

Sicular Environmental Consulting & Natural Lands Management

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SUPPLEMENTAL MEMO ATTACHMENT 3

Memorandum

To: Rachel Reid, Marin County CDA

From: Dan Sicular

CC: Tammy Taylor, Sabrina Cardoza, Marin County CDA

Date: July 30, 2023

Subject: Response to Comments Received on the Brian Johnson Trust Coastal Permit Project Prior to the July 31, 2023 Planning Commission Hearing

This memo includes brief responses to comments received on the Brian Trust Coastal Permit Project by CDA in the week prior to the July 31, 2023 Planning Commission hearing. Responses are provided only for comments related to the CEQA analysis, and not for policy or merits issues. Overall, these comments raise no new substantive issues not previously addressed in the January 2023 Supplemental Environmental Review (SER) or in the June 2023 Response to Comments (RTC) document. Comments do not provide substantial evidence to support a fair argument of a significant impact that cannot be mitigated.

Comment letters were received from the following parties (letter designation sequence continued from the June 2023 RTC document):

Letter Designation	Author/Affiliation
F	Patricia K. Conway, Brekhus Law Partners, representing Marisa Atamian-Sarafian and Dr. Stephen Sarafian, Stinson Beach Residents
G	Jim Zell, Stinson Beach Resident
H	Jack Siedman, Attorney, representing Robert Friedman, Stinson Beach Resident
I	Elizabeth Brekhus, Brekhus Law Partners, representing Marisa Atamian-Sarafian and Dr. Stephen Sarafian, Stinson Beach Residents
J	Kent Nelson, Stinson Beach County Water District
K	Leonard Rifkin, representing Brian Johnson
L	Elizabeth Brekhus, Brekhus Law Partners, representing Marisa Atamian-Sarafian and Dr. Stephen Sarafian, Stinson Beach Residents

The comment letters, with alpha-numeric coding of individual comments, are attached to this memo.

Responses to Comments

Letter F: Patricia Conway

- F-1 This comment is a request for documents, and does not comment on the environmental review.
- F-2 This comment does not address the environmental analysis. Impacts related to the Project site's location in a flood zone are addressed in Supplemental Environmental Review (SER) Section 2.10, Hydrology and Water Quality. See also the June 2023 Response to Comments (RTC) document, Master Response 1.
- F-3 Please see the response to comment F-2.

Letter G: Jim Zell

- G-1 Impacts on dune habitat are addressed in SER Section 2.3, Biological Resources, and in the June 2023 RTC document, Master Response 2.

Letter H: Jack Siedman

- H-1 The correspondence cited in this comment preceded the SER. The commenter did not submit comments on the SER. The commenter's client's view of the Project's merits is not relevant to the environmental analysis.
- H-2 The Stinson Beach Adaptation Response Collaboration Sea Level Rise Vulnerability Assessment is being prepared by consulting firm ESA for the Marin County Community Development Agency (CDA). A draft report was released in April 2023 and was reviewed by the hydrologist who prepared the Hydrology and Water Quality section (Section 2.10) of the SER. The sea level rise predictions and community vulnerabilities identified in that report are consistent with those used in the analysis in the SER and further discussed in the June 2023 RTC document, Master Response 1 and response to comment C-20. No new information, including the information in this recent study, contradicts or calls into question the conclusion of less-than-significant impacts related to coastal flooding and sea level rise studies reached in the SER.
- H-3 The California Coastal Commission's February 3, 2023 letter commenting on the SER was responded to in the June 2023 RTC document. Regarding the Commission's comments on Easkoot Creek's floodplain and the moratorium on building within the floodplain, please see response to comment A-14 in the June 2023 RTC document.

While a portion of the Project site is located within the Easkoot Creek floodplain, it is over 300 feet distant from the Easkoot Creek channel itself. There are at least four residences located along Calle del Onda between the Project site and the creek (see Figure 3 in Section 1, Project Description, in the SER). While Easkoot Creek contains sensitive riparian and aquatic habitat, the Project, given its distance, its small size, and its proposed controls on erosion and sedimentation during construction (see SER, Chapter 1, Project Description), would not have direct impacts on sensitive biological resources in and adjacent to the creek. SER Section 2.10, Hydrology and Water Quality, thoroughly analyzes the potential impacts of the Project related to both riverine and coastal flooding, and finds these to be less than significant. See also Master Response 1 in the June 2023 RTC document.

- H-4 Impacts and implications of the January 2023 atmospheric river storms are considered in Master Response 1 in the June 2023 RTC document.
- H-5 The potential for sea level rise to result in inadequate functioning of the proposed septic system is considered in the January 2023 SER, Section 2.10, Hydrology and Water Quality, as well as in Master Response 1 and the response to comment A-14 in the June 2023 RTC document. Impacts were found to be less than significant.
- H-6 The Project was the subject of the 2020 Initial Study/Mitigated Negative Declaration (IS/MND) prepared by the Stinson Beach County Water District, as well as the January 2023 SER. Both studies found that all significant Project impacts can be mitigated to less than significant. A Mitigated Negative Declaration is therefore the appropriate path to CEQA compliance, and an EIR is not necessary. See Chapter 3, Summary and Conclusion, in the SER, and Chapter 5, Summary and Conclusion, in the June 2023 RTC document.
- H-7 This comment addresses the merits of the Project, not the environmental review.

