

**MINUTES OF MEETING  
WEST COUNTY BOARD OF ZONING ADJUSTMENTS  
MARCH 25, 2009  
(APPROVED ON APRIL 22, 2009)**

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

**REGULAR MEETING: 1:30 p.m.**

**MEMBERS PRESENT:** Chair, Dawn Clark-Montenegro; Vice Chair, Kathy Gil; Members, Jewell Spalding and Ineda Adesanya.

**MEMBERS EXCUSED:** None.

**OTHERS PRESENT:** Phil Sawrey-Kubicek, Senior Planner; County Counsel, Eric Chambliss; Yvonne Bea Grundy, Recording Secretary.

There were approximately 10 people in the audience.

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

**Neighborhood Preservation Ordinance Abatement Hearing**

**1. Raymond & Jean Braine, 2659 Castro Valley CA 94546**

In violation of Alameda County Ordinance 6.65.030 A(1), F(6) and M(1).

1. Unlawful outdoor storage of debris and miscellaneous items, including scrap wood and construction materials, located behind fence, in rear of property and behind accessory structure in rear of property;
2. Graffiti on side of accessory structure.

Member Spalding motioned to extend the staff recommendation of 10 days. The property was declared a public nuisance abatement is required to be completed within 30 days. The Vice Chair seconded the motion. Motion carried 4/0.

**2. Sammy & Demetria Gatison, 16540 Ehle St., San Leandro CA 94578**

In violation of Alameda County Ordinance 6.65.030 A(1) and M(1).

1. Unlawful outdoor storage of debris in front yard, in public right-of-way.

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

**3 C.M. Bulhoes, (Lot) Saturn Dr., San Leandro, CA 94578**

**APN# 079-0006-028-04**

In violation of the Alameda County Ordinance 6.65.030 D (1), D (3) & M.

1. Overgrown vegetation and weeds throughout the property (vacant lot).

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

**4. Pensco Pension Services, Inc., (Lot) Upland Rd., San Leandro, CA 94578  
APN# 079-0010-001-00**

In violation of the Alameda County Ordinance 6.65.030 D (1), D (3) & M.

1. Overgrown vegetation and weeds throughout the property (vacant lot).

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

**5. Collin I. Gillespie, 14757 Saturn Dr., San Leandro, CA 94578**

In violation of the Alameda County Ordinance 6.65.030 A (1), A (3), D (1), D (3) & M.

1. Unlawful outdoor storage of miscellaneous items, household items, automotive parts, tires, rubbish and debris in both the upper (including the carport) and the lower portion of the property;
2. Overgrown vegetation and weeds throughout the property.

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

**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.

**CONSENT CALENDAR:**

1. **LILY & ANGELA VEGARA, CONDITIONAL USE PERMIT, PLN-2009-00001** - Conditional Use Permit Application to allow a child care center for 46 children, in an R-1 (Single Family Residence) District, located at 2500 Hansen Road, west side approximately 300 feet north of Cross Street, unincorporated Fairview area of Alameda County, designated Assessor's Parcel Number: 426-0130-072-00. (To be continued to April 22, 2009). **Staff Planner: Richard Tarbell.**
2. **DANTON GARNHART, VARIANCE, PLN-2008-00072** - Variance application to allow expansion of a non-conforming use with the addition of a second story to one unit on a property with seven units where one single family dwelling is allowed, in R-1 (Single Family Residence) District, located at 1143 Grove Way, south east side, approximately 77 feet north Birch Street, unincorporated Cherryland area of Alameda County, bearing Assessor's Parcel Number: 428-0011-111-01. (Continued from January 28 and March 11, 2009; to be continued to April 22, 2009). **Staff Planner: Damien Curry.**

Member Adesanya motioned to accept the Consent Calendar as presented. The Vice Chair seconded the motion. Motion carried 4/0.

