision was heard on September 30, 2020 within 60 days of applicant's appeal. At the Planning Commission hearing, applicant's attorney was provided the opportunity to agree to extend the time for applicant to appeal the Planning Commission's decision to the Board of Supervisors, but applicant's attorney declined at that hearing to agree to an extension of time; however, the applicant then filed an appeal of the Planning Commission's decision to the Board of Supervisors on or about October 16, 2020. By filing the appeal, the applicant implicitly agreed to extend the time for County to consider applicant's appeal and waived the 60 day deadline.

Applicant asserts that the appeal is filed pursuant to Monterey County Code Chapter 19.17, which provides for an administrative process to request a Director's interpretation or administrative decision in connection with the County's subdivision ordinance and then to appeal the determination to the Planning Commission and thereafter appeal the Planning Commission's decision to the Board of Supervisors. Staff finds that a "Director's Interpretation" applies to cases where a section of code is being interpreted, and which can apply in other similar cases. With this matter, the applicant is requesting a very fact specific determination on their project's process. As such, staff does not agree that this qualifies as a "Director's Interpretation" subject to County Code. While prior correspondence from staff to the applicant referenced the opportunity to appeal pursuant to Chapter 19.17, the most recent correspondence relies on Government Code section 65943 as the procedural basis for the appeal. (e.g., **Attachment A, Exhibits 19 and 22.**) In any event, both or either avenue provides the grounds for the Board of Supervisors to accept and hear the appeal.

To the extent that the procedures in Chapter 19.16, incorporated by Chapter 19.17, are applicable to this appeal, the hearing on the appeal is de novo. Section 19.16.045 states that the appropriate authority shall consider and render a decision on the appeal within 60 days. County's longstanding interpretation and implementation of this provision and similar language in the County's zoning ordinances is to bring the appeal to hearing within 60 days, unless an extension of time is agreed upon, with the Board retaining discretion to take such additional time as is reasonably needed to reach a decision on the appeal. The hearing of this appeal complies with the timeframe because it is being held within 60 days of receipt of the appeal. Due to the need for the Board to provide direction to staff on the issues raised by appellant, staff is recommending that the Board conduct the hearing, provide direction to staff in the form of a motion of intent, and continue the hearing to a date certain for staff to return with a written resolution with findings and evidence to support the Board's decision. Staff recommends the date of January 26, 2021 for the continued hearing date due to the upcoming County winter recess and time needed to prepare the resolution.

The issue in this appeal is whether the application for the Vista Nadura subdivision was deemed complete prior to October 16, 2007. The sole question is whether the application is complete or incomplete, and if complete, what date the application was deemed complete. The appeal lists "several determinations" to be made, but all of the questions identified by appellant as to the status of various submissions relate to the single issue of whether the application was deemed complete and if yes, on what date. The question appellant raises of what rules will apply to the processing of the application is derivative of the completeness date determination because the CA Subdivision Map Act (Government Code section 66474.2) provides that, with some exceptions, the County applies the local ordinances, policies and standards in effect when a subdivision application is deemed complete.

The applicant contends that the application should have been deemed complete before October 16, 2007, the cut-off date after which applications have to be evaluated pursuant to the policies of the 2010 General Plan, including its Carmel Valley Master Plan. Monterey County General Plan Policy LU-9.3 provides that subdivision applications deemed complete on or before October 16, 2007 are subject to the County plans and regulations in effect when the applications were deemed complete. Accordingly, if the application was deemed complete on or before October 16, 2007, the 1982 General Plan and earlier Carmel Valley Master Plan apply to the project, unless the applicant elects to go under the 2010 General Plan or a general plan amendment is required. If the application was not complete as of October 16, 2007, the 2010 General Plan and updated Carmel Valley Master Plan apply, including policies such as Long Term Sustainable Water Supply (PS-3.1), Development Evaluation System (LU-1.19), and Carmel Valley Build Out Cap (CV-1.6).

Regardless of the application completeness date, the project application will be subject to a complete analysis and process. That includes completing environmental review (CEQA) that will involve a hydrogeologic report as well as other technical data (e.g. traffic report). There are differing policies that apply depending on if the project is evaluated against the 1982 General Plan or the 2010 General Plan.

Application Background

The Vista Nadura application (PLN990274) is a proposed 20 lot standard subdivision tentative map on a 50 acre parcel of land located north of Los Arboles Road in mid Carmel Valley. The property is owned by the appellant, Vista Nadura LLC. The original application was made in the name of Durell and Nader Agha. Ownership of the subject property has changed hands within the Agha family and related trust several times since 2002. Appellant's attorneys have informed staff that the Vista Nadura LLC is the current owner of the property and that Mr. Agha is an authorized representative of Vista Nadura LLC. The appeal to the Planning Commission was filed by Vista Nadura LLC. This appeal to the Board of Supervisors was filed in the name of Vista Nadura LLC and Nader Agha.

