

TOWN OF SAN ANSELMO
Minutes of the Special Town Council Meeting of July 6, 1995

Present: Chignell, Kroot, Yarish
Absent: Breen, Hodgens

6:45 p.m.

Closed session for conference with real property negotiator regarding negotiations with Peter and Pamela Fraser, on the terms of purchase and exchange of real property in the vicinity of Bald Hill, Redwood Road, and Oak Avenue, A/P 7-154-04; 7-101-02; and 7-071-03, pursuant to Government Code Section 54956.8; and regarding negotiations with the San Anselmo Police Officers Association, pursuant to Government Code Section 54957.

7:30 p.m.

1. AUTHORIZE TERMINATION OF CONTRACT WITH MULLIN CONSTRUCTION, INC. ON THE LIBRARY RENOVATION PROJECT.

Public Works Director Bush said staff recommends that the contract with Mullin Construction be terminated. Very little progress has been noted since the last Council meeting on June 27, with no one working the past two days. Bush said his staff report dated June 23, 1995 lists all the problems that have been experienced with the Contractor. There are three major problem areas 1) not enough skilled workers have been supplied, 2) failure to pay subcontractors, and 3) not completing the job by the agreed to date of May 8, 1995. Bush said the Town should seek another contractor to finish the work.

Kroot asked if any work has been done since the last meeting. Project Architect Peterson said the masonry on the sump pump, some interior cleanup and installation of light tubes has been completed. The sump pump has not been installed and no electrical work has been done.

Yarish asked Bush if he has received any correspondence from the Contractor since the last meeting. Bush said he has received two letters, but feels none of his claims are founded.

Kroot asked about the stop notice on circuits and lighting. Bush said the electrical contractor won't do any more work until he gets paid.

Yarish asked if there is a way to avoid these kinds of problems with payment to subcontractors. Project Architect Peterson said the first notice the Town gets regarding non-payment is a stop work notice. The Town then withholds the funds from future payment or issues joint checks. There is no other way to smoke out these problems except through the normal process. Lien releases are not done in public work.

Chignell asked Mr. Mullin if he has had an opportunity to consult with an attorney. Mullin says he has.

Mike Mullin, Mullin Construction, said the time extension to May 8 was discussed as early as December 1994. It was not a surprise in March. Just a month ago his crew was making good progress on the job. He said the Project Architect had the cabinet work removed from his contract because he said it didn't comply with the Woodworkers Institute of California (WIC). He said this action broke down the cooperation between the two parties. He has had people on site every work day since the last meeting, including the last two. Regarding asbestos removal, he feels he did everything right, although they say he did the work improperly. He takes exception to having the cabinet work removed from the contract. Mullin says the remaining work is not much, but they need cooperation to get it done. He would like to finish the work and could if the Architect would cooperate.

Dan Peterson, Project Architect, said the trim on the partitions for the cabinet work is not complete and has poor quality workmanship, which the WIC commented on, and the trim

was not stained or finished. He said the asbestos issue is important. The work was done by Mullin's own people, who are not qualified personnel. Peterson said the job has gone on so long because he and Bush gave Mullin every opportunity to get it together. He said no electrical work has been done since the last meeting even though Mullin said it would get done.

Public Works Director Bush said the non-payment of subcontractors is a major problem. If you don't pay them, they won't work. Some of Mullin's subcontractor changes have been approved, and some have not. There is currently over \$14,000 outstanding in stop notices, and \$11,000 have accrued in liquidated damages since May 8th. Mullin has been wasting time and it's costing him a lot. He promised the Council at the last meeting that progress would occur, but it hasn't.

Yarish asked if the monies outstanding are more than the amount remaining on the contract. Peterson said there is about \$26,000 left in the contract and \$30,000 in retention funds. There are three stop notices outstanding for \$18,000, leaving about \$38,000 left to complete the contract.

The meeting was opened for public discussion.

Bob Desmond, Bob Desmond Painting, said he has had the displeasure of dealing with Mr. Mullin. He has been a painting contractor and resident for twelve years. He submitted a bid to Mullin for the painting and started work on Friday January 20. When Project Architect Peterson told him the ceiling paint he had purchased was not the special paint specified for the job, he and his two workers left the job. Mullin called him that weekend and told him to go ahead with the painting and ignore what Peterson said. Desmond said he had no reason not to trust him. He and his employees worked all weekend on the project. Later Mullin told Desmond that he had put the wrong paint on the ceiling. He has not received a dime for his work.