**ANNOUNCEMENTS BY THE CHAIR:** The Chair announced Item #3 Eden Area Livability Initiative will be moved to the first presentation on the Regular Calendar to accommodate the availability of Board of Supervisor staff person, Seth Kaplan.

**REGULAR CALENDAR**

1. Eden Area Livability Initiative (EALI) – Discussion regarding the Models of Governance Proposed by the EALI Governance Working Group.

County Counsel provided a response to topical legal issues that were discussed at the most recent ELAI Governance workshop. In addition Counsel discussed a requested draft. The three issue categories were summarized as follows:

**Can the County change the standard of review on land use matters appealed to the Board of Supervisors.**

Currently the BOS hears appeals on a de novo basis. Evidence is heard and decisions are made without a presumption in favor based on the lower body's decision

Recent discussion has proposed a process when the BOS considers appeals wherein there is a presumption in favor of a lower body's decision consistent with judicial review of administrative decisions. This would not be applicable to legislative matters heard by the Planning Commission. Counsel confirmed the BOS does have the discretion to change their appeal consideration process from the current de novo basis.

**Can appeals be remanded to the Planning Commission or Board of Zoning Adjustments for further review prior to hearing by the Board of Supervisor's, under the circumstance new information has been presented.**

Although it is not uncommon for different information to arise during an appeal process, the BOS does not see a strong basis of support in the law. Government Code provides that upon hearing an appeal, the Board of Appeals as it applies in Planning and Zoning law allows the Appeal body to, reverse, affirm wholly or partly, or modify an order. The law does not provide for remand. As a result there is not a basis for the BOS upon which to adopt a policy providing remand, given the statute.

**Can Board of Zoning Adjustments decisions that are appealed be reviewed by the Planning Commission prior to being referred to the Board of Supervisor's to provide an additional layer of application review.**

Analysis of Government Code, Section 65903 concludes there is one level of appeal. At a local level there is no discretion to change that process. Within some areas the BOS has discretion to change land use review process, however not in all circumstances.

In response to discussion that took place at the March, EALI Meeting. Counsel prepared a policy draft that lays out an alternative process allowing more public input in the BOS appointment process of Planning Commissioners, and Board of Zoning Adjustments Members.

In response to another concept discussed at the EALI Governance Committee. A draft ordinance was circulated which would ensure clear direction was provided in the Ordinance Code, which requires most Planning Commissioners reside in the unincorporated area of the County. The Administrative Code modification would require 4 Planning Commission Members reside in the Unincorporated County, for a period of 1 year prior to appointment. Counsel then asked for feedback from the audience, or Board Members. Board comments and questions for Counsel were as follows:

- In circumstances where new information is available regarding an appeal, does the BOS have the

- ability to return the matter to a lower body, for review
- Can the Ordinance be changed to provide a remand provision
- Does language in Government Code 65903 allow further consideration by a lower body based on the provision the Board of Appeals shall hear and determine appeals? An alternate consideration might be if new information has developed, the appeal is not ready to be heard in light of new information
- If the BOS concluded an appeal was not ready to be heard based on new information, would Counsel see the BOS as a true appellate body, as opposed to trying appeals on a de novo basis
- Is County Counsel in agreement that the primary differences between the Planning Commission and the BZA is that the BZA is semi fact finding adjudatory body, in contrast to the Planning Commission which often sits as a recommendation, or legislative body

County Counsel confirmed the BOS does not have the ability to return appeals to a lower body for review. California State Law limits local jurisdiction's discretion regarding Ordinances. California State Law would require modification, to allow a change. Counsel agreed that most of BZA Hearings are quasi judicial under California Law. In addition, most of the Planning Commission Hearings are also of a quasi judicial, although their recommendations are legislative in nature. Member Spalding thought in the fact finding role it would be appropriate for appeals to return for review when further information is presented. This is a distinguishing point between the BZA and Planning Commission. Staff may want to explore separating the Planning Commission's fact finding, and legislative roles. The fact finding component of an appeal can determine if and when consideration is required, and supports the BOS in an appellate role. Public testimony was opened. There were no requests to speak. Public testimony was closed. Board comments continued.