Application Completeness Options

The Permit Streamlining Act (Gov't Code sec. 65920 et seq.) requires public agencies to compile a list, often called the "application checklist," that specifies in detail the information that an applicant must submit for an application for a development project. (Gov't Code sec. 65940.) After the applicant submits the application and accompanying required information, the local agency must, not later than 30 days after receiving an application for a development project, inform the applicant in writing whether the application is complete. An application is deemed complete: 1) when the materials and information required for the project application are filed with all applicable fees, or 2) when an agency does not respond in writing within 30 days with a determination whether the application is complete. (Gov't Code sec. 65943(a).) After an application is deemed complete, a local agency is not prohibited from requesting the applicant to clarify, correct or supplement the information provided. (Gov't Code sec. 65944(a).)

The Board of Supervisors can accept or deny the appeal. The Board can find the application incomplete, or alternatively, the Board could find that the application is complete and establish the completion date, such as September 26, 2002. As noted above, a completion date prior to October

16, 2007 would mean the application is subject to policies of the 1982 General Plan (unless a general plan amendment is required or applicant elects to go under the 2010 General Plan), and a completion date after October 16, 2007 would be subject to policies of the 2010 General Plan.

Some options for the Board's consideration are discussed below.

Option 1. *Determine that the application was incomplete prior to October 16, 2007 and remains incomplete.*

Staff has consistently determined, pursuant to County's subdivision ordinance, that the application is missing a hydrogeologic report required by Title 19 (County's Subdivision Ordinance). Staff has repeatedly communicated to the applicant that the application is missing information required to find the application complete. **Attachment A** to this staff report provides the chronology of communications over the last 18 years and supporting documentation.

Some key points/dates leading to staff's determination, upheld by the Planning Commission, include the following:

June 10, 1999; Applicant submitted an Application Request form (aka pre-application). (**Attachment A, Exhibit 1b**).

September 2000; Board adopted an ordinance adding Section 19.03.015.L.3.A to Title 19 (non-coastal subdivision ordinance) of the Monterey County Code which requires that "Prior to an application being deemed complete, a hydrogeologic report based on a comprehensive hydrological investigation shall be prepared by a certified hydrogeologist, selected by the County and under contract with the County, at the applicant's expense." This section took effect on June 26, 2000. Subdivision applications deemed complete prior to June 26, 2000 were not subject to these new provisions.

July 6, 2001: County staff provided an application checklist dated July 6, 2001 identifying the information and materials required to submit an application (**Attachment A, Exhibit 1a**). A nominal fee is required for an Application Request to cover time for staff to visit the site and develop an application checklist.

August 26, 2002; Applicant filed his application (PLN990274) and paid a filing fee of \$15,958 on August 26, 2002. (**Attachment A, Exhibit 1b**). The application did not include a hydrogeologic report prepared by a certified hydrogeologist selected by the County, and that report still has not been submitted. In the 1999-2002 period, the Board of Supervisors adopted various resolutions (99-379, 01-133, and 02-024) affecting subdivision processing, including Resolution No. 02-024 which implemented Policy 39.3.2.1 of the former Carmel Valley Master Plan by stating a qualified policy of denying new subdivisions in Carmel Valley between Route 1 and Morse Dr, which includes the subject property. Since Resolution 02-024 pertained to a final action, not submitting an application, County accepted the Vista Nadura subdivision application

on August 26, 2002.

September 26, 2002; By letter dated September 26, 2002, staff informed the applicant that the application was incomplete due to missing information, and staff provided a list of the additional information required. (**Attachment A, Exhibit 1.**)

Over the succeeding years, the applicant submitted additional missing information to deem the application complete, except for hydrogeologic information required by the County's subdivision regulations (Section 19.03.015.L.3.A of the Monterey County Code). The Environmental Health Bureau (EHB) has consistently determined that unless this information is submitted, it cannot agree the application is complete. (e.g., **Attachment A, Exhibit 8.**) Staff has sent multiple letters after October 2007 informing the applicant of the information needed to render the application complete. (e.g., **Attachment A, Exhibit 9**, November 30, 2007 letter from EHB to applicant.) The course of correspondence shows that applicant has still not submitted information required to analyze water supply. (e.g., **Attachment A, Exhibits 17 and 21.**)

Option 2. *Determine that the application was deemed complete by operation of law on September 26, 2002.*

In the appeal, applicant contends that, pursuant to Government Code Section 65943(b), the application is deemed complete by operation of law because County failed to timely notify applicant in writing within 30 days after the August 26, 2002 submission of the application.

