

COUNTY OF SONOMA
PERMIT AND RESOURCE MANAGEMENT DEPARTMENT

2550 Ventura Avenue, Santa Rosa, CA 95403
(707) 565-1900 FAX (707) 565-1103

DATE: November 3, 2009 at 2:30 p.m.

TO: Board of Supervisors

FROM: Jane Riley, Project Planner

SUBJECT: ADA09-0001; [REDACTED] (Property Owner), [REDACTED] (Appellant)

Action of the Board of Zoning Adjustments:

At its regularly scheduled meeting on September 10, 2009, the Board of Zoning Adjustments with a 5-0 vote denied the request by [REDACTED] to overturn staff's decision that a legal non-conforming use continues and the existing four-plex may be remodeled under state and local laws, for property located at 1680 Center Way; APN 071-192-023; Zoning R1 (Low Density Residential), 4 du/ac, VOH (Valley Oak Habitat); Supervisorial District No. 5.

On September 17, 2009, an appeal of the decision was filed with the Board of Supervisors by [REDACTED]

ISSUES DISCUSSED AT THE PUBLIC HEARING

Issue #1: Survival of Legal Non-Conforming Use.

Discussion

The appellant suggests that the legal non-conforming use should have been deemed to have lapsed when the property was found to have significant code violations as early as June of 2005 or at least by August 31, 2007, when the building was "red-tagged" and the gas and electric service was disconnected. However, code violations, even "red-tags," are not the measure for termination of a legal non-conforming use under the County Code. Instead, under Section 26-94-030, Permit and Resource Management Department (PRMD) staff must determine when the "actual operation" of the use ceased. County records indicate that the four-plex was used and occupied at least through June of 2007, and that the structure continued to be occupied even as of August 31, 2007. It was not until May 9, 2008, that County inspectors documented that the structure's residential four-plex use had, in fact, ceased, with the building vacant and boarded. The May 9, 2008 date was used by PRMD staff in making its fall 2008 determination that the legal non-conforming use survived and that permits could be issued.

Resolution

The Board of Zoning Adjustments (BZA) agreed with staff's determination that the legal non-conforming use continued. The BZA noted that, even if the August 31, 2007 date was used

instead, it would be of no significance because termination of the use and revocation of permits would be inappropriate under the provisions of Government Code Section 65852.25 (see Issue #2, below) and the principles of estoppel (see Issue #3 below).

Issue #2: Applicability of Government Code Section 65852.25

Discussion

California Government Code Section 65852.25 limits local governments' ability to prohibit the reconstruction or rebuilding of a multifamily dwelling that is damaged by a catastrophic event such as fire or flood. Paragraph (a) of the Section provides:

"No local agency shall enact or enforce any ordinance, regulation, or resolution that would prohibit the reconstruction, restoration, or rebuilding of a multifamily dwelling that is involuntarily damaged or destroyed by fire, other catastrophic event, or the public enemy."

So long as the subject four-plex meets the requirements of Section 65852.25, that Section would preempt application of the County's Legal Non-conforming Use Ordinance and allow reconstruction of the structure even if the use had lapsed. As the appellant points out, however, one of the criteria of Subsection (d) of Section 65852.25 was not met. Subsection (d)(6) provides that the building permit for the reconstruction or restoration be obtained within two years of the date of the damage. In this case, the flood damage occurred in January of 2006, but the first building permit for repairs was not obtained until November 12, 2008.

Subsection (e) of Section 65852.25, however, allows the County, by "Ordinance, Regulation or Resolution," to allow reconstruction despite that delay as follows: "A local agency may enact or enforce an ordinance, regulation or resolution that grants greater or more permissive rights to restore, reconstruct, or rebuild a multifamily dwelling."

Under the circumstances presented here, staff recommends that this provision be utilized. Section 65852.25 is a clear statement of the State legislature's intent to promote the preservation and reconstruction of multifamily housing that has been damaged by natural events. The County has a long-standing practice of allowing additional time, more than two years, for reconstruction of residential structures damaged by fire or flood and in this case, the financial circumstances, including the property's foreclosure and general collapse of the real estate market, are additional mitigating factors that warrant application of this statute.

Resolution

The BZA agreed with staff's recommendation, made a finding that Subsection (e) of Government Code Section 65852.25 is appropriately utilized, and adopted a Resolution to that effect.

Issue #3: Estoppel

Discussion

County Counsel cautioned PRMD and the BZA that they might need to consider whether the legal principles of estoppel might now prevent the County from denying use of the four-plex after having issued, inspected and finalized building permits for its repair and renovation. Although estoppel is rarely found against a public agency, the courts may apply principles of estoppel to prevent rescission of permits where fairness and policy demand.

Resolution

The BZA agreed with staff that it is unnecessary to make a final determination of estoppel, and instead adopted a Resolution confirming that the renovation and re-occupancy of the four-plex is allowable under the provisions of Government Code Section 65852.25 as set forth above and in the attached Resolution.