Regarding appointments, Member Spalding said another proposal discussed at EALI meetings was to post potential Candidate names on the County Website. This method would shine light on the process. However this may present a further challenge to securing candidates. The Chair agreed posting names may discourage candidates. Further Board questions for staff were as follows:

- What process results if candidates cannot be found for open posts
- Is the BOS required to use the modified appointment path recommended by the ELAI Committee, or is the process optional
- Can the Ordinance be modified to allow the BOS to refer applications back to the BZA at their discretion
- What was the intent and/or preference of the ELAI Committee regarding review of the Ordinance appeal process
- Is there a mechanism to determine that an application is no longer an appeal when new information is provided
- Is a motion required at the end of today's discussion

Counsel said if the BOS is not successful in the appointment of candidates through the modified approach. They can revert to the prior appointment process. The alternate appointment path is optional,

and will not be adopted as a sole means of appointment. Counsel closed explaining feedback and comments will be forwarded to the ELAI Governance Committee and the BOS.

Member Spalding said language should be added clarifying it is within the BOS discretion to use either option. She then offered back ground information on review of the Ordinance appeal process. Member Spalding and the Vice Chair attended some of Governance Meetings. There is a lot of frustration on behalf of Members of the community. Decisions are rendered by the BZA, and on appeal the BOS hears the case, anew. Some aspects are thrown out. A common approach in Civil Court is that when a decision made a trial court is sent to a court of appeal. The court of appeal will uphold the trial court findings of fact, unless those facts cannot be upheld or supported by substantial evidence. The presumption is the reviewing body wants to affirm the lower body finding. Member Adesanya asked if the ELAI Committee had consensus, as to a preference. Member Spalding acknowledged she did not attend all Governance Meetings however the consensus was a preference for a judicial review model. The review would not be applicable for legislative matters. The Vice Chair agreed. She strongly believed that if facts and/or new information have been presented, the application should return for review, prior to a BOS Hearing. This process could provide more efficiency in that the new information may result in resolution. Member Spalding suggested staff consider a change in language. Rather than using the term “remand” which usually takes place after a decision is rendered, vs. “re-consideration” which takes place prior to a final action. The Chair remembered an item that was referred back to the BZA for additional review. Counsel said the item was not formally remanded, after discussion. The application was held at the BOS. An additional BZA Hearing was held, to provide further input. Member Spalding said the same type of forum could be used as a model. Counsel said recommendations presented could be helpful in providing options to slightly finesse Government Code, through articulation. Rarely are things clearly right or wrong, in the law. The Governance Committee can explore this further. Consequently there is an argument recommended changes are beyond what California State law would allow. Further direction from the Governance Committee and the BOS may provide some creativity and flexibility. In regards to new information, the consideration is has an application changed to the extend that is a new application. This rarely occurs. Member Adesanya said “change” could be a measured in the following ways: Do changes affect CEQA, do changes result in the modification of findings, or project description. Member Spalding agreed, any change that would have a determinative effect on findings, is a good measurement tool.

Seth Kaplan from Supervisor’s Nate Miley’s office spoke to the Board. He acknowledged the Board effort regarding comments, and discussion presented. It is important comments go back to the ELAI Governance Committee, as that is a key principal of the format. Mr. Kaplan told the BZA that Board of Supervisor’s staff operate under the assumption applicants bring new ideas forward at the BOS level, because this is their last opportunity to present information. Based on suggestions presented today, information will be taken to the Governance Committee in hopes of creating more of a communication loop. Mr. Kaplan thanked the Board for their participation.