Letter I: Elizabeth Brekhus

- I-1 This comment requests a continuation of the Planning Commission hearing, and does not address specifics of the environmental review.

Letter J: Kent Nelson, Stinson Beach County Water District

- J-1 The Stinson Beach County Water District (SBCWD) is the agency responsible for issuing the permit for an onsite wastewater treatment (i.e., septic) system for the Project. Should the applicant reapply for a permit, the SBCWD may choose to rely on the existing environmental documentation, including the 2020 IS/MND and the January 2023 SER, or may choose to prepare a new environmental document. Both the 2020 IS/MND and the

January 2023 SER examined impacts associated with the proposed septic system. The expiration of the permit has no bearing on the adequacy of the environmental documents. If a reapplication were to propose a substantially different onsite wastewater treatment system, additional environmental review could be required, as determined by the SBCWD or the County.

Letter K: Leonard A. Rifkind

- K-1 This comment does not address the environmental analysis.
- K-2 This comment analyzes the issue of a constitutional “taking” should the Project be denied. It does not address the environmental analysis.

Letter L: Elizabeth Brekhus

- L-1 The commenter submitted lengthy comments on the January 2023 SER (comment letter C in the June 2023 RTC document), all of which were responded to in the June 2023 RTC. This letter essentially repeats comments contained in comment letter C.
- L-2 The conclusion in the 2023 SER, reaffirmed in the June 2023 RTC document, that the Project, as mitigated, would not result in a significant impact on the environment is based on substantial evidence in the record cited and discussed for each impact conclusion. The expiration of the SBCWD Design Permit does not invalidate the environmental documents already prepared; see the response to comment J-1. The currently proposed 1,296 square foot residence, as well as the proposed septic system, were thoroughly analyzed in the January 2023 SER. Regarding the recent atmospheric river storms, please see Master Response 1 in the June 2023 RTC document.
- L-3 The issue of a constitutional taking, should the Project be denied, is not an environmental issue.
- L-4 The Project’s impacts on dune and sandy beach habitat are discussed in Section 2.3, Biological Resources, in the January 2023 SER and in Master Response 2 in the June 2023 RTC document.
- L-5 The commenter raised similar points in their comment on the SER. Please see responses to comments C-14, C-15, and C-19 in the June 2023 RTC document. The impact conclusions regarding geologic hazards are not conclusory, and in fact are based on substantial evidence in the record, including a Geotechnical Feasibility Study prepared by a Geotechnical Engineer, and reviewed by the Certified Engineering Geologist who prepared the Geology and Soils analysis in the January 2023 SER. The commenter presents no

substantial evidence to support a fair argument of a significant impact related to geologic hazards.

- L-6 Please see Master Response 1 and the response to comment C-20 in the June 2023 RTC document. The comment provides no new or substantial evidence to support a fair argument that the Project would result in a significant impact related to sea level rise and coastal flooding.
- L-7 The SER identifies the location of the Project site within the AO and VE flood zones and thoroughly analyzes the potential for flood-related impacts in Section 2.10, Hydrology and Water Quality. See also Master Response 1 and response to comments C-20, C-22, and C-23 in the June 2023 RTC document.
- L-8 Please see Master Response 1 in the June 2023 RTC document. That Master Response recounts the severe flooding, evacuations, and property damage that occurred in Stinson Beach during the January atmospheric river storms. That Master Response also provides evidence that the Project site itself was not inundated, and discusses the potential for the Project to exacerbate coastal and riverine flooding impacts on neighboring properties, finding that any such impact would be less than significant.

Letter F

From: [Patricia Conway](#)
To: [Cardoza, Sabrina](#)
Cc: [Marisa Atamian-Sarafian](#); [ELIZABETH A. BREKHUS, ESQ.](#); [Jack Siedman, Esq.](#)
Subject: Re: 21 Onda: Two Emails for our comment letters...
Date: Friday, July 21, 2023 4:05:21 PM
Attachments: [Marin County Memo- Repetitive Loss Area 3.2023.pdf](#)

Dear Sabrina,

We received notice that a Supplemental Memorandum was posted for the July 31, 2023 hearing. I did not see anything the Planning Page or the Environmental Review Page. I also wanted to note that all of the comments submitted during the January 9-February 8, 2023 comment period have been omitted.

Could you please send us the following:

- Latest Supplemental Memorandum for July 31, 2023 meeting;
- Supplemental Staff Report, if any;
- Supplemental Environmental Review, if any;
- All Public Comments submitted in 2023;
- All Inter-Agency Comments submitted in 2023, including but not limited to by the California Coastal Commission and / or Dept. Public Works.

Our client also received the following notice from the Marin County Dept. of Public Works that the area is designated a Repetitive Loss Area by FEMA, and we would like to know if this issue has been addressed by the Planning Department.