ALTERNATIVE

The Board of Supervisors may find that the actual use of the four-plex ceased as of August 31, 2007 and that the legal non-conforming use has thus terminated under Section 62-94-030. The Board may further find that the property owner does not qualify for relief under Government Code Section 65852.25 because he failed to obtain building permits within two years of the flood damage. If the Board makes those findings, it is recommended that the Board then consider whether principles of estoppel prevent rescission of the issued repair permits.

If the Board of Supervisors determines it appropriate to approve the appeal request, staff requests that the item be continued and that the Board provide direction to staff regarding the basis for findings. Staff would then prepare a final Resolution for Board adoption.

List of Attachments:

Draft Board of Supervisors Resolution

EXHIBIT A: Appeal Form

EXHIBIT B: Board of Zoning Adjustments Resolution No. 09-019

EXHIBIT C: Board of Zoning Adjustments Minutes dated September 10, 2009

EXHIBIT D: Board of Zoning Adjustments Staff Report dated September 10, 2009

Resolution Number

County of Sonoma
Santa Rosa, California

November 3, 2009
ADA09-0001 Jane Riley

RESOLUTION OF THE BOARD OF SUPERVISORS, COUNTY OF SONOMA, STATE OF CALIFORNIA, DENYING THE APPEAL OF A BOARD OF ZONING ADJUSTMENTS DECISION TO UPHOLD THE ADMINISTRATIVE DETERMINATION THAT A MULTI-FAMILY RESIDENCE IS LEGAL NON-CONFORMING USE AND THAT BUILDING PERMITS MAY ISSUE PURSUANT TO GOVERNMENT CODE 65852.25 FOR PROPERTY LOCATED AT 16680 CENTER WAY, GUERNEVILLE; APN 071-192-023.

WHEREAS, the appellant, [REDACTED], filed an appeal with the Sonoma County Permit and Resource Management Department to appeal an Administrative Determination that the subject property contains a legal non-conforming multi-family residence and that building permits for its repair and renovation may issue for property located at 16680 Center Way, Guerneville; Zoning R1 (Low Density Residential), 4 du/ac, VOH (Valley Oak Habitat); APN 071-192-023; Supervisorial District No. 5; and

WHEREAS, this appeal has been found to be categorically exempt from the California Environmental Quality Act (CEQA) under CEQA Guidelines, Sections 15300.1, Ministerial Actions; 15301, Existing Facilities; and 15302, Reconstruction; and

WHEREAS, on September 10, 2009, the Board of Zoning Adjustments held a public hearing, and with a 5-0 vote, denied the request by [REDACTED] to overturn staff's decision that a legal non-conforming use continues and the existing four-plex may be remodeled under state and local laws; and

WHEREAS, on September 17, 2009, an appeal of the denial was filed with the Board of Supervisors by [REDACTED]; and

WHEREAS, in accordance with the provisions of law, the Board of Supervisors held a public hearing on November 3, 2009, at which time all interested persons were given an opportunity to be heard.

NOW THEREFORE BE IT RESOLVED, the Board of Supervisors does make the following findings:

1. The residential four-plex survives as a legal nonconforming use under County Code Section 26-94-030, since the residential use of the structure did not lapse for a period of greater than one year. Vacation of the structure was not confirmed until May 9, 2008, and its use resumed in November 2008, when repairs and renovations began.
2. The Government Code at Section 65852.25 limits local governments' ability to prohibit the reconstruction, rebuilding or repair of a multi-family structure that is damaged by a catastrophic event, in this case a flood, whether that use is non-conforming or not. The legislative intent of this Section is clearly to preserve multi-family housing that has been damaged, and allows a local agency to adopt or apply more permissive standards.
3. It has long been the County's practice to allow more than two years for the issuance and

finalization of building permits for repair of damage caused by catastrophic events, including fires and floods. The foreclosure of the subject property and the general collapse of the real estate market are additional factors taken into account in determining that, pursuant to Subdivision (e) of Section 65852.25 of the Government Code, a period longer than the specified minimum of two years to obtain building permits should be allowed.

4. In light of the applicability of Section 65852.25, it is unnecessary to determine whether principles of estoppel might prevent rescission of the building permits already issued.
5. The property is not located within a FEMA mapped flood zone and is not within the F1 (Floodway Combining District) or F2 (Floodplain Combining District) zoning designations. However, the structure has suffered repetitive losses, has been listed for more than ten years on the County's Flood Elevation Mitigation Program Priority list, and is therefore automatically eligible for participation in the Flood Elevation Mitigation Program. Such structural elevation would be consistent with the County's Local Hazard Mitigation Plan.
6. Issuance of the building permits is consistent with the General Plan Housing Element goal and objective to preserve and rehabilitate multi-family housing units, and the project is eligible for County rehabilitation loan assistance in exchange for 20-year affordability requirements on three of the units.

BE IT FURTHER RESOLVED, that the Sonoma County Board of Supervisors denies the requested appeal of an Administrative Determination.

