

MINUTES OF MEETING
WEST COUNTY BOARD OF ZONING ADJUSTMENTS
AUGUST 25, 2010
(APPROVED OCTOBER 13, 2010)

The Regular Meeting was held at the hour of 1:30 p.m. in the Alameda County Building, 224 West Winton Avenue, Hayward, California 94544.

REGULAR MEETING: 1:30 p.m.

MEMBERS PRESENT: Chair, Dawn Clark-Montenegro; Vice Chair, Kathy Gil; Members, Jewell Spalding, Frank Peixoto.

MEMBERS EXCUSED: Ineda Adesanya.

OTHERS PRESENT: Phil Sawrey-Kubicek, Senior Planner; County Counsel, William Fleishhacker; Code Enforcement staff; and Yvonne Bea Grundy, Recording Secretary.

There were approximately 17 people in the audience.

CALL TO ORDER: The meeting was called to order by the Chair at 1:35 p.m.

ANNOUNCEMENTS BY THE CHAIR: The Chair made no special announcements.

OPEN FORUM: Open forum is provided for any members of the public wishing to speak on an item not listed on the agenda. Each speaker is limited to three (3) minutes. No one requested to be heard under open forum.

Neighborhood Preservation Ordinance Abatement Hearing

- 1. Timothy C. Carter, (Vacant Lot) Liberty Street, San Leandro, CA 94578**
In violation of Alameda County Ordinance 6.65.030 A (1, 8, 9, & 10) and B (6)
 1. Tall weeds on vacant lot.

Member Spalding motioned to uphold the staff recommendation . Declare the property a public nuisance, and require abatement to be complete within 10 days. The Vice Chair seconded the motion. Motion carried 4/0.

- 2. Cheuk & Juilan Fung, Trustee's, 997 Grant Ave., San Lorenzo, CA 94580**
In violation of Alameda County Ordinance 6.65.030 A (1, 8, 10 & 11)
 1. Weeds on the property;
 2. Broken fence.

Member Peixoto motioned to uphold the staff recommendation . Declare the property a public nuisance, and require abatement to be complete within 10 days. Member Spalding seconded the motion. Motion carried 4/0.

- 3. Lagon Turner, 16223 San Remo Dr., San Leandro, CA 94578**
In violation of Alameda County Ordinance 6.65.030 A (1 & 9).
 1. Overgrown weeds and vegetation.

The Vice Chair motioned to uphold the staff recommendation . Declare the property a public nuisance, and require abatement to be complete within 10 days. Member Peixoto seconded the motion. Motion carried 4/0.

Alcoholic Beverage Sale Regulations Administrative Hearings

There were no items on the Alcoholic Beverage Sale Regulations Administrative Hearings Calendar.

CONSENT CALENDAR:

1. **FRED PRICE / EL SHADDI MINISTRIES, CONDITIONAL USE PERMIT, C-8762, PLN-2009-00037, VARIANCE, PLN-2008-00020** – Conditional Use Permit Application to allow continued operation of a church, Variance Application to allow fewer than the required on-site parking spaces in a R-C ABCD (Residential Commercial, Ashland Cherryland Business Specific Plan) District, located at 565 East Lewelling Boulevard, south west side, corner southwest of Wickman Court, unincorporated San Lorenzo, area of Alameda County, designated Assessor's Parcel Numbers: 413-0031-053-00 and 413-0031-054-00. (Continued from November 12, 2008 and January 28, February 25 and May 27, June 10, July 8, September 23, October 28 and December 16, 2009; and April 14, 2010; to be continued to September 22, 2010). **Staff Planner: Richard Tarbell.**

Staff updated the Board on the status of the application. The church is attending a second settlement conference today. If an agreement cannot be reached, the Judge will set a trial date for September. Member Spalding recommended the application be continued to October 13, 2010. This will enable the staff report to reflect updated information.

Member Spalding motioned to accept the Consent Calendar with a modification. Conditional Use Permit, C-8762, PLN-2009-00037 and Variance PLN-2008-00020 shall be continued to the October 13, 2010 Hearing. The Vice Chair seconded the motion. Motion carried 4/0.

REGULAR CALENDAR

1. **ABC PRESCHOOL & DAYCARE / MAGGIE LAM, CONDITIONAL USE PERMIT, PLN-2010-00049** – Application to allow expansion of a child care facility from 41 to 56 children, in an R-S-D-3 (Suburban Residential, 2,500 square feet per Dwelling Unit) District, located at 20135 San Miguel Avenue, west side, approximately 350 feet north of Jeanine Way, unincorporated Castro Valley area of Alameda County, designated Assessor's Parcel Number: 084A-0124-001-04. **Staff Planner: Christine Greene.** (Continued from June 23 and July 28, 2010).

Staff reviewed the history of the application. The Castro Valley Municipal Advisory Committee heard the application again on August 23, 2010. The CVMAC continued the application and requested further information regarding parking. The Parking Plan submitted violated the Neighborhood Preservation Ordinance. It exceeded the maximum paving threshold of 50%. The application will return to the CVMAC for recommendation on September 15, 2010, then to the BZA on September 22, 2010. Staff conducted a follow-up visit to the site. There are 5 toilets and 4 sinks currently at the existing facility. This is in compliance with State Regulations. The Applicant proposes to add an additional shower, toilet and sink in the expansion. Public Testimony was opened.

The Applicant Ms. Maggie Lam said she would really like the Board to support the permit. The additional parking spaces will be added per the Planning Department. The Parking Plan will be modified to comply with the Ordinance. The current State license is for 41 children, pre-school and school age. This is difficult because the classroom is shared. There is limited space to hang art work. During

homework time smaller children are taken for other activities to provide quiet for older children. On hot or rainy days, one group of children must stay indoors while others are outdoors. If the CUP is approved, for an additional 15 children, they will gain much needed extra space. The expansion will not create additional traffic, as drop off can take place before or after the school bell. Parents with multiple children in attendance at school and/or pre-school can drop at one time. Staff walks children from the school back to the facility, at the end of classes. The School Year has already begun. Ten children are on the waiting list, it would be a shame to lose them. It would be appreciated if the application process could be expedited. Member Spalding asked if a revised application would be ready by September 22, 2010. Ms. Lam confirmed it would. Public testimony was closed.