Thank you,

Patricia K. Conway, Esq.
Brekhus Law Partners

1000 Drakes Landing Road
Greenbrae, CA 94904
phone: (415) 461-1001
facsimile: (415) 461-7356

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On Tue, Jan 31, 2023 at 1:31 PM Cardoza, Sabrina <scardoza@marincounty.org> wrote:

Hi Marisa,

You can send to both. Any comments that are sent directly to me regarding the environmental review will be forwarded to the Environmental Review team. They manage the environmental review process but I will make sure your comments get to them.

Best,

Sabrina Cardoza (she/her)

*** Please note that I may be working remotely. Phone calls will be responded to in the order they are received.***

Senior Planner | County of Marin

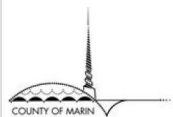
Community Development Agency, Planning Division

3501 Civic Center Drive, Suite 308

San Rafael, CA 94903

415-473-3607 T

415-473-7880 F



From: Marisa Atamian-Sarafian <marisa.atamian@compass.com>
Sent: Tuesday, January 31, 2023 1:22 PM
To: ELIZABETH A. BREKHUS, ESQ. <Elizabethb@brekhus.com>; Jack Siedman, Esq. <jsiedman@yahoo.com>; Patricia Conway, Esq. <patriciac@brekhus.com>
Subject: 21 Onda: Two Emails for our comment letters...

They've made it so confusing. Can we just email all prepared by Feb. 8th to both envplanning@marincounty.org and scardoza@marincounty.org to cover ourselves?
THANKS! Can't hurt...

Marisa Atamian-Sarafian, COMPASS

DRE 01482275 | Realtor®

510.913.2242




Email Disclaimer: <https://www.marincounty.org/main/disclaimers>

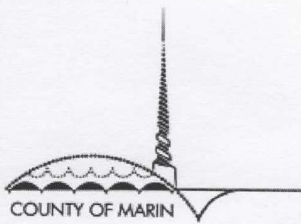
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Brekhus Law Partners

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DEPARTMENT OF PUBLIC WORKS

Quality, Excellence, Innovation

Rosemarie R. Gaglione
DIRECTOR

Dear Marin County Resident:

Administration
PO Box 4186
San Rafael, CA 94913-4186
415 473 6528T
415 473 3799 F
415 473 3232 TTY
CRS Dial 711
www.marincounty.org/pw

Marin County is concerned about flooding has active programs to help protect residents and property from future flooding. **Marin County is sending you this letter because your property has been identified as located in a Repetitive Loss Area.** A Repetitive Loss Area is an area where repetitive flood loss claims have been filed with the Federal Emergency Management Agency (FEMA). **FEMA defines a repetitive loss area as a group of parcels which have similar flood risks to one or more parcels that have filed multiple claims for flood losses in a ten-year period.**¹ Marin County continuously seeks to review and address repetitive flooding around the County and participates in the National Flood Insurance Program (NFIP).

Accounting
Administrative Services

As part of the NFIP program at effort, the County is updating our Repetitive Loss Area (RLA) Analysis. The 2022 Repetitive Loss Area (RLA) Analysis which assesses drainage patterns, causes of flooding, and suggests mitigation measures. Many of the Repetitive Loss Areas are located within FEMA Community Rating System (CRS) communities and receive discounts on their flood insurance based on these efforts.

Airport
Building Maintenance

The County is requesting your input on the description of flood hazards and flood protection recommendations identified the 2022 RLA Analysis report. The 2022 RLA report is posted at <https://publicworks.marincounty.org/fema-resources/>. Please provide comments via the online survey at <https://www.surveymonkey.com/r/RLAA-Survey>.

Capital Projects
Certified Unified Program Agency (CUPA)

The County encourages property owners in repetitive loss areas to implement flood mitigation measures, maintain and frequently clean their drainage facilities (ditches, drains, etc.) of debris. Please review the suggested mitigation measures for your area that have been identified in the RLA Analysis report. Additional information on FEMA, flood insurance, drainage system maintenance and other topics is available at the County FEMA/CRS website at <https://publicworks.marincounty.org/fema-flood-information-national-flood-insurance-program-nfip/>, and the Marin County Stormwater Pollution Prevention Program (MCSTOPPP) website at <https://mcstoppp.org/>.

Communications
Maintenance

Disability Access

Engineering & Survey

Fleet Operations

Flood Control &
Water Resources

Land Development

Procurement

Real Estate

Reprographic Services

Thank you for your response which helps improve flood resilience and supports Marin County's compliance with federal laws and qualification for community-wide insurance premium discounts. If you have any questions about the CRS Program or the online survey, please contact Beb Skye at 415-473-4284 or bskye@marincounty.org.

Road Maintenance

Sincerely

Stormwater Program

Transportation &
Traffic Operations

Hannah F. Lee, P.E., CFM
Senior Civil Engineer

Waste Management

Marin County Department of Public Works

Letter G

From: zelljas@aol.com
To: [Cardoza, Sabrina](#)
Subject: 21 Calle Del Onda
Date: Wednesday, July 26, 2023 11:14:43 AM

[You don't often get email from zelljas@aol.com. Learn why this is important at <https://aka.ms/LearnAboutSenderIdentification>]

1 | I strongly object to the proposed project at 21 Calle Del Onda as it would certainly result in the destruction of one of the last natural dunes in Stinson Beach. All this at a time when the County of Marin is promoting sand dunes as a great resource to help with sea level rise, climate change and greater and more frequent, intense winter storms. Thank you, Jim Zell, 6 Calle Del Onda, Stinson Beach.