BE IT FURTHER RESOLVED that the Board of Supervisors designates the Clerk of the Board as the custodian of the documents and other material which constitute the record of proceedings upon which the decision herein is based. These documents may be found at the office of the Clerk of the Board, 575 Administration Drive, Room 100-A, Santa Rosa, California 95403.

SUPERVISORS VOTE:

Brown: Kerns: Zane: Carrillo: Kelley:

Ayes: Noes: Absent: Abstain:

SO ORDERED.

County of Sonoma
Santa Rosa, California

September 10, 2009
ADA09-0001 Jane Riley

RESOLUTION OF THE BOARD OF ZONING ADJUSTMENTS,
COUNTY OF SONOMA, STATE OF CALIFORNIA, DENYING
THE APPEAL OF AN ADMINISTRATIVE DETERMINATION
THAT A MULTI-FAMILY RESIDENCE IS LEGAL NON-
CONFORMING USE AND THAT BUILDING PERMITS MAY
ISSUE PURSUANT TO GC 65852.25 FOR PROPERTY
LOCATED AT 16680 CENTER WAY, GUERNEVILLE; APN
071-192-023.

WHEREAS, the appellant, [REDACTED], filed an appeal with the Sonoma County Permit and Resource Management Department to appeal an Administrative Determination that the subject property contains a legal non-conforming multi-family residence and that building permits for its repair and renovation may issue for property located at 16680 Center Way, Guerneville; Zoning R1 (Low Density Residential), B6-4 du/ac, VOH (Valley Oak Habitat); APN 071-192-023; Supervisorial District No. 5; and

WHEREAS, this appeal has been found to be categorically exempt from the California Environmental Quality Act (CEQA) under CEQA Guidelines, Sections 15300.1, Ministerial Actions; 15301, Existing Facilities; and 15302, Reconstruction; and

WHEREAS, in accordance with the provisions of law, the Board of Zoning Adjustments held a public hearing on September 10, 2009, at which time all interested persons were given an opportunity to be heard.

NOW THEREFORE BE IT RESOLVED, the Board of Zoning Adjustments does make the following findings:

1. The residential four-plex survives as a legal nonconforming use under County Code Section 26-94-030, since the residential use of the structure did not lapse for a period of greater than one year. Vacation of the structure was not confirmed until May 9, 2008, and its use resumed in November 2008, when repairs and renovations began.
2. The Government Code at Section 65852.25 limits local governments' ability to prohibit the reconstruction, rebuilding or repair of a multi-family structure that is damaged by a catastrophic event, in this case a flood, whether that use is non-conforming or not. The legislative intent of this Section is clearly to preserve multi-family housing that has been damaged, and allows a local agency to adopt or apply more permissive standards.
3. It has long been the County's practice to allow more than two years for the issuance and finalization of building permits for repair of damage caused by catastrophic events, including fires and floods. The foreclosure of the subject property and the general collapse of the real estate market are additional factors taken into account in determining that, pursuant to Subdivision (e) of Section 65852.25 of the Government Code, a period longer than the specified minimum of two years to obtain building permits should be allowed.
4. In light of the applicability of Section 65852.25, it is unnecessary to determine whether principles of estoppel might prevent rescission of the building permits already issued.

5. The property is not located within a FEMA mapped flood zone and is not within the F1 (Floodway Combining District) or F2 (Floodplain Combining District) zoning designations. However, the structure has suffered repetitive losses, has been listed for more than 10 years on the County's Flood Elevation Mitigation Program Priority list, and is therefore automatically eligible for participation in the Flood Elevation Mitigation Program. Such structural elevation would be consistent with the County's Local Hazard Mitigation Plan.
6. Issuance of the building permits is consistent with the General Plan Housing Element goal and objective to preserve and rehabilitate multi-family housing units, and the project is eligible for County rehabilitation loan assistance in exchange for 55-year affordability requirements on three of the units.

BE IT FURTHER RESOLVED, that the Sonoma County Board of Zoning Adjustments denies the requested appeal of an Administrative Determination.

BE IT FURTHER RESOLVED that the Sonoma County Board of Zoning Adjustments action shall be final on the 11th day after the date of the Resolution unless an appeal is taken.

BE IT FURTHER RESOLVED that the Board of Zoning Adjustments designates the Secretary of the Board of Zoning Adjustments as the custodian of the documents and other material which constitute the record of proceedings upon which the decision herein is based. These documents may be found at the office of the Sonoma County Permit and Resource Management Department, 2550 Ventura Avenue, Santa Rosa, CA 95403.

THE FOREGOING RESOLUTION was introduced by Commissioner Davis, who moved its adoption, seconded by Commissioner Shahhosseini, and adopted on roll call by the following vote:

Commissioner Feibusch	Aye
Commissioner Shahhosseini	Aye
Commissioner Schaffner	Aye
Commissioner Davis	Aye
Commissioner Williams	Aye

Ayes: 5 Noes: 0 Absent: 0 Abstain: 0

WHEREUPON, the Chairman declared the above and foregoing resolution duly adopted; and

SO ORDERED.