The Vice Chair believed the application could be conditioned as such parking must be in compliance with the Neighborhood Preservation Ordinance. Therefore the Board can vote today. Staff confirmed this would be acceptable. The Zoning Ordinance does not have specific requirements regarding parking for childcare centers. Thresholds in the Cities of Hayward and San Leandro range from 4 to 6 spaces. Based on this Planning recommends the Applicant provide 5 parking spaces. Presently there are 3 assigned spaces and 2 on the apron area. There have been no complaints regarding parking. The proposal of the addition of 2 spaces in front of the carport can be reduced to 1space. This would comply with the 50% paving rule. Planning will follow up and review the Parking Plan. Member Spalding agreed. The CVMAC voted to approve the permit. The issue was NPO paving regulations. Member Peixoto pointed out the vote was close at 4:3. Staff informed the Board approval of the application would eliminate the need for further CVMAC recommendations. If the Board would like CVMAC review after item approval, review is considered informational. Conditions of Approval are already assigned. Member Spalding said CVMAC review of the Parking Plan prior to Planning approval should suffice. The Vice Chair and Member Peixoto acknowledged the process of Planning Department follow-up had been employed before.

The Vice Chair motioned to approve PLN-2010-00049 with the following modification. A Condition of Approval shall be added requiring the Applicant to submit a Parking Plan in compliance with the Neighborhood Preservation Ordinance. The Parking Plan shall be submitted to the Castro Valley Municipal Advisory Committee for comment, prior to required submission, and final approval by the Planning Director. Member Peixoto seconded the motion. Motion carried 4/0.

2. **CLUB K9 INC. / ERIC FABIANAC, CONDITIONAL USE PERMIT, PLN-2010-00019** - Application to allow continued operation and expansion of an existing boarding kennel for up to 65 dogs, with expansion to 100 dogs, with said expansion to be conditioned on requirements concerning septic / wastewater discharge, in an "A" (Agricultural) District, located at 10671 Crow Canyon Road, southeast side, approximately 1.28 miles north of Norris Canyon Road, unincorporated Castro Valley area of Alameda County, designated Assessor's Parcel Number: 085-1991-006-00. (Continued from July 14, 2010). **Staff Planner: Damien Curry.**

Staff reviewed the history of the application. The recommendation was approval. The matter was continued from the July 14, 2010 to obtain further information regarding future plans for expansion, and possible impact. The Applicant will speak during public testimony. The Vice Chair asked if a traffic study had been conducted since 2004. Staff confirmed the 2004 study was the most recent. Public testimony was opened.

The Applicant, Mr. Eric Fabianac was present. He reviewed his business model, and successes. The

kennel has been in existence since 1996. The site was granted a CUP in 2006 for a canine boarding facility for 65 dogs with an expansion to 150 dogs with the addition of a building. Final plans for the project were submitted in 2007. While awaiting plan approval for the new building, Mr. Fabianac worked with an architect and engineer to upgrade the existing facility. The socialization and run areas were upgraded with synthetic grass which is easier to clean. It provides a more sanitary area for the dogs. The current kennel was sound proofed. All buildings received a stucco finish. Once upgrades were complete, customers asked if expansion was necessary. They utilized the socialization areas more than other services. In mid 2008 the Economy also slowed. As a result, Mr. Fabianac decided not to construct a second building. He then met with the Planning Department to incorporate all new ideas. Planning suggested he approach neighbors with the new proposal. Neighbors were in favor. Planning then suggested Mr. Fabianac develop a more comprehensive plan complete with engineering and architectural drawings. After working with the Planning Commission, Environmental Health and Public Works a full plan set was submitted in January 2009. This included septic system and roadway access improvements. Grading requirements have changed since no new buildings are proposed. The application submitted incorporates the improvements considered for 150 dogs. However the proposal will not exceed 100 dogs. He is aware there are people present in opposition to the use based on Measure D. Mr. Fabianac has talked with County Counsel and confirmed the use is in compliance with Measure D. The kennel has been voted the best in the area. It rates 4 out of 5 stars on Yelp and Yahoo Local. In addition he has received accreditation from the Better Business Bureau for an outstanding business. The facility meets or exceeds their standards of excellence. No complaints have been received about the facility. He is proud of his relationship with his customers and neighbors. He hopes the Board will approve the application. Member Spalding congratulated Mr. Fabianac on the rating of this facility. The Board had the following questions:

- Is the November 5, 2004 Traffic Study (TKM Traffic Consultants) based on 150 dogs
- Has the project considered impact of projects in East Co. and on Crow Canyon Road
- Is Public Works requiring a left hand turn lane into the site
- Is Public Works requiring additional traffic lanes
- What is the average daily number of dogs and people going in and out the facility

Mr. Fabianac confirmed the Traffic Study was based on 150 dogs, although the current application is for 100 dogs. The facility is full every day with 65 dogs. Daily there are 40 to 45 overnight boarding customers. Twenty for day care, this generates 20 vehicles. There are 100 dogs on the waiting list. Mr. Fabianac was in agreement with the staff recommendation, the entire driveway be paved. He will also pave 50 feet to the west, and east to be used as an acceleration lane. Public Works is not requiring a 50 foot wide strip. The proposed width is approximately 10 feet. At this time Public Works is not requiring more than an acceleration lane on the south side of Crow Canyon Road. This will improve ingress and egress onto Crow Canyon Road to the east and west. A left hand turn lane is not required. Member Spalding believed the Public Works Condition was nebulous, as it does not state any specifics. The scope of work improvement appears to be broad. The Applicant may be required to provide more in the future. Counsel said it sounds as if the Applicant and Public Works have discussed specifics. If the Applicant is comfortable, Conditions of Approval can add specific language that ties implementation to the 2004 Traffic Study. Mr. Fabianac continued speaking. The Dublin Canyon Road kennel application considered in the East County, stirred a lot of discussion regarding Measure D and precedence. Discussion was also raised as to specific issues related to that application. The Chair clarified the East County BZA approved the application. The Board of Supervisor's denied it on appeal. Counsel recommended everyone have an opportunity to testify prior to discussion of Measure D.