The documents show that a planner accepted the application on August 26, 2002 and sent a letter dated September 26, 2002 stating that the application is incomplete. (**Attachment A, Exhibits 1b and 1.**) September 26 is 31 days after the application submittal. Government Code section 65943(a) provides that if the written determination that the application is incomplete is not made "within 30 days after receipt of the application, and the application includes a statement that it is an application for a development permit, the application shall be deemed complete."

While there are arguments as to why this technicality, asserted 18 years later, would not render the application complete, the Board could find that, although applicant had not provided the missing information, the application was deemed complete by operation of law on September 26, 2002. The application was accepted for processing on August 26, 2002. A notice of incompleteness was sent on September 26, 2002. Since that is the 31st day after submission, the application could be accepted as complete effective September 26, 2002.

Option 3. *Determine that the application was deemed complete on a date prior to 2002, such as September 2, 2001 as proposed by appellant.*

In the appeal, Mr. Hart reaffirms the list of 17 contentions presented to the Planning Commission as to why the application should have been deemed complete before October 17, 2007. His contentions and staff responses include the following:

- Contention: The County mis-identified the date of the applicant's Application which was filed on 8/1/01 and that the Application was complete prior to October 16, 2007, and [staff] misapplied section 19.03.15.L.3 of the Monterey County Code;
 - **Response:** Correspondence from applicant's representative from August 23, 2002 shows that County and applicant were communicating about the requisites for application submittal in August 2002, which implies applicant contemporaneous recognition that the applicant had not yet been submitted. (**Exhibit E to Appeal**)
 - **Response:** Appellant contends the subdivision application should not have been deemed incomplete due to the failure to include the requested information. Appellant contends this was not the proper procedure or standard in place at that time, rather, the application should have been deemed complete before October 16, 2007, when the applicant pointed to a proposed source of water supply. Appellant asserts that the actual sufficiency and viability of the water supply was not a precondition of deeming the application complete, rather it was an issue to be evaluated and examined during the project review, environmental review process under CEQA, and approval/denial process. However, in requiring a hydrogeologic report before deeming the application complete, EHB was implementing County regulation. Section 19.03.015.L.3.A of Title 19 (non-coastal subdivision ordinance) of the Monterey County Code requires that "Prior to an application being deemed complete, a hydrogeologic report based on a comprehensive hydrological investigation shall be prepared by a certified hydrogeologist, selected by the County and under contract with the County, at the applicant's expense." In the Project Referral Sheet accompanying the September 26, 2002 incomplete letter, EHB staff notes that the hydrogeologic report is necessary because the Initial Water Use Questionnaire indicates that the proposed project could result in intensification of water use. (**Attachment A, Exhibit 1.**) In 2006, staff was still requesting this information. (**Attachment A, Exhibit 8.**)
- Contention: The County failed to accept applicant's Application when submitted on 8/23/02 requiring communication from Applicant's legal counsel;
 - **Response:** County staff correspondence dated August 21, 2002 shows that County informed applicant that County was preparing the application checklist so that applicant could submit its application (**Exhibit E to Appeal**), and the County did accept the application on August 26, 2002. (**Attachment A, Exhibit 1b.**)
- Contention: The Planning Commission failure to timely provide a written determination on the appeal within 60 days of the filing of the appeal on August 3, 2020 renders the application complete by operation of law pursuant to Government Code Section 65943(c); Appellant contends that the County missed this deadline because the Planning Commission's resolution on its appeal was mailed on October 15, 2020, after the 60 days.
 - **Response:** Government Code section 65943(c) requires a final determination in writing on the appeal of application incompleteness within 60 days of the filing of the appeal,

or the application is deemed complete by operation of law. The County Planning Commission heard the appellant's application completeness appeal and made its final determination on September 30, 2020, within 60 days from the filing of the appeal. The written staff report and resolution, which the Commission adopted with one alteration made orally at the hearing, were provided to the applicant at or before the September 30, 2020 hearing date. Therefore, applicant received the written determination within the 60 days. Clerical finalization of the resolution (recording the vote and obtaining the Chair's signature) and mailing of the resolution are ministerial functions, so the fact that the resolution was mailed on October 15, 2020, does not trigger the automatic completion date. In any event, applicant has appealed the Planning Commission's determination, so the Board's determination will control.

