

MEMORANDUM

To: Supervisor Jerry Smith

From: Pamela Silkwood, Representing Lisa and Karl Kleissner, Members of
Coast Property Owners Association
Sheryl McKenzie, Monterey County Associations of Realtors®
Nancy Isakson, Salinas Valley Water Coalition and Independent Growers
Association
Bob Perkins, Monterey County Farm Bureau
Christopher A. Bunn, General Farm Investment Co.
Jennifer Pavlet, Fenton & Keller
Gwen Miller, Salinas Valley Builder's Exchange
Beverly Meamber, Salinas Valley Chamber of Commerce
Mike Caplin, Coast Property Owners Association

Date: September 7, 2005

This memorandum is written to outline the issues and concerns associated with both the process in which the proposed code enforcement ordinance was presented to the Board of Supervisors and the substantive issues within the proposed ordinance which demonstrate that it is flawed.

I. PROCEDURAL FLAWS

A. The existing code enforcement provisions of the Monterey County Code are sufficient.

The existing code enforcement provisions of the Monterey County Code provide sufficient authority and power to the County to adequately enforce the County Code. The existing ordinance allows the County the authority to enforce the County code (Section 1.20.020); declare and abate nuisance (Sections 18.52.030, 20.90.030 and 21.84.030); punish violators through administrative process and criminal proceedings (Section 1.20.040); and recover costs and collect penalties through judicial proceedings (Section 1.20.090). These existing provisions could be implemented more efficiently if all of the existing code enforcement sections are compiled into one Chapter of the Monterey County Code.

B. The proposed code enforcement ordinance does not directly address its intended purpose.

Attachment A of the staff report dated August 16, 2005, states that the main purpose of the ordinance is to resolve violations more quickly than current processes. The proposed ordinance does not grant any additional authority and power to the code enforcement officer to resolve violations; it only increases the County's ability to charge, collect and recover unlimited administrative and abatement costs and maintain its own fund. As discussed above, there are sufficient authority and power granted to code enforcement officers to timely resolve violations under existing sections of the Monterey County Code.

Reduction in due process proposed by the new ordinance, i.e., the eliminating existing levels of appeal, is the only change that directly addresses the stated intent to resolve violations in a more expeditious manner. However, the County must carefully balance the public's right to due process against the County's desire to quickly process violations. The due process appeal provisions in the existing Monterey County Code are the result of such a balancing of individual rights versus County expediency. No compelling reason has been given to abandon these existing due process provisions.

Furthermore, the existing appeal process does not hinder the County's ability to immediately address violations that pose imminent risk to the public health, safety or welfare. If there is a violation that poses an imminent risk to public health, safety and welfare, the County currently has the authority under the existing County code to "take measures deemed necessary or expedient to enforce and secure compliance" with the provisions of the Monterey County Code (Sections 20.90.020 and 21.84.020 of the Monterey County Code) and "summarily abate a nuisance" (Section 1.20.070 of the Monterey County Code).

C. The Board of Supervisors cannot make an informed decision on the proposed changes to existing code sections when the existing code sections have not been properly identified and presented to the Board.

A compilation of existing code enforcement sections of the Monterey County Code should have been provided to the Board of Supervisors so that the Supervisors could compare the existing code enforcement provisions with the proposed code enforcement provisions. The Board of Supervisors cannot make an informed decision on the proposed changes to existing code sections when the existing code sections have not been properly identified and presented to the Board.

D. Staff should demonstrate to the Board of Supervisors the need for more severe penalties through proper analysis of code enforcement cases.

The proposed ordinance allows the County to assess more severe penalties. In order to properly evaluate whether there is a compelling need to impose more severe penalties against code violators, the number and severity of code violations need to be properly analyzed. For example, categorizing past code violations from minor matters to those of serious public health and safety concern would assist the Board of Supervisors in determining to what extent there may have been an increase in health and safety violations as opposed to increased reporting due to neighbor conflicts or vigilantes. We have identified at least 50 cases in 2004, which were opened and closed within 1 to 3 days, indicating they were either not violations or were truly minor and insignificant. Apparently there has been no such analysis of the validity of recorded reports or severity of violations.