Mr. Matt Turner from Castro Valley said staff is relying on a report from September 28, 2009 regarding the kennel on Dublin Canyon Road. The BOS voted 4:0 to deny the application. Anyone present at the

Hearing would not have determined ambiguity about precedence set within Measure D boundaries. Supervisor Haggerty was angry that staff would state kennel use is compatible within Measure D, as he saw its purpose. The Board of Supervisor's were all angry. Member Spalding pointed out although located in Castro Valley, the matter to which Mr. Turner referred was within East County. The decision was made by the East County Board of Zoning Adjustments. In contrast this project is within the western portion of unincorporated County. Measure D was approved in 2000. This project was approved in 2006. Mr. Turner said the Haegeland application raised visibility. Member Spalding responded the BZA is concerned as well. However in this case the Applicant underwent a thorough approval process in 2006 to insure the project was in compliance, and consistent with zoning. There was also another kennel in operation in 2006 that underwent the same process. This is not a new application. Mr. Turner then referred to page 5 of the staff report. The staff report references a statement by County Counsel. Counsel does not believe the findings for the Haegeland project set precedence for kennel use on land designated Resource Management within Measure D. The Board of Supervisor's felt this was in error. Their decision to deny the Haegelnad project strikes Counsel's opinion. Member Spalding pointed out while this may be a comment however it is not an actual Finding in the staff report.

Mr. Najibullah Sayami lives next door, east of the kennel. He has never had any problems. The Fabianac's run a beautiful operation in every aspect. The site landscaping and staff are great. He is in favor of permit approval.

Ms. Dianna Hanna lives in Cull Canyon. She has issues with landscaping, sewage, run off into creeks, and traffic. On July 26, 2010 the Castro Valley Municipal Advisory Committee stated they did not have sufficient information in reference to the application. They only had a September 28, 2009 letter. That meeting was prior to the March 10, 2010 Board of Supervisor's meeting. The Sierra Club translated the Minutes of the March 10, BOS Meeting. Ms. Hanna commented Measure D has been in effect for 10 years. It is a shame the public has to be watch dog. The BOS said although prior kennel applications had not been appealed, a decision could set a precedent for future matters. Specifically, Supervisor Nate Miley asked if a determination regarding Resource Management could be made, also if any decision would set precedence. He did not believe kennel use fit into the Measure D, Resource Management category unless connected with some agricultural use. In addition if the kennel provided the appropriate level of care for dogs and cats. Counsel present confirmed a determination had not yet been made. The BOS could make a determination. That determination could also set precedence. Ms. Hanna continued to speak about the application. The Applicant keeps dogs in sky kennels used for travel purposes from 8 pm to 7 am daily. She referred to a letter submitted by a Veterinarian who owns a kennel. Since 1999 kennel use has declined. The Pet Care Service Association formally known as the American Boarding Kennel Association has a Standard of Care. Most reputable kennel owners belong to this Association. It provides training for kennel owners and promotes industrial standards and practice. They recommend primary pet enclosures provide enough space for normal posture movement, allowing animals to lie down. Enclosures should be large enough to allow animals to break into a trot. Typically a facility should allow 56 to 100 square feet per enclosure even if there is a large exercise yard. Ms. Hannah said as an animal lover she had personal issue with dogs being confined to kennels of this size. Supervisor Miley said regarding dog kennel facilities Measure D interpretation should be very strict. He thought kennels should be denied. This will set precedence for staff when use issues arise in the future. The Board of Supervisors voted 4:0 to deny, one Member excused. Ms. Hannah then read from a letter submitted from the Sierra Club regarding the current application. Upon recognition the permit is grandfathered in because approved in 1996 prior to the existence of Measure D in 2000. Section 22a of Measure D states, it does not affect existing parcels. However existing structures may not be enlarged or uses expanded except by authorization of State Law, under Section 19c. No subdivision map, development agreement or plan, use permit, prohibits legislative or quasi legislative action inconsistent with Measure D. It is clear that public Boards should uphold what the public voted for. It is unfortunate the public has to continue to play watchdog. It is also unfortunate to mislead applicants regarding uses.

Member Spalding asked Ms. Hannah if she acknowledged the kennel was in existence in 1996. If so would expansion from 65 to 100 dogs be inconsistent with Measure D. Ms. Hannah acknowledged the business is grandfathered, 100 dogs would be an expansion. Member Spalding said this is an existing business. This point sets this application apart from the kennel proposed in East County. The Vice Chair said the expansion happened in the 2006 permit. Ms. Hannah responded that the 2006 application did not go before the BOS. Member Spalding said no one appealed the decision. In her opinion Ms. Hannah did not believe, two wrongs made a right. Ms. Hannah believed the permit was grandfathered in at 65 dogs. The Applicant did not implement the expansion clause to 150 dogs. The Applicant was operating the business in 1996 illegally. They had 10 dogs and grew in size from there. The Chair clarified the first use application was denied by the Zoning Administrator. The decision was appealed to the Board of Supervisor's where it was approved. Member Spalding said in any case the application was approved in 2006 for 150 dogs. The Applicant proposes to reduce the number from 150 to 100 dogs. Although comments from County Counsel appear in the staff report, they are not Findings. Ms. Hannah closed and said the permit allowing expansion from 65 to 100 dogs is in violation of Measure D. This information was not available in 2006. She still had issues with traffic, sewage, run-off into creeks and landscaping.

