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To Pierre Rivas/PV/EDC@TCP
cc Larry S Lohman/PV/EDC@TCP, Gregory L
Fuz/PV/EDC@TCP, Julianne Van Leeuwen/PV/EDC@TCP,
Jack Sweeney/PV/EDC@TCP
bcc

Subject Bavarian House Restaurant

I have been reviewing the various correspondence on this, and then had a conversation with Supervisor Sweeney and have the following comments:

1. In 1992, the property was zoned SA-10. This zoning did not allow a restaurant use. The building permit issued calls out a "restaurant" use. Apparently, one copy of that building permit includes a notation that it is a "dining facility", rather than a typical restaurant, but other copies, including the one shown to me, do not include that notation. Since the use was not allowed in the zone district at that time, the use is not governed by the nonconforming use sections of the code, but rather by principles of equity and estoppel. The nonconforming use sections can give guidance for the application of the principles of equity and estoppel. Some cases hold that you can never vest to a permit that is inconsistent with the zoning and general plan, other cases hold to the contrary. All appear to base the conclusion on a balancing of the equities-- is the public harm of not enforcing the ordinance greater than the harm to the applicant if the ordinance were enforced?
2. The zoning ordinance's definition of dining facility is: *an establishment where food, other than that produced on the premises, is prepared and served to the public in an established indoor seating area.* A dining facility, by this definition, appears LESS compatible with agricultural promotion than a restaurant where food is prepared on the premises-- since it does not, by definition include food grown and prepared on site.
3. The Ranch Marketing Ordinance adopted in 2001 purports to sunset all food service that is not attributable to food grown on site within one year of adoption as follows: *Food items, where the principle ingredient of the food are not grown on the premises, may be make and/or sold for one (1) year following the implementation of this ordinance, except as otherwise provided for in this ordinance.* This, if meant to apply to legal non-conforming uses, is probably an unlawfully short period for amortization of those uses. However, as I stated earlier, this is not a legal non conforming use, since it never complied with the zoning, so this section of the Ranch Marketing Ordinance, is inapplicable to this project. As stated previously, what is relevant here is what is reasonable and equitable: could the applicant reasonably rely upon the building permit issued by the County as lawfully allowing the operation of a restaurant, given that the existing zoning did not allow for such a use?
4. The applicant apparently relied upon the issuance of a building permit for a "restaurant" and has operated the business as a restaurant for 14 years. There is no evidence presented that the use is harming the neighborhood; however, allowing these types of uses permanently potentially harms the public by converting agricultural lands to other uses. However, it is doubtful a court would find this sufficient public harm to outweigh the harm to the applicant.
5. Legal nonconforming uses are ordinarily not allowed to expand. This use, as an illegal, nonconforming use, has no greater right to expand.
6. The simplest way to legalize the existing use, but to prevent any future expansion that is inconsistent with the zoning would be to have the applicant submit an application for a minor use permit, that sets forth the existing operation in detail. The permit could then contain conditions so that no further expansion could occur unless the project went through the appropriate process and could be found consistent with whatever Ranch Marketing Ordinance was then in effect.

Supervisor Sweeney would like Julianne and I to meet with Development Services staff to determine if staff believes that a SUP could be processed through the ZA to legalize this business which has been in

operation with a building permit that apparently authorizes its use for 14 years. If staff does not think that it can process and recommend approval of an SUP, then Supervisor Sweeney proposes to place the item on the BOS agenda under threat of litigation and determine whether we are estopped from proceeding with any code enforcement action.

I hope that this email is clear and of assistance. Let me know when you would like to meet about this matter. I am out of the office Thursday - Monday, and tomorrow and Wednesday are booking fast.

Paula F. Frantz
Deputy County Counsel