Sent from my iPad

Letter H

From: [Jack Siedman](#)
To: [Cardoza, Sabrina](#)
Cc: [Marisa Atamian-Sarafian](#); [Elizabeth Brekhuis](#)
Subject: from Jack Siedman
Date: Thursday, July 27, 2023 1:57:11 PM
Attachments: [friedman MCC\(1\).pdf](#)

July 27, 2023

EMAIL TO

Sabrina Cardoza

Re: Coastal Permit Application

P3049

cc: Marisa.atamian-Sarafian

Elizabeth Brekhuis

Hello Sabrina:

Please find attached a copy of the letter I sent to County Planning on June 22, 2023 regarding the project at 21 Calle del Onda, Stinson Beach. I understand the letter has not been included in the County's file. Please include it at once for consideration in this matter. Thank you.

Sincerely,

// Jack Siedman //



Jack Siedman
Attorney at Law
P.O. Box 37
Bolinus, CA 94924

JACK SIEDMAN
ATTORNEY AT LAW
P.O. Box 37
BOLINAS, CALIFORNIA 94924

TELEPHONE: (415) 868-0997

E-MAIL: jsiedman@yahoo.com

June 22, 2023

Marin County Community
Development Agency
Planning Division
3501 Civic Center Dr., Ste. 308
San Rafael, CA 94903-4157

Re: Coastal Permit Application P3049
21 Calle del Onda, Stinson Beach

Dear Planners:

1 I represent Robert Friedman, who owns property located at 17 Calle del Onda, which is adjacent to the above-referenced parcel. I previously wrote you on July 29, 2021, and on November 9, 2021, expressing concerns over this project, the latter specifically addressed to the applicant's claim that CEQA review by the Stinson Beach Water District satisfied CEQA requirements. As I stated in that letter the Water District's review was limited to issues of waste water only, and did not otherwise address the issues required to be addressed by CEQA.

Since then, there has been some modification of the proposed project, including removal of the garage and reduction of the house's size from 1500 sq. ft to 1200 sq. ft. Nevertheless, it continues to be my client's view, shared with virtually every one of his neighbors, that the project is fundamentally flawed and ill-conceived for its location.

2 I understand that you have been provided with a copy of ESA's Stinson Beach Adaptation Response Collaboration dated April 24, 2023. That comprehensive study enumerates some half-dozen environmental "vulnerabilities" which collectively lead to the obvious conclusion that no building should be allowed at this site.

3 1. Easkoot Creek. In a letter to you dated February 3, 2023 from the Coastal Commission Staff, it was specifically pointed out that any development within the 100-year flood plain is contrary to the provisions of the LCP, Unit 1, Policy IV-30, and contrary to Marin Code Sec. 27.56.130L. In addition, the staff expressed concern that, in general, the project would have adverse impacts to environmentally sensitive habitat areas, including the Creek.

4 2. Erosion, Storm Flooding and Wave Run-up. After the storms in January of this year it became apparent that these issues were not something to be worried about in the future. In an article appearing in the January 23, 2023 edition of the *San Francisco*

4 (cont)

Chronicle Sarah Jones, then acting director of CDA, toured Stinson Beach after those storms and said: "One thing this has told us is this is not a someday kind of thing." Photos of waves running over the dunes and down the Calle's clearly demonstrate the vulnerability of this project site to continued erosion, flooding and wave run up.

3. Septic. In the October 23, 2022 edition of the *San Francisco Chronicle* the following item appeared:

5

Septic tide Home septic systems in communities near the coast are becoming less practical as rising sea levels cause ocean water to seep into the soil needed for wastewater to be treated and flushed into the environment, a report warns. As groundwater rises with the sea, coastal septic systems no longer work well, with a mix of groundwater and untreated waste being pushed to the surface."

Therefore, whatever conditions are currently used as the basis for allowing any septic system are temporary and will only diminish over time, thus threatening the surrounding ecosystem.

6

4. CEQA. If there was ever a project which required a complete and comprehensive review of CEQA requirements, this is that project, and cannot be avoided with a Negative Declaration. Unless and until such a comprehensive report is submitted addressing all of the issues discussed above the application cannot be approved.

7

5. Common Sense. In addition to the above there must be some consideration given to the common sense of not building a home with a septic system at the Stinson Beach sand dunes, especially near Easkoot Creek. From an environmental view, as well as benefit to the public, the site needs to remain undeveloped.

Thank you for your consideration in this matter. I hope your decision will concur with the conclusion that this is an ill-conceived project and should not be allowed.