Sonoma County Board of Zoning Adjustments DRAFT MINUTES

Sonoma County Permit and Resource Management Department
2550 Ventura Avenue, Santa Rosa, CA 95403
(707) 565-1900 FAX (707) 565-1103

Date: **September 10, 2009**
Meeting No.: **09-011**

ROLL CALL

Commissioners

Marcel Feibusch
Komron Shahhosseini
Lisa Schaffner
Pamela Davis
Bob Williams, Chair

Staff Members

Jennifer Barrett
Melinda Grosch
Blake Hillegas
Jane Riley
Susan Dahl
David Hurst # 1 and 2, Sue Gallagher #3

Call to order: 1:00 p.m.

Public Comment on Items Not on the Agenda: **Martin Sessi**, Penngrove, has an item coming up on the agenda for redevelopment in downtown Penngrove which includes mixed use and will help to enliven downtown Penngrove. He invited the commission and the community to an open house September 19 from 10:00 to noon at the site at the corner of Woodward Avenue and Main Street.

REGULAR CALENDAR

Item No. 3	Time:	1:30 p.m.	File:	ADA09-0001
	Applicant:	██████████	Staff:	Jane Riley
	Env. Doc.:	Categorical Exemption		
	Proposal:	Appeal of an Administrative Determination that the subject property contains a legal non-conforming 4-plex which may be repaired and remodeled, and that building permits can issue pursuant to GC §65852.25.		
	Location:	16680 Center Way, Guerneville		
	APN:	071-192-023	Supervisory District:	5
	Zoning:	R1 (Single Family Residential), 4 du/ac, VOH (Valley Oak Habitat)		

Jane Riley summarized the written staff report which is incorporated herein by reference.

Questions from Commissioners: **Commissioner Shahhosseini** asked if government code supercedes County code, and it was confirmed to be true.

Commissioner Williams asked for clarification that the raising of the building was not at issue today, and Staff Riley confirmed that the purpose of the hearing was limited to a determination of whether the building permits for remodeling were issued erroneously because the legal non-conforming use did not survive. Flood elevation issues were not up for discussion; the elevation program is a federal program and the list was established over 10 years ago, so any appeal period for flood elevations has passed.

Public Hearing Opened: 2:40 p.m.

Speakers: ██████████, **appellant**, thanked staff for their work. She has met with ██████████ She is in favor of project, but thinks the replacement should be a single family dwelling or a duplex.

The project as written will be detrimental to the health and safety of the other residents, and affordable housing should not be used to sidestep zoning. The current residential character should be considered, and the towering building being proposed will be out of character with the neighborhood, which already has a shortage of parking.

██████████ continued that the area is zoned R1, and Center Street is narrow with drainage and flooding problems. ██████████ stated that the building was never used as a four plex, because the lower levels flood. Repairs were made without permits, and the whole building was red tagged in 2007. The Code states that the legal non conforming use ceases if the property is vacated for a continuous period of one year. It was red tagged as unsafe in June of 2007 and the utilities were disconnected in August of 2007. These factors are commonly used as a basis for determining legal non conforming status. The date used by Code Enforcement (May 2008) was arbitrary. State Code also says that reconstruction and restoration are to take place within two years, but the records show that the permit was applied for three years after the property became uninhabitable. ██████████ cited Government Code 65852.25.

The project will be detrimental to services, fire access, safety and visual privacy. The roof will be one story higher than existing buildings and neighbors will lose privacy. Ambient noise will be amplified.

Housing Element policies state that the community character shall be preserved and areas that flood are to be avoided. The issue of estoppel being used by a public agency could create a precedent and could negatively impact public policy.

Bard Henry, Guerneville, agrees with the appellant. The site was empty more than a year, and the County does not have the dates correct. The site was reg tagged in August of 2007, and no one has been there since. The County date was based on a random site inspection. Henry said that estoppel should not be used and can injure other property owners. Henry wants the downstairs units eliminated. The property was sold as raw land to ██████████, and it should not be assumed that it is still all right to put in four units, which will negatively affect the rest of the neighborhood by increasing traffic, density, noise, and loss of parking and privacy. The project is a 40 foot monstrosity. Henry said a duplex would be better suited for the site.

Susan Pappan, Guerneville, lives directly behind the subject property and echoed the feelings of the appellant. Her privacy will be heavily impacted and she is concerned about loss of property value. The canyons also intensify noise. Pappan said a duplex would be more appropriate for the location.

Linda Johns, neighbor, also concurred with prior speakers. Johns stated that the plans submitted are out of scale, inconsistent and incomplete. The bays are not showing, which will expand the building two feet into the easement, making it impassable for emergency service vehicles. The project will negatively affect her property. The footprint of the original building has been changed, which Johns thinks is illegal when using government money. Johns claimed the project to be an abuse of affordable housing that will be a detriment to the community. The plans were done without benefit of a survey, and the location of the property lines should be determined.