Without fully understanding the number and types of code violations which have been used to justify this ordinance, the Board of Supervisors cannot make properly informed decision on whether to adopt this ordinance. If analysis reveals an increase in the number of invalid or non-substantive reports, the correct action would be to increase the public's protection against abusive reporters. For example, the Board could amend the existing ordinance to sanction repeated reports of false or non-substantive violations. The analysis could include a table showing the quantity of reports from each person (without identifying individuals) and the severity of each of the violations they reported. It would also be helpful to include if the reporter was a County employee, thus aiding the analysis of whether a substantial number of reports is made by an aggressive vigilante or an overzealous County employee.

E. In support of the County Administrative Officer's recommendation, the decision on the need for a new code enforcement ordinance should be deferred until a new Resource Management Department has been formed and is operational.

During the August 16, 2005 hearing, Lew Bauman, the County Administrative Officer, recommended deferring a decision on the proposed ordinance until a new Resource Management Department has been formed and is operational. The head of this new department, once hired, can assess the adequacy of the existing code or determine if there is a need for a new code enforcement ordinance. Streamlining the permitting system, which should be the department's first priority, may reduce the number of code violations and make the need for a stricter code enforcement ordinance unnecessary.

- F. The existing code enforcement sections should be repealed at the same time of the approval of the new ordinance in order to prevent duplicate and inconsistent code enforcement provisions in the Monterey County Code.**

Staff stated during the March 15, 2005 hearing that the existing code enforcement provisions are scattered throughout various chapters of the Monterey County Code. One purpose of the proposed ordinance is to compile the code enforcement provisions into one chapter of the Code, which would then be used to enforce any provision of the Monterey County Code. If the proposed ordinance is intended to be the central tool for enforcing all provisions of the Monterey County Code, then the repetitive and inconsistent code enforcement sections of the Monterey County Code should be repealed at the same time that the new ordinance is approved.

- G. Attachment B was not included in the packet to the Board of Supervisors.**

Attachment B, referenced in the staff report dated August 16, 2005, which provides staffing and budget related information, was not included in the packet to the Board of Supervisors and was not made available to the general public. The Board of Supervisors needs this information in order to make an informed decision regarding the proposed ordinance.

II. SUBSTANTIVE FLAWS WITHIN THE PROPOSED ORDINANCE

- A. In the proposed ordinance, the discretionary authority of the County to impose sanctions would be increased while procedural due process would be decreased.**

The discretionary authority of the code enforcement officer to impose sanctions would be significantly increased in the proposed ordinance. The code enforcement officer has a broad and discretionary authority to charge an unlimited amount of administrative and abatement costs to the responsible party and to assess these costs as special assessments with ordinary property tax collection. At the same time, the existing procedural due process protections inherent in multiple administrative appeals in front of panels is proposed to be decreased to one appeal in front of a hearing officer. If the County chooses to significantly reduce due process, then it needs to require a higher level of qualification for the person who will hear the only and final administrative appeal. That person should be an Administrative Law Judge. The ordinance (as proposed) should not allow the County to designate someone other than an Administrative Law Judge.

B. Penalty terms are undefined and unlimited.

The proposed ordinance uses the following terms associated with costs and penalties charged against the responsible parties without properly defining the terms: *administrative cost*, *administrative fee*, *administrative penalty*, and *administrative citation*. According to Planning Director, Scott Hennessy, administrative costs that would be charged to responsible parties would include staff time, charged on an hourly basis, to administer the code enforcement violation. The proposed ordinance does not provide information on the hourly rate(s) that would be charged and does not limit the amount of administrative cost that would be passed on to the responsible parties. The public has a right to notice of the penalties and costs that will be charged for a particular violation. If proper notice and limitations are not provided, then the County would be provided an unconstitutionally broad and discretionary authority under the proposed ordinance.