Sincerely,


Jack Siedman

JS/ms

cc: client

Elizabeth Brekhus

Letter I
Brekhus
Law
Partners

ATTORNEYS AT LAW

1000 DRAKES LANDING ROAD
GREENBRAE, CA 94904-3027
FACSIMILE: (415) 461-7356
(415) 461-1001

July 27, 2023

Sent via Email Only

Marin County Community Development Agency
Planning Division
3501 Civic Center Drive, Suite 308
San Rafael, CA 94903-4157
planningcommission@marincounty.org

**Re: 21 Calle del Onda, Stinson Beach, Brian Johnson Trust Coastal Permit Application
(P3049 formerly P1162)**

Dear Planners:

I represent Marisa Atamian-Sarafian and Dr. Stephen Sarafian, who own property located at 24 Calle del Sierra, Stinson Beach, CA, directly adjacent to the rear of the subject property located at 21 Calle del Onda, Stinson Beach, and write to request a postponement of the hearing scheduled for July 31, 2023, as adequate time has not been provided to review and respond to the latest submissions posted online on July 26, 2023.

We contacted the Senior Planner in charge, Sabrina Cardoza, on multiple occasions including on June 30, 2023, finally reaching her July 25, 2023, as neither the planning page nor the Environmental Review page had any updated documents, even though the comment period had ended on February 8, 2023. On July 26, voluminous documents were finally uploaded to the Planning Page. There is a supplemental response by the Department by the Senior Planner with 9 attachments, including one attachment consisting of a 177 page Supplemental Environmental Review which appears to have been prepared in "June 2023" (attachment 6). This voluminous document was not on the Environmental Review Page for the project and instead the Environmental Review Page only posts the January 4, 2023 Draft Subsequent Environmental Review / Mitigated Negative Declaration. The Environmental Review Page has no subsequent postings, but we keep getting emails alerting us to new submissions so it is unclear whether there are additional documents / comments / etc. which have not been posted. For example, Sabrina Cardoza, has informed us that the attached letter from Stinson Beach Water District will also be addressed, however, no information regarding this letter is posted on the Planning Page or Environmental Review Page.

We are concerned that the Planning Commission also has not had access to these documents which were posted on July 26, 2023, and will not have time to adequately prepare for a hearing on July 31, 2023. Members of the public certainly will be deprived of the opportunity

1 (cont)

to review and respond to the most recent voluminous submissions. Likewise, our office is still reviewing this document and will not be able to respond to it in time to get comments to the Planning Commission before the hearing. Given that we will only be afforded 3 minutes to discuss the project, it will be impossible to address all of the new materials in this time.

Accordingly, we respectfully request that the July 31, 2023, hearing be cancelled and postponed to a date which affords all affected the opportunity to review the additional materials.

Very truly yours,



Elizabeth Brekhus

Attachment

Letter J

From: [Kent Nelson](#)
To: [Cardoza, Sabrina](#)
Cc: [Rich](#)
Subject: 21 Calle de Onda - Stinson Beach
Date: Friday, July 21, 2023 10:59:29 AM
Attachments: [21 Onda Variance Approval.pdf](#)

You don't often get email from knelson@stinsonwater.org. [Learn why this is important](#)

Sabrina,

I saw the public notice for the Planning Commission Hearing scheduled on 7/31/23 regarding the aforementioned property and wanted to bring your attention to SBCWD Resolution 2020-03.1, which granted a Design Variance for this property subject to a Design Approval Permit from the District (see attached). **This permit was issued on 7/20/20 and expired on 7/20/23.**

Per the District's Title IV – Onsite Wastewater Code, no extensions shall be granted for Design Permits. If the owner wishes to install an onsite wastewater treatment system at this location, they will need to reapply for a new Design Permit which will then need to be approved by the SBCWD Board of Directors.

If you have any questions, please let me know.

Best regards,
-Kent

Kent Nelson, PE
General Manager/CEO

Stinson Beach County Water District
3785 Shoreline Hwy | PO Box 245
Stinson Beach, CA | 94970
e: knelson@stinsonwater.org
p: 415.868.1333

Letter K

From: [Len Rifkind](#)
To: [PlanningCommission](#)
Cc: steve@civicknit.com; [Cardoza, Sabrina](#); [Alyce Johnson](#)
Subject: 21 Calle Del Onda, Stinson Beach, CA; Project ID: P3049
Date: Thursday, July 27, 2023 1:06:10 PM
Attachments: [2023-07-27 Marin County Planning Commission 21 Calle Del Onda Stinson Beach.pdf](#)

Some people who received this message don't often get email from len@rifkindlawgroup.com. [Learn why this is important](#)

Dear Planning Commissioners:

Please find attached our correspondence regarding a takings analysis as it will apply to your decision regarding the referenced property to be heard at your July 31, 2023 public hearing.

Leonard ("Len") A. Rifkind

RIFKIND LAW & MEDIATION, PC

1010 B Street, Suite 200

San Rafael, California 94901

T: 415-785-7988,

C: 415-308-8269

E: len@rifkindlawgroup.com

W: www.rifkindlawgroup.com

Named to **Superlawyers**, Northern California Real Estate Law, 2012-2023

Rifkind Law & Mediation, PC

1010 B Street, Suite 200, San Rafael, CA 94901
Telephone: (415) 785-7988 * www.rifkindlawgroup.com

Leonard A. Rifkind
len@rifkindlawgroup.com

July 27, 2023

VIA EMAIL ONLY: planningcommission@marincounty.org

Marin County Planning Commission
Community Development Agency
3501 Civic Center Drive, Rom 308
San Rafael, CA 94903

Re: **Agenda Item:** Brian John Trust Coastal Permit and Subsequent Mitigated Negative Declaration at 21 Calle Del Onda, Stinson Beach, CA (APN 195-162-49)

Public Hearing Date: July 31, 2023

Project ID: P3049

Time: 1:00 p.m.