Mr. Dick Schneider of the Sierra Club was present. The Sierra Club believes the use is inconsistent with Resource Management Designation. Allowing the expansion is not permitted under Measure D. When Measure D was passed it was clear. An urban growth boundary was established. Urban uses were to be contained inside the urban growth boundary; rural, agricultural uses outside the urban growth boundary. Rural uses include agriculture, recreation, natural resource protection, and resource production. Urban services and urban commercial services are meant to be contained within the urban growth boundary. Agricultural uses, and related resource production within Measure D. The urban uses were to be contained within the urban boundaries. To a large degree this has been followed. This application was able to slip under the radar in 2006, and gain approval. The application is now for an expansion of the use. Under Measure D and the March Board of Supervisor's decision; a kennel that is not related to agricultural uses, related to open space or recreation, used to house urban pets by urban pet owners, is an inconsistent use. This is a non-conforming use. The Zoning Ordinance and Measure D states non-conforming uses may not be expanded. Therefore the use is inconsistent with the voter's mandate. This is the essential issue from the Sierra Club's perspective. The Sierra Club realizes this kennel is not new, nor is it as bad as the proposed Haegeland kennel. That kennel was an atrocity. It is unbelievable the project got through staff. Board questions for the Mr. Snyder were as follows:

- In Mr. Schneider's opinion could the staff position of expansion be erroneous because the Applicant already has a permit for 150 dogs
- In Mr. Schneider's opinion is horse boarding in a urban or rural categorization
- In Mr. Schneider's opinion if a kennel use is urban, is the facility limited to urban dogs

Mr. Schneider said the permit request is for renewal. A renewal must conform to laws and their interpretation. Counsel explained the staff report based on interpretation established with Counsel, is the prior permit had expired. The facility for up to 150 dogs was not built. The current application is revised. Mr. Schneider said a kennel for the housing of urban pets is an urban use. There are kennels that serve for the breeding and housing of dogs used for herding and hunting. These are legitimate open space uses. The current boarding kennel is an urban use. If this use were new, it would not be allowed. It is presumed it is grandfathered and non-conforming because it pre-dates Measure D, although he has not done a careful analysis. A non-conforming use cannot be expanded. Horses cannot be boarded within urban boundaries, only rural. Horse boarding is only allowed in Agricultural zoning. Horse riding is a bonafide recreational activity that takes place in rural areas. Member Spalding responded there was horse

riding in Golden Gate Park. The issue is local for each jurisdiction. Mr. Schneider pointed out the local Ordinance does not allow horse boarding within the urban boundary. The issue should be tied to the specific use, and the related percentage of that specific use. For example a kennel/boarding facility within Measure D might be used to hold and hunting dogs. The purpose for this facility is clear. The Vice Chair asked Mr. Schneider to explain the difference between a sheep herder's dog boarding each day and an urban dog daily running the land to socialize. Both are running the land. Mr. Schneider said he was not an expert in the kennel business. However a sheep herder would probably only take his dog there occasionally, as it would be with the sheep. This use is for people who will most likely take animals there on a daily basis.

Mr. Bob Baltzer is a resident of Livermore. He was on the original committee for Measure D. He is a current member of the Friends of Livermore. He is puzzled as to how County Counsel can interpret this use permissible under Measure D. Supervisor Nate Miley was correct to think staff was out to sabotage Measure D, by recommending approval of uses that do not conform to Measure D. Supervisor Miley said kennels have an urban use, in his motion to deny the Haegeland application. Supervisor Miley acknowledged a vote in favor would have set precedence. This was clear. Staff is falling back into their old ways. Measure D was passed 10 years ago. He is sick of running to hearings to correct errors made by staff, intentional or not. The Applicant and the Board may be acting in good faith but may not be getting full information from staff.

Ms. Joan Seppala supports the perspective that the permit has expired. The use is non-conforming. Expansion under Measure D is prohibited. Granting this application would set precedence, and undermine Measure D. Ms. Seppala has testified at many hearings in Livermore. She cares passionately about open space in East County. She and other members of the community have worked for decades on this cause. She closed, and asked the Board to deny the permit.

Mr. Brian Pesicka has lived on the adjacent property to the west, for 6 years. The facility is neat, clean and safe. The owners are accommodating to the neighbors. If there was a noise issue, the Fabianac's came and talked with neighbors. When Mr. Pesicka he goes out of town, he boards his dog at the facility. The Chair asked the size of his property, also if he allowed public access for hiking, etc. Mr. Pesicka does not allow public access to the 134 acres.

Mr. Matt Turner returned to testify. He said the difference between urban and rural uses is who utilizes the facility. The use by the gentleman that just spoke would be considered rural. If urban people are coming from San Ramon and Castro Valley to the rural area, the use is considered urban. Measure D prohibits urban serving uses for commercial purposes in an Agricultural area. Member Spalding said that definition should be used with caution. She lives in an urban area that allows a cow or goat. This is an agricultural use. Mr. Turner said the difference is that this is an urban use in a rural area that proposes to expand. Member Spalding pointed out that generally horses are associated with Agricultural areas. However they are allowed in Limited Agricultural areas which are within urban areas. These issues have been considered for a long time. This particular consideration is for expansion. Mr. Turner responded the issue is clearly outlined in Measure D. Commercial use in a Resource Management protected area must only be for people in the rural community. This prevents crossover. It must service people in the nearby municipal area. The Chair asked for clarification. If she lived on Mines Road and brought her dog, would that be acceptable. Mr. Turner reiterated it is the rural element of the commercial facility. The facility can serve people in the immediate rural area. Otherwise it is considered a commercial use for urban purposes, in a rural area. Member Spalding asked if additional language was available containing Mr. Turner's points. Language provided by staff states: Measure D allows agricultural, recreational, habitat protection, water shed, and quasi public purposes... The main question is "agricultural use" Mr. Turner said agricultural use was defined in the BOS decision regarding the Haegeland permit. The BZA will refer to the Board of Supervisor's resolution.

Mr. Brent Downing said he was actually present for another Agenda item. However he grew up in a very rural area. He has three Spaniels that he uses a lot for hunting. He often uses Mr. Fabianic's kennel. This might give the Board something to consider regarding, recreational use. Public testimony was closed.