- Contention: The Application was determined complete by the County, but recommended for denial.
 - **Response:** Appellant is referring to a memo dated July 12, 2011 from EHB to RMA stating the application is complete with recommendation for denial because applicant has not provided information demonstrating a long term sustainable water supply. (**Exhibit G to Appeal**.) However, there is a second, later memo dated November 15, 2011 from EHB to RMA stating the application is incomplete with recommendation for denial for the same reasons. (**Attachment A, Exhibit 16.**) These contradictory memoranda are not conclusive proof, but in any event, if the July memo were the basis for a completeness determination, it would be evidence for a July 2011 completeness date, not an earlier date.

CEQA:

CEQA is formally initiated when a project is deemed complete. However, despite the application remaining incomplete due to incomplete information about the proposed water supply, in July of 2006, the RMA decided to offer Mr. Agha the opportunity to move forward with the subdivision by initiating the EIR CEQA process. A Request for Proposal (RFP #9903, dated 7/24/2006-8/21/2006) was issued and two consultant firms responded with proposals: 1) EMC of Monterey, and 2) Culbertson, Adams and Associates of San Diego. On December 22, 2006 Mr. Agha was sent a letter from Bob Schubert, Acting Planning and Building Services Manager, that the firm EMC had been selected by the County to prepare an EIR for the Vista Nadura Subdivision (**Attachment A, Exhibit 23**). Mr. Agha was asked to review the proposal and let Mr. Schubert know if Mr. Agha agreed to the scope and terms for the EIR. If so, a Professional Service Agreement (PSA) between the County and consultant would be prepared in accordance with the proposal as well as a Funding Agreement for Mr. Agha to reimburse the County for costs related to that PSA. According to a letter sent to Mr. Agha on October 28, 2010 from Mr. Schubert, a response was never received or deposit made for the EIR, so work was never started on the EIR. (**Attachment A, Exhibit 24**).

The application status determination now before the Board is not a project under CEQA Guidelines section 15378(b)(5) because it does not constitute approval of the subdivision application or commit the County to approval of the subdivision. This determination is an administrative activity that will not result in direct or indirect physical changes in the environment. The standard subdivision application itself will be subject to CEQA review once the application is deemed complete. That includes

completing environmental review (CEQA) that will involve a hydrogeologic report as well as other technical data (e.g. traffic report).

OTHER AGENCY INVOLVEMENT

The following agencies have been consulted on the appeal:

- Environmental Health Bureau
- County Counsel Office

The project site is within the Carmel Valley Planning Area. Consideration of the date a project was deemed complete is not within the preview of the Land Use Advisory Committee (LUAC) authority so was not referred to the Carmel Valley LUAC. If the project moves forward, it will be subject to review by the Carmel Valley LUAC.

FINANCING:

Application fees for this request and appeal were paid. If the project moves forward, subdivision and EIR projects are considered extraordinary projects that require the applicant to pay for actual costs of the EIR consultant as well as staff time to process the application.


BOARD OF SUPERVISORS STRATEGIC INITIATIVES:

This action represents effective and timely response to our RMA customers. This matter has been processed in accordance with all applicable policies and regulations.

Check the related Board of Supervisors Strategic Initiatives:

- Economic Development
- Administration
- Health & Human Services
- Infrastructure
- Public Safety

Prepared by: John M. Dugan FAICP, Deputy Director of Land Use and Community Development

Reviewed by: Carl P. Holm, AICP, Director, Housing and Community Development 

The following attachments are on file with the Clerk of the Board:

Attachment A - Vista Nadura Subdivision Key Dates, Exhibits 1 through 24, including:

- Exhibit 1 - Incomplete letter 9/26/2002
- Exhibit 1a - Application Requirements Checklist Form 7/6/2001
- Exhibit 1b - Application Form 8/26/2002
- Exhibit 2 - Additional Response from EHB to Nader Agha 11/04/2002
- Exhibit 3 - 18 - Other Evidence
- Exhibit 8,10,12 Incomplete letters from Environmental Health Bureau
- Exhibit 19 - Letter from John Dugan to Paul Hart Summarizing project history
- Exhibit 20 - Letter from Paul Hart requesting director's interpretation
- Exhibit 21 - Memorandum from Environmental Health Bureau
- Exhibit 22 - Letter from John Dugan to Paul Hart
- Exhibit 23 - Letter from Bob Schubert to Nader Agha

Exhibit 24 - Letter from Bob Schubert to Nadar Agha stating options for subdivision
Attachment B - April 1, 2020 Letter from Dugan to Hart
Attachment C - Vista Nadura LLC Appeal to Board of Supervisors
Attachment D - Planning Commission Resolution

cc: Front Counter Copy; Zoning Administrator, Brandon Swanson, RMA Services Manager; Rey & Clark, Property Owner; Adrian Lopez; The Open Monterey Project (Molly Erickson); LandWatch (Executive Director); Interested Party List in Accela; Project Files PLN190332.