Location: 3501 Civic Center Drive, Rooms 328-330, San Rafael, CA

To: Ms. Margot Biehle, Chair, and Members of the Marin County Planning Commission:

1 | Our firm represents the applicant/owner Brian Johnson, Trustee of the Brian Johnson Trust, acting on his own behalf and all owners of record, regarding the referenced matter to construct a new one-story 1,296 square-foot single family residence (reduced from 1,488 SF) and the prior proposed 288 square foot garage has been eliminated, on a vacant lot in Stinson Beach (the “**Project**”). The Project complies with all zoning constraints (C-R2) and proposes only a nine (9) percent floor area ratio (half the average FAR of 20% within a 600-foot radius), and a modest height of 20 feet, 7 inches (reduced from 25 ft). The Property will have a new septic system approved by Stinson Beach County Water District that is vastly superior to existing environmental contamination in the event of inundation events when compared to existing neighboring systems.

Takings Analysis.

2 | **Failure to Approve the Project Would Constitute a Taking.** We limit our comments to a takings analysis. Failure to approve the Property would constitute a taking of Brian Johnson’s property under the Fifth Amendment to the United States Constitution, as applied to the states through the 14 Amendment. The Fifth Amendment states in pertinent part, “. . . *nor shall private property be taken for public use, without just compensation.*” [Italics original]. Denial of this application would deny Brian Johnson all reasonable investment backed expectations for his property. The 14th Amendment states in pertinent part, “. . . *nor shall any state deprive any*

person of life, liberty, or property, without due process of law . . .” [Italics original; Underlined emphasis added]. It is rare for a local planning board to have the opportunity to address issues of Constitutional import. This is such an application, requiring your Commission’s careful and considered deliberation. We note, Staff recommends conditional approval because disapproval would result in an unconstitutional taking.

Similar rights to the 5th and 14th Amendments are provided in the California Constitution. Cal. Const. Art. 1, §19 (“Private property may be taken or damaged for a public use and only when just compensation . . . has first been paid to . . . the owner”). In California, just compensation is determined by a jury. *Property Reserve, Inc. v. Superior Court* (2016) 1 Cal. 5th 151. An inverse condemnation results from the invasion or appropriation of some valuable property right by or under the auspices of a public agency, which directly and specially injures the property owner. *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110. The conduct of the public agency must have negatively affected the use or enjoyment of the property in a significant manner, lowering its value, imposing a physical burden, or decreasing the income it produced. *San Diego Metropolitan Transit Development Board v. Handlery Hotel, Inc.* (1999) 73 Cal.App.4th 517.

Failure to Approve the Project Would Create an Action for Inverse Condemnation Against the County. An action for inverse condemnation can be initiated by the property owner for the recovery of damages resulting from the improper “taking” of the owner's property by some activity or negligence of the agency, or by some cause for which the agency is responsible. *City of Los Angeles v. Superior Court* (2011) 194 Cal.App.4th 210. A property owner has an action for inverse condemnation whenever a valuable property right is appropriated or impaired by a public entity. *Holtz v. Superior Court* (1970) 3 Cal.3d 296. It must be shown that a governmental agency has taken some action that has caused an invasion or appropriation of private property rights. *Marina Plaza v. California Coastal Zone Conservation Commission* (1977) 73 Cal.App.3d 311. A “regulatory taking” occurs when some governmental action *so restricts* the owner's use and enjoyment of the property that it amounts to a “taking” even though there is no physical invasion or damage to the property and no planned or formal exercise of the power of eminent domain. When a restriction or regulation imposed by a public entity “goes too far” it constitutes a taking of private property for public use.

Here, failure to approve the Project will “go too far” because it will prevent reasonable and fair economic use of the property and constitute a regulatory taking. Precluding any building will reduce the property here to zero or even negative value when considering insurance and property tax obligations. *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003. A *de minimus* residual value remaining from a non-economic use does not preclude application of the takings rule. *Lost Tree Village Corp. v. U.S.* (Fed. Cir. 2015) 787 F.3d 1111, which held a permit denial resulting in 99.4 percent loss of value was a *per se* taking, even though property had *de minimus* residual value as a wetland. Here, the property has zero or negative residential value if the Project cannot be constructed.

To state a cause of action for inverse condemnation, the property owner must show that there was a taking or damaging by a public entity of a valuable property right that the property owner possesses, that the taking or damaging was for a public use, and that the invasion or

appropriation directly and specially affected the property owner to his or her injury. *City of Los Angeles, supra.*, 194 Cal.App.4th at 221. Property is “taken or damaged” within the meaning of the California Constitution so as to give rise to a claim for inverse condemnation when an intangible intrusion onto the property has occurred, which has caused no damage to the property but places a burden on the property that is direct, substantial, and peculiar to the property itself. *Boxer v. City of Beverly Hills* (2016) 246 Cal.App.4th 1212.