Counsel explained he did not have a copy of the Haegeland Resolution at present. However County Counsel reviewed the document in the course of advising staff regarding the permit under consideration. Counsel's opinion is the Board of Supervisor's decision did not set precedence for all kennels within the Resource Management District. The BOS found that project was inconsistent with Measure D. Each Board has the discretion to consider if each application and project is consistent with Measure D. If the BZA finds this proposal, which is an expansion of the current use is consistent with Measure D. It would not be prohibited by Measure D because the expansion is consistent. Reasonable minds can differ as to what happened at particular hearings and opinions. There are ways to distinguish between this project and others considered. The expansion does not propose to add a building. There are other issues to consider such as expansion of number of dogs and other impacts that relate to consistency and general zoning. These are also examples of things that can be viewed as impact to open space. Member Peixoto asked how the 2006 application affected the current consideration. Counsel said the prior application had expired. They did not implement the option to expand to 150 dogs. The application potentially can be considered non-conforming for the current use of 65 dogs. Non-conforming uses can be considered consistent with Measure D. If the Board determines the use is consistent, therefore the expansion could be considered consistent with Measure D. Member Peixoto asked if the request for renewal for 65 dogs is in compliance with Measure D. Counsel said the application could be considered legal under some of the theories discussed. The use is allowed as a non-conforming use. Another question to consider is the use consistent under the use provisions of the Resource Management District, if so it would be allowed as a non-conforming use. Secondly Counsel believes that a kennel is not necessarily inconsistent based on the September Memo, the "use" can be compatible or similar to those uses allowed under the description of Resource Management. Others may find the opposite opinion, as did the Board of Supervisor's. Member Spalding asked if all could agree the Applicant could continue to do business with 65 dogs. If so this permit could be bifurcated. The BZA could approve the existing use. All Members agreed. Counsel said this permit was connected as one application. The application should be heard as a whole.

Member Spalding asked staff if they believed Conditions #4 and #12 regarding roadways is consistent with the Applicant's description of his responsibility. She also asked the purpose of Condition#5. Staff explained that Condition #4 relates to the on-site driveway. Condition #12 relates to Crow Canyon improvements. Condition #5 is standard. For example if an acceleration or deceleration lane is installed, a sign may need to be moved. It can be related to anything, road improvement. Member Spalding said there was nothing in the right of way at this site. Staff said possibly Condition #12 can be removed, but it would include berms, and sign posts etc. Counsel added the Condition also protects the County. Member Spalding did not believe the Condition was standard. If the wording remained, Public Works could make the Applicant responsible for adding traffic lanes. This makes a cogent argument about the urban use relationship. A point could be made multiple lanes would indicate this is not supporting an agricultural use. Public Works may get a blank check to add traffic lanes to Crow Canyon Road,

subsidized by the Applicant. Counsel suggested if there was concern regarding a specific improvement. Conditions of Approval can be altered to prevent the addition of traffic lanes.

The Chair asked staff differences between Ordinance definitions of kennel versus boarding facility, also what is the Ordinance definition for horse boarding. Staff said the definition of kennel is a premise for 6 or more dogs; or 12 or more cats over the age of weaning that are boarded, kept or otherwise maintained. The Chair asked if the Ordinance language specified uses, such as breeding or overnight stays. Staff

confirmed the Ordinance did not. There are no references to other animal types. In addition there is no Ordinance definition for boarding facilities. The term boarding house in the Ordinance refers to humans. Member Spalding asked if the definition of kennel would be the same for agricultural or urban areas. Staff confirmed that was correct.

Counsel located, and read findings contained in the Haegeland Resolution. Finding #c states the project if permitted under all circumstances and conditions in this particular case would materially adversely affect the public welfare as proposed. It is not an allowed use under the Land Use Management designation. It does not conform to General Plan Policies regarding minimizing impacts of development. Member Spalding asked Counsel his opinion of the words "as proposed". Counsel said the words as proposed, in this particular case refers to a specific project. The resolution further states, the kennel as proposed is a commercial facility that will serve an urban population, rather than the serve the population in Agricultural District in which it lies. The kennel does not conform to the standards set within the Resource Management District. The resolution also states the size of the facility proposed as a 19,950 square foot kennel facility, walking trails and parking areas. Counsel's opinion is the resolution refers to that specific use. Again, others may have different opinions, as the Board of Supervisor's did on appeal.

Member Spalding referred to public testimony given. The neighbor boards his dogs at the site. Another person boards his hunting dogs there. Infrastructure is an important consideration regarding this application. If Public Works requires lanes be installed on Crow Canyon Road. This would support an urban related use verses uses compatible with Agricultural Districts.

The Vice Chair requested that public testimony be re-opened to obtain further information from the Applicant. Public testimony was opened.

Mr. Fabianac explained an average day at his facility. Dogs can run around from 7 am to 7 pm. Daycare clients are picked up prior to 7 pm. Dogs boarded overnight go to run at 7 am and return to eat breakfast. A protocol has been established with a veterinarian, dogs maintain rest for an hour. Dogs then go back out to run and exercise until 7 pm. There are 20 acres of land. Five acres are dedicated to play area specifically. Acreage is divided into 12 sections. Section allocation change daily depending on the dogs in the facility. For example, 5 to 6 sections of 1/2acre each. Dogs are sorted by size, play style and disposition. Board Members asked the following:

- Will exercise areas expand as the use expands
- What is the clientele breakdown by geographical area
- Do dogs receive specialized training

The Applicant confirmed run areas will not be expanded. They will continue to customize the 5 acre section depending on mix of dog size, play style etc. Clients come from the Crow Canyon Road, Bollinger Canyon, Sunol, Napa Santa Cruz and Stockton, San Ramon and Castro Valley. Dogs do receive socialization during time spent. They do not receive specialized training. Public testimony was closed.