C. Proposed ordinance attempts to create new code violations, which is inconsistent with its purpose.

Section 1.20.05 of the proposed ordinance provides a list of code violations even though Section 1.20.20 states that the purpose of the ordinance is to enforce all Monterey County Code provisions. The proposed code enforcement ordinance effectively creates new code violations, which is inconsistent with its purpose.¹ The purpose of the ordinance was to update the existing code enforcement authority and provide a mechanism to enforce the existing Monterey County Code in its entirety. If staff wishes to propose new code violations, a more transparent and appropriate procedure is for staff to propose the revisions within the appropriate sections of the Monterey County Code (i.e., building, fire, grading, etc.).

D. The definition of public nuisance is overbroad and unconstitutional.

The definition of public nuisance is over-inclusive and therefore, unconstitutional. The proposed ordinance grants the Enforcement Officer the authority to declare any violation of the Monterey County Code a public nuisance, abate the public nuisance and demand the responsible person or property to pay for the abatement, record a nuisance abatement lien against the

¹ Section 1.20.05 of the proposed ordinance provides the following new violations:

L. The accumulation or storage of nonworking appliances, junk, scrap metal, car parts, engines and similar items out of doors in a residential district for more than 30 days is declared to be a public nuisance.

M. The accumulation or storage of trash and debris on any property is declared to a public nuisance.

N. The accumulation or storage of construction materials out of doors on any property in a residential district, unless an active building permit has been secured, is declared to be a public nuisance.

property, include the abatement and administrative costs as a special assessment with ordinary property taxes, and initiate proceedings to foreclose the property if the payment is not made. Because of the severity of these extraordinary remedies, the definition of public nuisance should have been restricted to only those violations that pose a significant threat to the public health, safety and welfare or significant threat to the environment.

E. The provisions for administrative searches does not accurately reflect the legal requirement of consent or search warrant.

It should be stated at the outset of Section 1.20.04 that the code enforcement officer does not have the authority to search private property unless the owner or occupant gives permission to enter and inspect the property. Furthermore, the proposed ordinance fails to set out the procedure that is required, pursuant to sections 1822.50 and 1822.51 of the Code of Civil procedure, if an inspection is to occur subsequent to the owner, occupant, or agent's refusal to grant permission to inspect the premises. Section 1822.50 and 1822.51 of the Code of Civil Procedure require an inspection warrant signed by a judge of court that is supported by an affidavit, particularly describing the place, dwelling, structure, or premises to be inspected and the purpose for which the inspection is made. The warrant requirement applies to local law relating to building, fire, safety, plumbing, and electrical.

F. Notice requirement is not legally sufficient.

Section 1.20.04E of the proposed ordinance allows for service of notice of violation by regular mail. Given the severity of code enforcement penalties and the short duration (10-day limitation) allowed for a right to appeal, notice by regular mail is not legally sufficient. The ordinance should require the notice be given in a manner that complies with state statutory requirements for service of process by mail, which includes demonstrating proof of service by mail through an affidavit. At a minimum, the ordinance should include an automatic five (5) calendar day extension of the appeal response period upon service by mail, pursuant to Code of Civil Procedure section 1030, to compensate for delivery time.

Posting notice on the property, by itself, also does not provide adequate notice. Notice of service by certified mail/regular mail or by personal service would be needed in addition to posting notice on the property.

G. The proposed ordinance fails to protect property owners who are not a responsible party.

The proposed ordinance does not provide sufficient protection for property owners who are not responsible for the violation. A property owner may face recordation of notice of violation and liens and placement of abatement and

administrative costs as special assessments with ordinary property taxes despite the fact that the owner had no involvement in the code violation. A property owner should not be assessed with any administrative penalties or administrative and abatement costs if he or she is determined not to be a responsible party as defined in Section 1.20.03 of the proposed ordinance.

H. The proposed ordinance improperly cites Government Code section 38773.1 for collection of all costs, fees and penalties as special assessment when the code section only applies to collection of nuisance abatement costs and administrative costs related to the abatement as special assessment.

The County's authority to charge against the property as a special assessment with ordinary property taxes is limited to situations where the County declares the violation a public nuisance and proceeds to abate the nuisance. It is, therefore, important to properly limit the definition of public nuisance to violations that pose a significant risk to health, safety and welfare as discussed in Section II.D. of this memorandum. In only those specific nuisance cases can the County collect nuisance abatement costs and administrative costs related to the abatement by placing the costs as special assessments with ordinary property taxes pursuant to Government Code section 38773.1. This Government Code section does not grant the County the authority to charge any other fees, penalties and costs as special assessments to be collected with ordinary property taxes.