Substantive Due Process, Equal Protection and Fundamental Fairness Also Require Approval of the Project. Substantive due process as required by the 14th Amendment prevents governmental power from being used for purposes of oppression or abuse of governmental power that shocks the conscience, or action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests. Cal. Const. Art. I, §§ 7, 15; *Stubblefield Construction Co. v. San Bernardino* (1995) 32 Cal.App.4th 687. The California Constitution guarantees an individual’s liberty interest to be free from arbitrary adjudicative procedures. *Ryan v. California Interscholastic Federation-San Diego Section* (2001) 94 Cal.App.4th 1048. Here, denial of the Project would easily constitute a denial substantive due process because there is no rational basis to support such a decision.

Damages. Compensation is required for a regulatory taking when the regulation denies the owner all economically viable use of his or her property. *First English Evangelical Lutheran Church of Glendale v. Los Angeles County* (1987) 482 U.S. 304. This is also considered a “per se” or “categorical” taking, because it is akin to a physical occupation of the property denying the owner all economic use of the property. Here, denial of permits to construct a modest single family residence in compliance with zoning, and minimizing impacts under the LCP would be construed as a per se categorical taking because there is no viable economic use of the Property. The test for regulatory takings requires a comparison of the value that has been taken from the property with the value that remains in the property. *Keystone Bituminous Coal Association v. DeBenedictis* (1987) 480 U.S. 470. In this case the value would be the fair market value of the property at its highest and best use. Code of Civ. Proc. §1263.320, subd. (a); *Avenida San Juan Partnership v. City of San Clemente* (2011) 201 Cal.App.4th 1256. Compensation is based on what the property owner has lost, not on what the public has gained from the activity of the public entity. *County of Ventura v. Channel Islands Marina, Inc.* (2008) 159 Cal.App.4th 615. The loss here would be in excess of three million five hundred thousand dollars, based upon appraisal value, as well as recovery of attorney’s fees and costs. Code of Civ. Proc. §1036.

Staff Supports Approval of the Project. We do not repeat here Staff’s careful and detailed analysis of Brian Johnson’s ownership interest in the Property and the fair market value amounts that he paid for additional interests acquired over time with a reasonable expectation that the property would be developed. (Marin County Code §22.70.180). Brian Johnson and family members paid property taxes over the years on the property. They also have paid approximately \$328,500 in development costs since 2018.

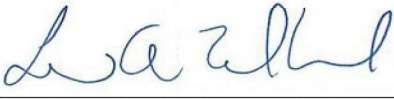
We also do not repeat here Staff’s careful and detailed history of the general plan, zoning and land use designations applicable to the property at the times of Brian Johnson’s various acquisitions of partial interests in the property. Brian Johnson’s total financial investment in the property is equal to approximately \$385,000. In sum, he had a reasonable basis to conclude that

modest residential development would likely be approved because there was a structure on the property that was destroyed in a 1985 fire; he was advised he could rebuild, and in 1979, while the Coastal Commission recommended denial of a proposed subdivision of the property, it did not state no development could occur.

Conclusion. This is not a close case to conclude that denial of the Project will preclude any reasonable investment-backed expectation, and therefore constitute a regulatory taking of private property rights. Brian Johnson has invested \$108,000 to acquire his interest in the Property. Mr. Johnson and his family members have invested \$328,500 towards development related expenses since 2018. They have paid property taxes, and the Assessor has more than doubled the assessed property value in 2021. Brian Johnson has reasonable expectations to modestly develop the property. Much of the expenses were incurred prior to the County's 2021 approval of LCP provisions that prohibit any development in ESIIAs; however, modest development like the Project is permitted in ESHAs to eliminate takings claims. Finally, a March 2023 appraisal of a developed property opines fair market value equal to \$3,559,000. The Property complies with C-R2 (Coastal, Residential, Two-Family) zoning. The Property design, siting and size are the minimum necessary to avoid a taking, and the least environmentally damaging alternative to no project. Based upon all of these facts, and the law of the United States, California and the Marin County Code, we respectfully request that you approve the requested Coastal Permit and mitigated negative declaration for the Project.

Sincerely,

RIFKIND LAW & MEDIATION, PC

By: 

Leonard A. Rifkind

LAR/es

cc: Client

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Letter L

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ATTORNEYS AT LAW

July 28, 2023

VIA EMAIL

Marin County Community Development Agency
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San Rafael, CA 94903-4157
planningcommission@marincounty.org

**Re: 21 Calle del Onda, Stinson Beach, Brian Johnson Trust Coastal Permit
Application (P3049 formerly P1162)**

Dear Planners:

1 You will recall that we represent Marisa Atamian-Sarafian and Dr. Stephen Sarafian, who own property located at 24 Calle del Sierra, Stinson Beach, CA, directly adjacent to the rear of the subject property located at 21 Calle del Onda, Stinson Beach, CA. As our request for a continuance of the July 31, 2023 meeting has not been granted, and our clients and members of the public have not been afforded a full opportunity to respond to the Supplemental Memorandum and Subsequent Mitigated Negative Declaration, we are providing a truncated list of issues that should result in the denial of the application.