Member Peixoto asked since all agree 65 dogs is an established legal use, would expansion to 100 dogs be conforming. Counsel clarified staff has established an opinion the use can be compatible within Measure D boundaries under Resource Management. The BZA, a decision making body that can make a determination. Member Spalding agreed with Counsel's opinion. The kennel use is similar and can be compatible with Agricultural uses, Recreational uses, Habitat etc. The use would conform to Resource Management Designation. Although persons in opposition to the application do not agree, it conforms. Non-conformance in turn would then prevent expansion. Counsel further explained the Applicant is requesting an expansion of the use. If the Board approves the project, they must find this proposal,

particular dog kennel is consistent with Measure D. Member Spalding said it has been established there may be kennel uses specifically related agricultural uses. Therefore examination of this application becomes an examination of facts as to who is using the kennel. This also supports the importance of establishing traffic issues specific to this facility. Even those in opposition agree kennel use is acceptable within Measure D boundaries. However they disagree with the end users of the kennel.

The Chair commented she grew up in an agricultural district. She had dogs, cats, chickens, and cows. People had uses related to those animals. At some point sometimes these uses do become commercial. Regarding this application, in contrast to the other kennel application heard by the East County BZA. This site does not have a large building. The Applicant's use is recreational, primarily dogs running around. She cannot find that to be an urban use. In contrast the Hageland application, a kennel that includes a building of 20,000 square feet, was not appropriate within Measure D boundaries. The use considered today is not the same thing. There are horse related uses on Crow Canyon Road. It would be hard to differentiate this use from that being considered.

Member Spalding said according to evidence presented as testimony from a neighbor who owns a 150 acre parcel. He uses the site. Another neighbor sends his hunting dogs to the site. This does speak to an agricultural use, a point made in testimony from those that oppose the application. In the interest of ensuring Conditions are consistent with the proposed use. Public Works should not have the ability authorize any new traffic lanes.

The Chair pointed out the Applicant is proposing a merge lane, not additional lanes. She travels through the area a lot. It can be very dangerous. People traveling eastbound toward San Ramon are traveling 55 miles an hour. As a result of the driveway grade, to enter the facility cars must come a dead stop in the street because there is no shoulder. Shoulder improvement may be necessary. However the proposed is not a traffic lane. The Applicant should not be responsible for adding traffic lanes to Crow Canyon Road.

Member Peixoto agreed. If the Applicant were proposing a 20,000 square foot building, the Board may have different considerations. However that is not what this Applicant proposes.

Member Spalding responded Conditions of Approval that affect traffic should be consistent with what has been discussed with staff, and the Applicant as a deceleration lane. Conditions should also address the possible necessity of tree removal, as a result of road widening. The intent of the Landscape Plan should be clarified. Neighbors may want to comment on landscape selections. Tentative Finding #2 should be edited. The phrase: This type of facility is compatible with rural and agricultural uses in the area, should remove the word "type" so as not to set precedence. It is not the BZA's role to say that any and all kennels are consistent with Measure D, only this application.

Staff told the Board the Applicant intends to landscape using native plants. Landscaping will be directed to the front of the site, not the entire location. The Chair said a Landscape Plan is acceptable as it also states water conservation policies. The plants proposed may be appropriate. Landscaping should look natural not perfect, and related to the rural surroundings.

The Vice Chair said the Board may want to modify the Condition #12 to be consistent with statements made at the public hearing as to what has been discussed with Public Works. The Applicant will contact Public Works again after approval.

The Vice Chair motioned to approve, PLN-2010-00019 Fabianac with the following modifications:
Condition of Approval #9 shall be stricken and replaced with: The Applicant shall submit a Parking Plan to the Planning Director for final approval.

Condition #11 shall be stricken.

Condition #12 shall remove the words: *In consultation with the*. Condition #12 shall now state: and discussed with the Traffic Division in detail as presented at the Public Hearing of August 25, 2010. This does not authorize the addition of any new traffic lanes.

Tentative Finding #2 shall remove the word, *type of*. The word proposed, shall replace it.

Member Peixoto seconded the motion. Motion to approve, PLN-2010-00019 Fabianac carried 4/0.

3. **TERESA NAZARETH, VARIANCE, V-12114** – Application request to allow construction of a 2,436 square foot, two-story, single-family dwelling with seven foot side yard setbacks where 15 foot side yard setbacks are required. The parcel contains 0.12 acres (5,200) square feet and is zoned R-1-BE (Single Family Residential, 10,000 square foot Minimum Building Site Area) District, located at 3306 D Street, east of Fairview Avenue, unincorporated Fairview area of Alameda County, designated Assessor's Parcel Number: 417-0220-004-00. **Staff Planner: Jeff Bonekemper.**

Staff reviewed the application, and recommended approval. Initial Board questions were as follows:

- Is this lot the only 5,000 square foot parcel in the area
- What are the lot dimensions
- Will this project affect trench lines
- Was the application referred to community organizations, and the Fairview Community Club
- Is slope an issue
- What is the zoning
- What is the square footage of the proposed home
- What is the footprint of the proposed home

Staff told the Board the lot was created, prior to zoning, and the Specific Plan. It is a legal building site with a width of 52 feet and depth of 100 feet. There are a few other lots this size in the area, however most are larger. The trench lines approximately 5 feet from the property line are not related to the proposal. The current proposal is a variance for 7 foot side yard setbacks. Member Spalding thought the application should be continued. There were no references to community organizations, including the Fairview Community Club. Member Spalding also questioned analysis in the staff report. There has been discussion of hillside, slope and density. Specifically it may be appropriate to update the Fairview Plan to apply rules for parcels in excess of 10% slope, to all parcels within the Plan. Staff responded the lot topography is less than 10% slope. The requirements of a parcel with 15 foot setbacks were used as a threshold for this project. The Applicant is only requesting a setback variance of 7 feet. The staff report refers to density requirements. Initially construction began without approval. Referrals were distributed in 2008, and again recently to the Fairview Homeowners Association and Fairview Community Club. There were no responses. Member Spalding said there may not have been an opportunity for the Community Club Chair to review recent materials. A family member had been hospitalized. Staff explained possible revision to the Fairview Plan would not be relevant for this application. This proposal does not increase density. The lot was also created prior to zoning. Member Spalding asked since the former bungalow had greater setbacks would the lot be considered non-conforming. Staff said no. Current zoning allows a Single Family Residence. Zoning requires a Minimum of 10,000 square feet. The existing lot is 5,200 square feet. The only non-conformity is the requested side yard setback variance. The Fairview Specific