I. The proposed ordinance fails to include a necessary procedural check with County Counsel before entitlements are taken away, which leaves the County vulnerable to lawsuits.

An existing provision (Section 1.20.020.G.) of the Monterey County Code requires a procedural check with County Counsel prior to the County's commencement of any proceeding or action to terminate, revoke, or deny any permit, license, or any other entitlement to ensure that such proceeding or action is undertaken in a lawful manner consistent with the laws of the United States, the State of California, and the County of Monterey. The proposed ordinance does not include this necessary provision which may result in unlawful taking of entitlements by County officials, leaving the County vulnerable to lawsuits.

J. The proposed ordinance does not provide adequate notice of the County's administrative procedure for processing code violations.

To provide proper notice to the general public, the proposed code enforcement ordinance should include information on the County's administrative procedure for processing a violation, starting from when a violation is first reported to the County code enforcement department through the closure of the code enforcement case. The proposed ordinance lacks any information on whether the County uses a priority system to first address the violations that pose

a significant risk to public health, safety and welfare before addressing the minor to insignificant violations.

K. The proposed ordinance fails to provide penalties for false reporting of violations by neighbors and by vigilantes.

The proposed ordinance does not include punishment for those who knowingly make a false report of a violation, e.g., as a result of neighbor conflict or vigilante attitudes. The ordinance makes it too easy for those who are interested in causing undue delay and problems for property owners to falsely report a violation because the proposed ordinance does not include any repercussions for knowingly making false charges.

L. The proposed ordinance fails to clarify the role of County Administrative Officer and the Hearing Officer.

The proposed ordinance has not sufficiently defined the roles of the County Administrative Officer and the Hearing Officer. Under Section 1.20.15.I of the proposed ordinance, the County Administrative Officer “may appoint a Hearing Officer to consider any appeal filed under this section.” Furthermore, the County Administrative Officer retains jurisdiction over the subject matter of the administrative enforcement hearing for the purposes of granting continuances, modifying an administrative enforcement order, granting a new hearing and drafting the written decision of the appeal. Yet, the staff report dated March 1, 2005, reads that the “decision of the hearing officer would be final.” What is the role of the Hearing Officer if the County Administrative Officer retains jurisdiction of all of the above?

M. The provision for denying a written appeal provides an unconstitutionally broad discretionary authority to the County to deny an alleged violator the fundamental right to a hearing.

Section 1.20.15D of the proposed ordinance states that the appeal can be denied by the County Administrative Officer and Enforcement Officer if the written appeal is stated “in generalities.” The words “in generalities” are constitutionally vague, thereby providing broad discretion to the County Administrative Officer and the Enforcement Officer to deny the alleged violator of the right to an appeal hearing. Moreover, this discretion given to the County Administrative Officer and the Enforcement Officer is a violation of the fundamental right to a hearing. The County Administrative Officer and Enforcement Officer should not be able to deny the fundamental right to a hearing based on unspecified deficiencies.

N. The establishment of code enforcement penalties fund may create a financial conflict of interest.

Provisions of the proposed ordinance, which create a financial conflict of interest, may bias the Enforcement Officer. The bias arises from the establishment of the Code Enforcement Penalties Fund under section 1.20.17 of the proposed ordinance, which allows the monies recovered from the responsible parties and/or property owner for fines and charges to be placed into the Fund. A desire to keep the Fund alive through fines and charges may result in biased decisions being made by the Enforcement Officer, who is paid from the Fund. This is particularly important when the County uses the compliance agreement provision (Section 1.20.08 of the proposed ordinance) because there is no administrative avenue available to the responsible party to challenge the “costs of enforcement” under the agreement.

O. The proposed ordinance fails to include a hardship provision.

The proposed ordinance does not include a provision to protect those who would face an extreme financial hardship if the County held strict adherence to fines, penalties, and administrative and abatement costs.

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