1. CEQA Review has not been Completed

2 The Subsequent Environmental Review (SER) claims no Environmental Impact Report (EIR) is required for the project in violation of CEQA. This explanation is wholly conclusory: "an EIR is not required for this Project, as the Project, with the incorporation of identified mitigation measures that the Applicant has already agreed to, would not result in any significant impacts." The SER continues to rely on the stale 2020 Initial Study / Mitigated Negative Declaration (IS/MND) adopted by Stinson Beach County Water District, which never considered or studied the construction of a residence. A full EIR should be required. Reliance on the SBCWD is further problematic as the SBCWD Design Permit has expired and the owner will need to reapply for a new Design Permit. The fact the permit expired and a new septic will need to be proposed is an issue that has not been analyzed or addressed by the Supplemental Memorandum. Moreover, conditions in the Stinson Beach shoreline have changed since the Initial Study was performed in 2020, as evidenced by the recent atmospheric river storm and violent flooding at the location of the application site in January 2023.

2. Denial of the Application is Not a Constitutional Taking

3 This issue is not addressed by the SER or Supplemental Memorandum. The Supplemental Memorandum from the Senior Planner, does not discuss the takings claim, except to note the

3 (cont) submission of the ownership history of the parcel and the claimed financial investment of the owner. There has been no Constitutional Taking as the applicant has failed to show that his alleged investment of \$385,291, would not be recouped if he sold the property “as is” or if the development plans matched the original structure on the property and were built outside the FEMA flood zones and the protected ESHA areas. No such showing has been made by the owner. As we previously explained, there is no Constitutional taking “where the government simply *restricts* the use of property without demanding the conveyance of some identifiable protected property interest (a dedication of property or the payment of money) as a condition of approval.” *Lindstrom v. California Coastal Commission* (2019) 40 Cal.App.5th at 105 citing (*Id. At p. 105* citing *California Building Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435, 460, *Beach & Bluff Conservancy v. City of Solana Beach* (2018) 28 Cal.App.5th 244). There are many examples of development restrictions that do not result in a taking. For example, the applicant cannot construct a five story home or a hotel on the premises; as such, restricting the scale of his development based on the California Coastal Act and LCP does not result in a taking.

4 **3. The Application should be denied as the destruction of ESHA Dune and Sandy Habitat Violates the LCP and Mitigation Measures are Inadequate**

It is undisputed that the current plans continue to be in violation of the newly activated Marin Local Coastal Program (LCP) as well as the Marin County LCP Land Use Plan (LUP) and Implementation Plan (IP) as it proposes construction on sandy beach / dunes which are considered Environmentally Sensitive Habitat Areas (ESHA), and development is strictly prohibited in these areas. The SER acknowledges that dunes will be destroyed and contemplates approval of a permit without submission of a Dune Mitigation Plan. Moreover, the SER is incorrect in stating that sandy beach is not ESHA – whereas the LCP specifically requires the protection of “sandy beach habitat” in Stinson Beach. (See C-BIO-9)

5 **4. The Application continues to be in Violation of the California Coastal Act**

The SER acknowledges that a full geotechnical study is required prior to construction but suggests this can be done as part of the building permit process in violation of the California Coastal Act Section 30253 for new development, which requires development to: (a) minimize risks to life and property in areas of high geologic, flood, and fire hazard and (b) assure stability and structure integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter nature landforms along bluffs and cliffs. The SER concludes that the use of piers (rammed, driven or drilled), or the concrete retaining wall around the septic system do not violate the LCP even though no facts support this finding. Again, this is a conclusory finding, facts do not support the conclusion, and a full geotechnical study should be required before the application is approved.

5. The Application does not Adequately Address Sea Level Rise Hazards

6 The SER dismisses the recent flooding of Stinson Beach, including along the 21 Calle del Onda, and instead relies on prior sea level rise studies. The SER relies on site visits that occurred weeks after the storms instead of the videos, photos, and neighbor eye-witness accounts that demonstrate that the site actually flooded.

6. FEMA Flood Zones

7 The SER concludes that coastal flooding is outside of CEQA review notwithstanding that the project is in two FEMA flood zones (AO and VE) and development in those areas is prohibited. The SER incorrectly finds that since flooding from Eastkoot Creek “would be less than significant” which cannot be accurate since the property is specifically designated within the Eastkoot Creek flood zone as well as the coastal flood zone. The FEMA floodplain base flood elevation issue raised in our February 8, 2023, correspondence is not addressed by the SER or the Supplemental Memorandum / Draft Resolutions. While the re-submitted plans have elevated the Base Flood Elevation to the minimum that is required, i.e., one foot above that, the proposal does comply with the current Marin County policy to require the lowest floor to be three feet above the base flood elevation. In light of the recent severe flooding in the area, which none of applicant’s studies nor the County Review took into account, the proposal should be denied and ordered to be revised prior to approval.

7. Impact on Neighboring Properties

8 The January 2023 storm demonstrated the severe impact that the planned construction will have on neighboring properties. The SER pretends the flooding never happened and instead relies on a site visit nearly two weeks after the storm that showed “no evidence” of flooding. The lack of thoughtful analysis of this project is an insult to the Calle del Onda neighbors who suffered severe damage from coastal flooding that crossed over and through the applicant’s property.

Very truly yours,

BREKHUS LAW PARTNERS



Elizabeth A. Brekhus

EAB:cmr