Mike Mullin, Mullin Construction, said he specified Benjamin Moore paint, not Fuller O'Brien. Mullin also said there is a problem with the money for the roofing company (Henris). The check is being held by an attorney waiting for a release.

Public Works Director Bush said that Mr. Mullin's attorney is also Henris' attorney. Mr. Henris says there has been no release requested. The Town cannot verify that the check has gotten to Henris Roofing.

Mullin said he is willing and able to sit down with Bush and Peterson and wrap this project up.

The public hearing was closed.

Kroot said this has gone on too long, partly because Bush and Peterson gave Mr. Mullin the benefit of the doubt. They have tried to help him, because if the work goes well, they look good too. He feels the Town must terminate the contract and get the work done.

Chignell said the evidence is convincing to him after reviewing all the material. Even giving Mr. Mullin the benefit of the doubt, the total record shows there is no doubt that the contract needs to be terminated. Many significant issues in the staff report remain unaddressed by Mr. Mullin, and he must therefore assume the staff is correct. The community has been distressed, the Town has been cited by Cal OSHA, the delays are untenable, and he feels he must support the staff recommendation. At the last hearing Mullin promised he would make progress on the job and he hasn't. He supports termination of Mr. Mullin's contract.

Yarish said he concurs with his colleagues. There is no end in sight to this work. This has been an inconvenience and a stress to the staff and the community. All four of the required findings seem well founded. He said he trusts staff will be fair in determining balances due.

Town Attorney Roth said that in making this determination, the Council is relying on the Public Works Director's staff report dated June 23, 1995, Mr. Mullin's letter of July 6, 1995, Project Architect Peterson's July 6, 1995 memorandum with a schedule attached, and the change order dated March 29, 1995. The motion should indicate, if Council is satisfied, that all the elements in the staff report have been shown to be true. If any have been shown not to be true, that should be indicated. Any one of the four grounds set forth in the contract and listed in the staff report can be cause for termination.

M/s, Chignell/Kroot, to terminate the contract with Mullin Construction Co. Inc., based on reasons listed under Article 11.2 of the contract, finding that grounds one through four have all been met, based on information in the change order dated March 25, 1995, the June 23, 1995 staff report from the Public Works Director to the Town Council, the July 6, 1995 letter from Mr. Mullin to Mr. Peterson, and the July 6, 1995 memorandum/status report with schedule attached from Mr. Peterson, in addition to testimony by the staff, the public and Mr. Mullin. Ayes: Chignell, Kroot, Yarish. Absent: Breen, Hodgens.

Public Works Director Bush said Mr. Peterson's contract didn't include this additional work. On the agenda for July 11, 1995, will be a written request to compensate him for the additional work.

2. ESTABLISH WHETHER THE TOWN COUNCIL OR THE PLANNING COMMISSION SHOULD CONDUCT THE PUBLIC HEARING ON THE REQUEST FROM LAURENCE BARTONE FOR TOWN APPROVAL OF AN ACCESS EASEMENT FROM TOMAHAWK DRIVE OVER PRIVATE OPEN SPACE LANDS OF THE OLD QUARRY SUBDIVISION TO HIS PROPERTY IN THE VICINITY OF MIWOK DRIVE.

Planning Director Chaney said the question before the Council is a procedural one. The request is from Mr. Bartone, 58 Miwok Drive, who wants access across private open space to property he owns on Tomahawk Drive. One decision needed is whether the Conditions, Covenants, and Restrictions (CC&R's) include the right of access to a third party across the private open space of property governed by the CC&R's. If the answer is yes, then this project can be examined. The CC&R's provide that no building, fence, retaining wall, etc. can be built on the open space. Bartone argues that the placement of the house utilizing the open space access would be better than if built in the envelope approved through the County. The second question is who should make this decision. Chaney feels it is properly with the Planning Commission, but the Town Council is the body that ultimately decided on the Quarry Mountain issue, so the matter could be reviewed by either body. Timing is a factor as the Planning Commission is booked until September. If the Town Council considers the matter it could be on the July 25 agenda. The applicant has a time constraint as the property is in escrow and scheduled to close July 15.