Plan was enacted in 1995. Setbacks were not addressed. A home built at that time would have required 5 foot side yard setbacks, 20 foot front and rear yards. When the Fairview Plan was amended in 1997 larger setbacks were implemented. Currently in this Zoning District a 10,000 square foot lot would require a 15 foot side yard, 30 foot front yard and 20 foot rear yard setbacks. Zoning allows no more than 30% lot coverage in hillside areas with no more than 10% slope. Based on the zoning calculation the home can be approximately 1,500 square feet. The 2,436 square foot home proposed, is two stories. This would comply with density requirements. However this lot is not in an area of more than 10% slope. Although the density calculation would not apply, Planning is using the requirements as guidelines. For further general comparison if this 5,200 square foot lot were in an area zoned 5,000 square foot minimum, side yard setbacks requirements would be 7 feet. Member Spalding said although the hillside slope does not apply to this parcel, many Fairview residents believe the rule applies to all parcels. Public testimony was opened.

Architect Brent Downing spoke, representing the property owner. The proposal was to take down a home that was not structurally sound. The proposed design is in line with single family homes in the area which are much nicer. There are many newer homes in the area. Target size is 2,400 square feet of living space, including garage. A variance is only required for the side yards. Front and rear yard setbacks can be accommodated. All other design aspects are in compliance with the Fairview Plan. A two story building is allowed. A 15 foot side yard could be used however the only projects types that would fit with those dimensions are a two story condominium. Mr. Downing believed the home is a superior proposal. Board questions for the Applicant were as follows:

- Is Mr. Downing aware there are neighbors opposing the project
- Have design alternatives been considered, including structure placement
- What is the estimated height of the structure
- Will the proposed structure cast a shadow on neighboring homes to the side or rear
- Will the proposed home obstruct views of surrounding homes

Mr. Downing was just made aware of the letter from the neighbor. The owner considered many design options. Originally the proposal was 5 foot setbacks. The project was shy of approval. This is why initial construction had already begun. The current proposal pulls the garage outward, and recesses the structure. The home recesses again at the entryway and creates a patio. The design is placed on a tight lot, and does leave some flatness at the back. However the design accentuates the front. The home behind the site is somewhat elevated. He does not believe a shadow will be cast at 25 feet in height and a 45 degree angle caused at a 20 foot setback. A shadow should not be cast in the front. A shadow study can be conducted to confirm this. The home next door is to the north. This is the view from the front yard. Any single story structure would cast a shadow. Member Spalding read the letter submitted from the neighbor. The original structure allowed a partial view of the hills. Mr. Downing said the original home was 7.6 feet in height with a roof peak of 9 feet. The rear of the structure had settled another 6 inches into the ground and was not Code compliant. The state of dilapidation may have afforded slightly more of a view.

Mr. Marc August told the Board he submitted the letter in opposition to the application. The variance is submitted by someone who does not live in the area. They are a Realtor /Builder who wants to build something quick, profit and get out. The cottage demolition was begun haphazard without permits. Live 220 voltage wiring was left on a pole, accessible to anyone. Mr. August contacted PG&E immediately to disconnect the power, prior to demolition. Mr. August had issues with staff comments. The proposal is on a lot smaller than surrounding properties. It is unfair to grant the Applicant a variance that none else would be granted. Approval would grant special privilege to the developer. It is also detrimental to the community. His lot is 19,800 square feet. He is not allowed to subdivide his lot into 5,200 square foot

sections. He could not build within 7 feet of another property line. Community members have participated with many the Board of Supervisor's to get setbacks implemented to prevent postage size lots. Approving variances of these types washes away community, staff efforts. The excavations that have been there for the past two years are 7 feet from his home, and 6 feet of another home. The house may have been downsized per staff recommendations. However there is no set of plans available for review. It is unknown if existing foundation excavations will be used. Regarding views, Mr. August presented a sketches and photographs. The view east is from his back porch. The view north is approximately 20 feet from his home. The photograph included the 10 foot long 2X4 board that remained on the site as a reference. During the winter months the lower arc of the sun will cast shadow in his driveway and house in the morning. He already lost 3 hours of sun per day as the result of the Carlson Port Development to the west. These homes are not monolithic but similar to the proposal. They are approximately 20 feet above his property. As a result Mr. August requested the Board deny the variance application. The setbacks should be in compliance with the Fairview Specific Plan. Member Spalding asked if 10 foot setback would be acceptable or a 22 foot by 50 foot structure. The lot is pre-existing and deemed buildable. Mr. August would like the proposed home be limited to a single story with 15 foot setbacks. If this lot were 200 square feet smaller, a home would not be allowed per the Ordinance. The project has been shut down twice for construction without a permit. The Applicant purchased the lot sight unseen. They are responsible for purchasing an insufficient parcel. A 7 foot setback would not eliminate shadow. The fence line at the right of the eastern view is the fence line to the back of his home. The proposed garage is 20 feet away, the house another 5 to 10 feet away. In-fill homes like this should not be built. Homes should look like those that exist. The Chair pointed out there were lots in the neighborhood with odd configurations. Mr. August said the two most recent lots sold on Carlson Court were turned into subdivisions for 17 homes with 10,000 square foot minimums.

Alan Moss lives to the north of the site. His property faces the rear of the lot. He has lived in the neighborhood 35 years. A two story home would look directly into his windows. A two story home would obstruct his view, and destroy his privacy. Approval of the project would also mean destruction of a large pine tree. Mr. Moss requested the proposal be limited to a single story. The character of the neighborhood would also be affected. Alan located his home on a map for the Board Members. Mr. Moss was subjected to this process during the Carlson Court project. Those homes were limited to a single story. Single story would also be appropriate for the proposed structure. He also submitted a letter for the record.