Bob Barter, Guerneville, rebutted the issue in the staff report which calls for an amnesty program. Housing Element Policy states that the County should be sensitive to the environment, and that flood areas should be avoided. Affordable housing should not be used to as a bludgeon. Neighbors attempted to compromise with ██████████ just to build a duplex, and he turned them down. This is not about affordable housing, it is about making a profit. The property was condemned, and the Commission needs to look at the impact on the community. The project is wrong on all levels. Barter would like a win-win situation, and in the case of a duplex, the roof would only be raised three feet.

██████████, property owner, stated that he was told by the County that he was buying a four-plex when he bought the property to be rehabilitated. The site has four electrical meters and four sewer hook ups, and the power was never off for more than 12 months at a time. Code Enforcement said that the violations were correctable. The state of the building is blighted, and ██████████ wanted to improve the situation, while cooperating with PRMD and CDC. The final design plans are not done yet, but additional parking will be created and the structure will look completely new and will attract a higher quality tenant. ██████████ plans to manage the property, and lives nearby. ██████████ has met with the neighbors, and said that many other buildings in the neighborhood have also been raised. This changes a neighborhood. Elevations are allowed in the Code, with FEMA, and other agencies. ██████████ wanted to keep the four unit zoning status, and will consider incorporating screening on the rear and sides to create privacy.

Commissioner Feibusch asked if the design plans had been approved, and what exactly was being decided at today's hearing. Staff **Riley** said that decision is limited to whether the permits were issued erroneously. Some remodel permits have been issues and other plans are in Plan Check. Staff **Riley** was unsure about the elevations, but added if applicant wants to extend into the setback, a Use Permit is required and new public hearing would be conducted.

Counsel Gallagher stated that the elevation permits will be ministerial since it involves a Federal program. The Commission is to decide whether the four-plex remains a legal non-conforming use, so the current remodeling permits can be retained.

Commissioner Williams asked if [REDACTED] intends to remodel the insides at this time, and [REDACTED] replied that he wanted to get through the public hearing, and then raise the height.

Commissioner Shahhosseini asked how lapse in use is normally determined. Staff **Riley** said it is from the time that the lack of use of the property in question is determined by staff. **Deputy Director Barrett** added that it is based on evidence of reinspection.

Commissioner Davis stated that there is still flexibility to be more lenient.

[REDACTED], on rebuttal, stated that the legal non-conforming use lapsed fair and square. To allow a towering complex flies in the face of common sense and violates a number of codes.

Public Hearing Closed: 3:40

Deputy Director Barrett stated that Commission decision is strictly related to whether to allow the non-conforming use, and directed the Commission's attention to a finding referencing Government Code 65852.25. Staff was asking the Commission to include that finding in their action, that it was appropriate under 65852.25.

Commissioner Davis visited the site and acknowledged the concern expressed, noting that the area is pretty dense and other structures are elevated.

Changes in draft conditions:

Action: Commissioner Davis made a motion to deny the appeal with the findings as recommended by staff allowing the existing four multi-family units to be rebuilt. Commissioner Shahhosseini seconded the motion and it passed with a 5-0 vote.
Appeal Deadline: ten days
Resolution No: 09-019

Feibusch: aye Shahhosseini: aye Schaffner: aye Davis: aye Williams: aye
Ayes: 5 Noes: 0 Absent: 0 Abstain: 0

There being no further business to come before the Board of Zoning Adjustments at this time, all items having been handled and all persons having been given an opportunity to be heard on any matter before the Board of Zoning Adjustments in public hearing or otherwise, the meeting was adjourned.

Sonoma County Board of Zoning Adjustments STAFF REPORT

Sonoma County Permit and Resource Management Department
2550 Ventura Avenue, Santa Rosa, CA 95403
(707) 565-1900 FAX (707) 565-1103

FILE: ADA09-0001
DATE: September 10, 2009
TIME: 1:30 p.m.
STAFF: Jane Riley

Appeal Period: 10 calendar days

SUMMARY

Appellant: [REDACTED]

Owner: [REDACTED]

Location: 16680 Center Way, Guerneville
APN 071-192-023 Supervisorial District No. 5

Subject: Appeal of an Administrative Determination

PROPOSAL: Appeal of an Administrative Determination that the subject property contains a legal non-conforming 4-plex which may be repaired and remodeled, and that building permits can issue pursuant to GC §65852.25

Environmental Determination: Categorical Exemption: Sections 15300.1, Ministerial Actions; 15301; Existing Facilities; and 15302, Reconstruction

General Plan: Urban Residential 4 units per acre

Specific/Area Plan:

Land Use: N/A

Ord. Reference: Section 26-92-040

Zoning: R1 (Single Family Residential), 4 du/ac, VOH (Valley Oak Habitat)

RECOMMENDATION: Deny the appeal, finding that the non-conforming use survives and that the building permits can issue pursuant to GC §65852.25

ANALYSIS

Background and Project Description:

According to Sonoma County Assessors records, the subject structure was constructed in approximately 1947. A property survey conducted in 1983 by County staff (B-055858) determined that the 4-plex was legal non-conforming, and building permits were issued for repair work at that time. More recent building records indicate that the subject structure received flood damage in 1986, 1995, 1997, and the New Years flood of 2006. A RESA flood evaluation conducted following the 2006 flood noted that the two lower units received four feet of water, but the structure was occupied and it was repairable. Repair work was initiated by the tenants without benefit of permit; a stop work order was issued on June 22, 2007. On August 31 2007, all four units were red-tagged (posted "unsafe for occupancy"). The property went into foreclosure in early 2008, and was documented by PRMD staff as having been vacated and properly boarded on May 9, 2008. On October 31, 2008, title transferred to the present owner, [REDACTED], after a four-and-a-half month period of bank ownership.

By this time, the property had fallen into further disrepair and had been badly vandalized. On Nov 12, 2008, permit BLD08-4874 was issued to the new owner to legalize flood repairs that had previously been carried out without benefit of permit, and to repair the damage caused by the vandalism. Specific items covered by the permit included replacing the HVAC, the deck stairs, electrical, plumbing, new front stairs and a reroof. This work was performed and this building permit has been finalized.

On April 15, 2009, PRMD issued permit BLD09-0993 for remodeling work beyond the substandard conditions. The work includes remodeling kitchens and bathrooms, replacement of sliding glass doors, relocating water heaters and altering bedroom windows. This work was started, but a "hold" was then placed on the building permit following receipt of complaints from neighbors asserting that the permits should not have been issued because it was located within a flood zone, and that only two legal units should be allowed on the site, not four. A complete Code Enforcement timeline is provided as Exhibit A.

PRMD staff investigated both the flood issue and the legal non-conforming issue, and determined that: 1) the non-conforming use of a residential four-plex survives, and the building permits may therefore issue; 2) the units should be allowed to be rebuilt under Government Code Section 65852.25, because it is a multi-family structure that was damaged by a catastrophic event (flooding); and 3) the parcel, although subject to repeated flood events, is not located within a FEMA mapped flood zone and is therefore not prohibited from rebuilding, but is eligible for participation in the County's Flood Elevation Program. Deputy Director Barrett issued a written determination on June 30, 2009, that the legal non-conforming use survives and that the repairs may proceed (Exhibit B). An appeal of this determination (Exhibit C) was filed on July 8, 2009.

Site Characteristics:

The site is a slightly undersized, nearly level 4,620 square foot parcel on the west side of Center Way, between Neeley Road and Guernwood Road (see Site Location Map, Exhibit D). The rear of the parcel is heavily treed, and the residential structure is located at the front of the site with an 11 foot front yard setback and three to five foot side-yard setbacks. No off-street parking is provided; none was required when the units were constructed in 1947. The site is within the Urban Residential 4 units per acre land use designation and zoning, and public sewer and water serve all four units.

Surrounding Land Use and Zoning:

Surrounding lands are all zoned the same (R1 (Low Density Residential), 4 du/ac) as the subject parcel. Adjacent land uses are as follows:

North: (across 9 foot public walkway) Single family residential, one story (elevated).

East: (across Center Way) Single family residential, one story.

South: Single family residential, one story (elevated).

West: Single family residential, one story (elevated).

DISCUSSION OF ISSUES

Issue #1: Non-Conforming Use Survives

The appellants object to the County's determination that the legal non-conforming use survives because they feel that the non-conforming use "lapsed" for a period of greater than 2 years. In making their argument, appellants mistakenly rely on Sonoma County Code Section 26-92-130, which states:

"In any case where a Zoning Permit, Use Permit, Design Review approval or Variance Permit has not been used within two (2) years after the date of the granting thereof or for such additional period as may be specified in the permit, such permit shall become automatically void and of no further effect"

However, this Subsection applies only to the revocation of a Zoning Permit, Use Permit, Design Review approval or Variance, and does not apply to the continuation of a legal nonconforming use nor to the issuance of a ministerial building permit.

Section 26-94-030 of the County Code is more appropriately cited, which establishes a shorter, one-year period for termination of a legal nonconforming use under the County Code:

“Sec. 26-94-030. - Termination of use.

If the actual operation of a legal nonconforming use ceases for a continuous period of one (1) year, unless the legal owner can establish valid proof to the contrary, such cessation of the legal nonconforming use shall be considered termination; then without further action by the planning commission the use of the land shall be subject to all the regulations specified by this chapter for the district in which such land is located.”

The appellants suggest that the legal nonconforming use should have been deemed to have lapsed when the property was found to have significant code violations as early as June of 2005. Code violations, even serious code violations, however, are not the measure for termination of a legal nonconforming use under the County Code. Instead, under Section 26-94-030, PRMD staff must determine when the “actual operation” of the use ceased.