Kroot said there seem to be major implications to this decision. Chaney said research needs to be done to see if it would be allowed in the CC&R's. This may be precedent-setting.

Chaney said the actual construction of the house will be reviewed by the County.

Chignell asked Town Attorney Roth if the Council has the legal option to send this back to the Planning Commission. Roth said yes.

Laurence Bartone, Applicant, said they feel the question is simply legal. He has a letter from his attorney whose opinion is that the easement is allowed in the CC&R's. He said there is no need to rehash what was done at the time of the Quarry Mountain agreement. The general rule is that covenants go in favor of the free use of land. The Council has the right to decide tonight on this matter. The main issue is to get this taken care of for their buyers. They were told this was no problem by the title company. They are in a contract that is due to close July 15. They are not interested in an encroachment permit. If access is from Miwok, the Town will have no say on the trees that are removed, or about the color or size of the house. Virtually every neighbor wants to see the access from above in

order to preserve the mature Bay trees below. At least fifteen of the trees would have to be removed. This situation requires a fast solution. He said he has always had access to that road since they've lived there.

Mark McCarthy, prospective buyer, said he is a contractor and the Bay forest downhill would have to be cut down if the access was from below.

Erica Marovich, prospective buyer, said they don't want to build if they have to cut down the Bays. They have time constraints because of capital gains rollovers.

Robert Gillarden, 56 Miwok, said he lives downhill from the hillside parcel. He is pleased with the buyers and feels access from above is best. He asked the Town Council to expedite the sale and respect the opinion of the seller's attorney so the deal can close.

Jonathan Braun, 479 Scenic, said he sat through five years of hearings on Quarry Mountain, and he does not remember an intent for any development on the private open space. It was to stay forever in its open space condition. He understands the time constraint, but the issue has a lot of ramifications. It shouldn't be rushed into without looking at it closely. He feels the Planning Commission is the appropriate body to decide.

Kathleen Sanders, 310 Redwood Road, Chair of the Open Space Committee, said she wants to stress the sanctity of both private and public open space. The CC&R's assured the public that sensitive areas would be protected. Building a roadway through breaks down public confidence.

Laurence Bartone, Applicant, said the conditions are clearly spelled out in the CC&R's. This is just a 40 foot driveway going over barren land. There are no more landlocked parcels, so it is not precedent setting.

Kroot said he was on the Planning Commission when Quarry Mountain was finalized. Many meetings were involved, the public attended in force; there is a lot of history to this. He said the Planning Commission at that time would have been shocked to think a roadway could go through there. The question is whether access can be granted here, and whether access can be granted through another's property, even if it's not open space. He said he thinks the Planning Commission should hear the matter. He asked if the timing could be speeded up.

Chaney said the agendas are very heavy through the summer as everyone is trying to beat the rainy season. Someone else would have to be bumped to get this heard before September.

Chignell said he agrees that the matter should go to the Planning Commission as they originally heard it. He suggested the Planning Commission consider a special meeting to expedite the matter.

Yarish said he feels the matter should be heard by the Town Council due to the technicality of the issue and the probability of appeal. This is a policy setting matter.

Beverly Lefridge, Applicant, said that from a legal standpoint, these points have already been addressed in the CC&R's. They are following the CC&R's to the letter. This is an unfair burden to have to wait on something that has already been decided. They want to preserve the neighborhood.

Town Attorney Roth said he has read her attorney's opinion on the issue, and he doesn't agree with it. It is a question of legislative intent - what did the Planning Commission and Town Council intend when those bodies approved the CC&R's.

M/s, Chignell/Kroot, to refer the issue to the Planning Commission to be heard, requesting the Planning Department report back to the Town Council at the next meeting, in writing, on how the matter can be moved up to a date closer than September. Ayes: Kroot, Chignell. Noes: Yarish. Absent: Hodgins, Breen.

3. ADJOURN.

The meeting was adjourned at 10:00 p.m.

Debbie Stutsman