Anne Wilson moved to Fairview 15 years ago because of the open space. Her property is on the flagship lot. A home with a 7 foot setback does not fit her definition of spacious living in Fairview. Ms. Wilson pointed out the relationship of the lot size compared to others in the neighborhood. She also distributed a Google photograph of the cottage that formally sat on the lot. If the Applicant were to build a 2,400 square foot home, it would be 4 times larger than the cottage. This is not appropriate. Perhaps a larger home can be built, but not that large. Ms. Wilson conducted research on narrow home designs prior to moving to Fairview. Reasonable plans exist. Regardless of the Board's decision, the Applicant should be required to remove the remaining debris and salvage material left over from the lean-to wall on the site blew down in a past storm. In addition the cargo container should be removed if not related to the building of the home. It is being used to store furniture that is not related to the proposed project. The mess and debris is a detriment to the neighborhood.

Mark August returned to testify. He was told by Alameda County Code Enforcement could not do anything about the cargo container because the application was on-going.

Contractor, Mario Clamer went to the Building Department. Prior to demolition he was told via telephone by the Building Department he could start, because the plans were going to be approved. He used to live on East Avenue, and built the homes built on Israel Court. Mr. August visited the site 3

weeks ago. A neighbor pouring concrete and building on nearby site dumped construction debris on the lot. Public testimony was closed.

Board questions for staff were as follows:

- Is this considered a “ legal” according to the Specific Plan definition
- What is the minimum lot size for the area
- What is the maximum allowed structure footprint
- What are the minimum allowed setbacks
- Are setbacks required to conforming to current Specific Plan
- Is a two story structure allowed
- If so how many two story structures exist in the neighborhood
- Can the garage be placed in the rear of the lot
- Is there an existing Ordinance that considers “Light and Shadow”
- Could this project be effected by the current discussion of a “View Ordinance”

Staff confirmed the lot is legal and buildable. It was developed prior to the Fairview Plan. There are not many 5,000 to 6,000 square foot lots in the area. Most were in existence prior to the Fairview Plan. There are other two story homes in the neighborhood. Per the Specific Plan now that the cottage has been demolished, the Applicant is required to comply. If the former cottage remained a variance would still be required to add to the structure. Staff did not believe a rear garage considered a detached accessory structure would be viable. The proposed 15 foot driveway for the two car garage would not meet Fire Code requirement of 20 feet. This is not possible in the space. The footprint of the proposal is 30%. The single story aspect of the project is the garage and storage area. The balance of the structure has two stories. Presently there is no Light or Shadow component of the Ordinance. Although discussion has begun of a View Ordinance and possible related components of Design Guidelines proposals, considerations will not affect this active application.

Member Spalding believed a Finding the project would case detriment could be supported based on the neighbor’s testimony. Member Peixoto asked her to explain. Member Spalding said 7 foot setbacks are not consistent with the neighborhood. Most other parcels have 15 foot setbacks. The proposal is also in violation of the Fairview Plan. It inconsistent with the rest of the neighborhood, the Applicant has design options. For example, perhaps 10 foot setbacks can be employed. The Vice Chair pointed out the Applicant should have been aware of all of the issues. Member Peixoto did not object to the proposed height of the structure, but the width.

The Chair re-opened public testimony per the request of the Project Architect.

Architect Brent Downing told the Board he used a 7 foot setback because it is established in the Fairview Specific Plan. The current design almost accommodates a 10 feet on one side. The proposed design accommodates this. The drawings are set-up to use possibly smaller or larger setback back due to encroachment allowances. The design the Building Department originally approved pending final signoff had 5 foot setbacks. The plans had been re-submitted in response to second stage plan check comments. The Building Inspector gave approval to begin demolition. Errors were discovered later in the process.

Member Spalding asked if Mr. Downing would be interested in revising project plans. Design modification has been on-going with staff for some time resulting in 10 different versions of the proposed home. However he can take a second look at alteration of encroachment setback tolerances. Member

Spalding recommended the Applicant take an opportunity to speak with neighbors present. Comments should also be obtained from other neighbors, as well. Staff confirmed modification review would require 30 days. Public testimony was closed.

The Chair motioned to continue Variance, V-12114 Nazareth to October 13, 2010. Member Spalding seconded the motion. Motion carried 4/0.

APPROVAL OF MINUTES: Member Spalding motioned to accept the Minutes of July 28, 2010 as presented. Member Peixoto seconded the motion. Motion carried 3/0. The Vice Chair was not present at the July 28, 2010 Hearing, therefore did not participate in the vote.

The Vice Chair motioned to accept the Minutes of August 11, 2010. Member Peixoto seconded the motion. Motion carried 3/0. Member Spalding was not present at the August 11, 2010 Hearing therefore did not participate in the vote.

STAFF COMMENTS & CORRESPONDENCE: The Village Lounge, on Hesperian Blvd. appealed the BZA's decision regarding the Alcoholic Beverage Sale Regulations the Board of Supervisor's.

The appeals of Condition Use Permit, PLN-2010-00028 Seventh Step Foundation and James Silva, Variance, PLN2009-00010 are on the Board of Supervisor's September 14, 2010 Calendar.

BOARD'S ANNOUNCEMENTS, COMMENTS AND REPORTS: The Chair asked staff for more information regarding kennels especially there use within Measure D boundaries. The Chair said she understood there was a table of allowed uses established at the time of passage. One of the specific allowed uses was supposedly kennels. Counsel said to his knowledge he did not believe there was further information other than what has been presented. The recent decision regarding the kennel in East County was based on resource management designation language. Member Spalding asked the location of Measure D boundaries along Crow Canyon Road. Staff responded, generally Measure D boundaries are outside the R-1 District and urban type developments. Parcels that are designated "A" (Agriculture) or R-1, (5 Acres or larger) are included in Measure D. Measure D has different designations that allow different things. The Board said it would be helpful when considering a use within Measure D to provide them with more detailed information.

The Vice Chair will not be at the September 22, 2010 Hearing.

ADJOURNMENT: There being no further business, the hearing adjourned at 5:15 pm.

ALBERT LOPEZ - SECRETARY
WEST COUNTY BOARD OF ZONING ADJUSTMENTS