The County’s records indicate that the four-plex was used and occupied at least through June of 2007. County records further indicate that the structure continued to be occupied even as of August 31, 2007, despite the disconnection of electrical and gas service at that time. It was not until May 9, 2008, that County inspectors documented that the structure’s residential four-plex use had, in fact, ceased, with the building vacant and boarded. The May 9, 2008 date was used by PRMD staff in making its determination, in the fall of 2008, that the legal nonconforming use survived and that reconstruction permits could be issued.

Staff believes that that determination was correct. However, even if that determination was found to be in error (for example, one might argue that staff should have used the August 31, 2007 date instead), the error now appears to be of no significance. Even if the legal nonconforming use of the structure as a four-plex might have been found to have ceased for more than a year under the County Code, termination of the use now appears inappropriate under the provisions of Government Code §65852.25 (see Issue #2, below) and the principles of estoppel (see Issue #3 below).

Issue #2: Government Code §65852.25

California Government Code §65852.25 limits local governments' ability to prohibit the reconstruction or rebuilding of a multifamily dwelling that is damaged by a catastrophic event such as fire or flood.

Paragraph (a) of the Section provides:

“No local agency shall enact or enforce any ordinance, regulation, or resolution that would prohibit the reconstruction, restoration, or rebuilding of a multifamily dwelling that is involuntarily damaged or destroyed by fire, other catastrophic event, or the public enemy.”

The statute does not exclude nonconforming uses and thus applies equally to a nonconforming use, regardless of whether that use has ceased for more than 12 months. Thus, so long as the subject four-plex meets the requirements of Section 65852.25, that Section will preempt application of the County’s legal nonconforming use Ordinance and allow reconstruction of the structure.

As the appellant points out, however, one of the criteria of Subsection (d) of Section 65852.25 was not met. Subsection (d)(6) provides that the building permit for the reconstruction or restoration shall be obtained within two years of the date of the damage. In this case, the flood damage occurred in January of 2006. The first building permit for repairs was not obtained until November 12, 2008.

Subsection (e) of Section 65852.25, however, allows the County, by “Ordinance, Regulation or Resolution,” to allow reconstruction despite that delay as follows:

"A local agency may enact or enforce an ordinance, regulation or resolution that grants greater or more permissive rights to restore, reconstruct, or rebuild a multifamily dwelling."

Under the circumstances presented here, staff recommends that this provision be utilized. Section 65852.25 is a clear statement of the state legislature's intent to promote the preservation and reconstruction of multifamily housing that has been damaged by natural events. The County's General Plan also strongly encourages the retention of affordable multifamily housing (see Issue #4, below). The County has a long-standing practice of allowing additional time, more than two years, for reconstruction of residential structures damaged by fire or flood and in this case, the financial circumstances, including the property's foreclosure and general collapse of the real estate market, are additional mitigating factors that warrant application of this statute.

Issue #3: Estoppel

County Counsel has cautioned that PRMD and the Board of Zoning Adjustments may need to consider whether the legal principles of estoppel may now prevent the County from denying use of the four-plex after having issued, inspected and finalized building permits for its repair and renovation.

Although estoppel is rarely found against a public agency, the courts will apply principles of estoppel to prevent rescission of permits where fairness and policy demand. There are five elements for a finding of estoppel against a local agency:

- (a) The local agency knew the facts;
- (b) The local agency intended that its conduct would be acted upon (or the agency acted in such a way that the property owner had the right to rely upon the actions);
- (c) The property owner was ignorant of the true facts;
- (d) The property owner relied upon the local agency's conduct to its detriment; and
- (e) The injury to the property owner if the agency is not estopped is greater than the injury to the public interest if the agency is estopped.

Estoppel will not be found, however, if to do so would effectively nullify "a strong rule of policy, adopted for the benefit of the public."

Here, staff has concluded that the elements of estoppel may be present. Staff, however, believes that it is unnecessary to make a final determination of estoppel. Staff recommends, instead, that the Board of Zoning Adjustments confirm that the renovation and re-occupancy of the four-plex is allowable under the provisions of Government Code § 65852.25.

Issue #4: Consistency with General Plan Housing Element Policy

The General Plan Housing Element contains a number of policies aimed at increasing the number of affordable units, especially units whose affordability is protected by long-term Affordable Housing Agreements (AHAs). In this case, the applicant is proposing to place AHAs on three of the units in order to qualify for rehabilitation loans through the Community Development Commission (CDC), providing long-term (55-year) rental units affordable to lower-income households. Specifically, the 2002 Housing Element Policy HE-3m, in effect upon transfer of the property to the current owner and application for building permits, calls for the County to:

"Establish an "amnesty program" for illegal housing units that encourages such units to be brought up to current building and public health and safety standards, provided they are rent-restricted to be affordable to moderate or lower income households."

Its implementing Housing Element Program #25 calls for the County to grant "amnesty" for illegal units in

exchange for affordability restrictions. Thus, even if the subject units were not already determined to be legal non-conforming and were not protected by Government Code §65852.25, they could be granted amnesty and allowed to remain and be remodeled in exchange for the affordability restrictions being offered by the present property owner.