2. **MICHAEL, FRANCES & CHARLES AAHL, CONDITIONAL USE PERMIT, PLN-2009-00026** – Use permit application to allow the continued operation of a daycare facility in an RS-D3 (Suburban Residence, 2,500 square feet per Dwelling Unit) District, located at 20135 San Miguel Avenue, west side, approximately 260 feet north of the intersection with Jeanine Way, unincorporated Castro Valley area of Alameda County, designated Assessor’s Parcel Number: 084A-0124-001-04. **Staff Planner: Richard Tarbell.**

Staff recommended approval. The Castro Valley Municipal Advisory Committee also recommended approval. The Chair asked if penalties regarding pick-up and drop off contained in Condition #5 were discussed with the Applicant. Staff confirmed schedules were provided by the Applicant. The required

Conditions were included in the prior permit, and are a function of the daily operation. Public testimony was opened.

The Applicant, Frances Aahl was present. Board questions for the Applicant were as follows:

- Is Ms. Aahl the original proprietor
- Has the Applicant read the staff report
- Are parents aware of pick-up, drop off rules, regulations, and penalties

Ms. Aahl told the Board she had read the staff report, and is agreement with Conditions of Approval. She had owned the business since 1962. Regarding day care regulations, parents are very conscientious. There has never been a problem with pick-up, or drop off. Public testimony was closed.

Member Adesanya motioned to uphold the staff recommendation of approval. Member Spalding seconded the motion. Motion carried 4/0.

3. **TRAN TUONG / ZERENT ZHOU, VARIANCE, PLN-2008-00076** – Variance application to allow a front yard setback of 18.56 feet where 20 feet is required, in conjunction with Parcel Map, PLN-2008-00051, located at 1515 Mono Avenue, west side approximately 215 feet northwest of the intersection of Mateo Street and 159<sup>th</sup> Avenue, unincorporated Ashland area of Alameda County, designated Assessor's Parcel Number: 080-0040-068-02. **Staff Planner: Damien Curry.**

Staff reviewed the application. The recommendation was approval. Initial Board questions were as follows:

- Is the application in conjunction with a subdivision
- Is an affirmative finding on the variance required for subdivision of the parcel
- What is the maximum number of units allowed on the parcel without a variance
- Is the effect of the variance limited to proposed Parcel #1
- Is there an alternate method to achieve the same end
- Are the existing setbacks non-conforming
- What are the necessary parking requirements for the project
- Is the Applicant required to provide further information on the proposed parcel map
- What is the position of the Ashland Association regarding the project

Staff confirmed the variance application is in conjunction with a subdivision proposal. Subdivision of the parcel is not possible without variance approval. The front yard setback must be in compliance, or be granted a variance to allow the Planning Director action on the subdivision. The existing front yard setback is non-conforming. Without a variance zoning allows 10 dwelling units. Required zoning density per dwelling unit is 2,000 square feet. If the parcel map gains approval, Parcel #1 with the existing home could potentially allow one additional unit. Parcel #2 will accommodate 7 units. The variance will only affect the existing dwelling. Currently there are two open air parking spaces on the side of the home. Parking is allowed in any area that is not in the required front yard setback. There has been no response from the Ashland Association. The Applicant is not required to provide further parcel map information at this juncture. Standard requirements are necessary to obtain approval of a parcel map. The Planning Director will consider compliance with applicable requirements, during the consideration process. Public testimony was opened.



The Applicants, Mr. Tuong Tran and Zerent Zhou were present. Member Spalding asked Mr. Tran if he would be willing to continue the application in order to provide the Board further subdivision information. Staff said the subdivision consisted of 2 lots, one at 5,000 square feet, the other 15,000 square feet. A subdivision map is provided in the staff report. Mr. Tran said the property owner Mr. Zhou does not have specific development plans at this time. He would like to divide the property into 2 parcels. Parcel #2 may be developed in the future, and then sold to cover the cost of building a second home on Parcel #1

Planning Director Albert Lopez, explained that prior to subdivision all legal aspects must be resolved. The required setback is 20 feet the existing setback is, 18.5 feet. The available options are to move the house; or ask for a variance. The proposed lot split is fairly straight forward. Each of the proposed lot sizes will meet the zoning code. Although staff does not know the details of what the Applicant proposes in subdivision, it appears they propose one home per lot. Although further information regarding the lot split is not available. The purpose of the hearing is consideration of the variance. Public testimony was closed.

Member Adesanya agreed the lot split proposal appeared to be straight forward, and warranted for the existing non conforming use. However Tentative Findings support the subdivision map. Required Findings should be re-crafted. Member Adesanya did not want to set the wrong precedence. In 2008 the BZA heard an application in which the purpose of the variance was to allow subdivision, there was no other reason. The BZA denied the application because they felt subdivision of the parcel would result in detrimental effects to the neighborhood. The application was appealed to the BOS. Although these conditions do not exist in the present application, the Board is conscience not to set a green light for detrimental subdivisions in the future. Mr. Lopez acknowledged that was not the case with the current application. The present application seems to be relatively benign. The zoning code requires reconciliation prior to consideration of the parcel map.

Board Members then discussed Tentative Findings. Regarding Tentative Finding #1, Member Spalding said although the home has been in existence since 1913 it would be helpful to have a proposed plan upon which to support required Findings, as opposed to Findings solely supported by the proposed subdivision. The public is concerned with the final outcome of a project. The Vice Chair pointed out the current zoning density would allow a unit beyond what the Applicant is currently proposing. In addition the Applicant also has the ability to add a second story onto the existing home. Staff explained that further development of Parcel #2 would require expanded review that must be in compliance with the Zoning Ordinance.

After discussion Board Members agreed that regarding Finding #1: As the result of the dwelling being developed in 1930, the Finding should be tied specifically to the home. The ability to subdivide is not a special circumstance. In addition, Parcel #2 is irrelevant and should not be included. This will prevent a nexus being drawn for future lot splits.

Regarding Finding #3: The project did not appear to be an overblown development therefore the result may not be detrimental. Parcel #2 would be very large, and could support development. There is a 1.5 foot difference in the existing setback, and the present zoning requirement of 20 feet. Finding #3 can be re-stated as follows: The proposed variance is de minimus and would keep the present lot consistent with the existing neighborhood pattern.

The Chair said although the BZA will not be considering the parcel map. En light of overdevelopment in the area, especially at the rear of surrounding parcels. The Planning Director might consider use of a private street versus a driveway. A private street has more stringent requirements for width, and turnaround. Open space is also very important, and should be given maximum consideration. Further

landscaping would greatly enhance the site. Implementation considerations would be very helpful to the neighborhood. Mr. Lopez acknowledged overdevelopment was also a concern for planning staff. Design Development Guidelines currently under consideration will be useful in preventing overdevelopment.

Member Spalding motioned to adopt the staff recommendation of approval of Variance, PLN-2008-00076 with the following modifications:

Tentative Finding #1, Sentence two shall be removed. Finding #1 shall now read: The dwelling was constructed in 1913 and is considered legal nonconforming.

Tentative Finding #3 shall have the following language added: The proposed variance is de minimus and would keep the present lot consistent with the existing neighborhood pattern.

The motion to approve PLN-2008-0004 passed 4/0.

**APPROVAL OF MINUTES:** Member Adesanya moved to approve the Minutes of March 11, 2009 with stated corrections. Member Spalding seconded the motion. Motion carried 4/0.

**STAFF COMMENTS & CORRESPONDENCE:** Staff made no comments.

**BOARD'S ANNOUNCEMENTS, COMMENTS AND REPORTS:** The Chair complemented Staff Planner, Richard Tarbell. Staff Report PLN-2009-00026 was very thorough. It should be used as a template for all day care applications. Member Spalding added that the business at 20135 San Miguel Avenue should also be complemented for providing day care in the community since 1962.

**ADJOURNMENT:** There being no further business, the hearing adjourned at 3:35 p.m.

---

ALBERT LOPEZ - SECRETARY  
WEST COUNTY BOARD OF ZONING ADJUSTMENTS