Issue # 5: Flooding

The appellant asserts that the four-plex should not be allowed because, among other things, the property is subject to frequent flood events. This is true. Code Enforcement Records indicate that the property suffered some flood damage in 1986, 1995, 1997 and 2006; however none of these flood events rendered the property uninhabitable.

The County Code at Chapter 7B regulates construction in flood areas, and does not allow construction within the Floodway (F1 zone). Construction within the Flood Zone (F2) is allowed so long as the finished floor is at least 1foot above the base flood elevation. In this case, the property is located just outside of the flood zone and is therefore not regulated by Chapter 7B and is not required to be elevated.

According to CDC staff who administer the County's Flood Elevation Program, an eligible property is not required to be located within a mapped flood zone. Rather, this program established an eligibility list for participation in the program based on flood damage caused by the 1995 and 1997 floods. The subject property appears on the eligibility list, and therefore has already been determined to be eligible for the Flood Elevation Program. The list was established more than 10 years ago and the appeal period has lapsed. According to CDC staff, a property that is on the list has already been deemed eligible to participate in the program. A large number of the surrounding properties, including both next-door neighbors, have been elevated. Even with the elevation sought by the property owner, the overall height of the structure is shown to be within the 35 foot height limitation for this zoning district.

Issue # 6: Parking

As noted above, no off-street parking is currently provided for the four-plex, and none was required at the time of construction. It is therefore not within the purview of the Board of Zoning Adjustments to require parking; the appeal is limited to a determination of whether the building permits for remodeling were issued erroneously. For the sake of clarity, however, it is worth noting that if the subject structure is elevated, plans indicate that tuck-under parking for at least two and up to four vehicles would be provided on-site underneath the elevated structure, rather than on-street.

STAFF RECOMMENDATION

Deny the appeal and uphold staff's determination that the subject property contains a legal non-conforming four-plex which may be repaired and remodeled, and that building permits may issue pursuant to GC §65852.25.

FINDINGS FOR RECOMMENDED ACTION

1. The residential four-plex survives as a legal nonconforming use under County Code Section 26-94-030, since the residential use of the structure did not lapse for a period of greater than one year. Vacation of the structure was not confirmed until May 9, 2008, and its use resumed in November 2008, when repairs and renovations began.
2. The Government Code at Section 65852.25 limits local governments' ability to prohibit the reconstruction, rebuilding or repair of a multi-family structure that is damaged by a catastrophic event, in this case a flood, whether that use is non-conforming or not. The legislative intent of this Section is clearly to preserve multi-family housing that has been damaged, and allows a local agency to adopt or apply more permissive standards.
3. It has long been the County's practice to allow more than two years for the issuance and finalization of building permits for repair of damage caused by catastrophic events, including fires and floods. The foreclosure of the subject property and the general collapse of the real estate market are additional factors taken into account in determining that a period longer than the specified minimum of two years

to obtain building permits should be allowed, pursuant to Section 65852.25 of the Government Code.

4. In light of the applicability of Section 65852.25, it is unnecessary to determine whether principles of estoppel might prevent rescission of the building permits already issued.
5. The property is not located within a FEMA mapped flood zone and is not within the F1 (Floodway Combining District) or F2 (Floodplain Combining District) zoning designations. However, the structure has suffered repetitive losses, has been listed for more than 10 years on the County's Flood Elevation Mitigation Program Priority list, and is therefore automatically eligible for participation in the Flood Elevation Mitigation Program. Such structural elevation would be consistent with the County's Local Hazard Mitigation Plan.
6. Issuance of the building permits is consistent with the General Plan Housing Element goal and objective to preserve and rehabilitate multi-family housing units, and the project is eligible for County rehabilitation loan assistance in exchange for 55-year affordability requirements on three of the units.

LIST OF ATTACHMENTS

- EXHIBIT A: Code Enforcement Time Line
- EXHIBIT B: E-mail determination by Deputy Director Barrett dated June 30, 2009
- EXHIBIT C: Letter of Appeal dated July 8, 2009 (3 pages)
- EXHIBIT D: Vicinity Map
- EXHIBIT E: Zoning Map
- EXHIBIT F: Aerial View
- EXHIBIT G: E-mail from [REDACTED] dated August 18, 2009
- EXHIBIT H: Letter determining structure to be abandoned and properly secured dated May 9, 2008
- EXHIBIT I: E-mail from Director Parkinson to appellant, with GC §65852.25 dated July 6, 2009
- EXHIBIT J: Site Plan, Floor Plan and Elevations
- EXHIBIT K: Draft Resolution

Background information is on file at:

County of Sonoma Board of Supervisors Office
575 Administration Drive, Room 100A
Santa Rosa, CA 95403

It can be viewed and/or copies requested during regular business hours, 8:00 a.m. to 5:00 p.m., Monday through Friday. Call (707) 565-2241 for more information.