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August 9, 2021

**VIA EMAIL AND
PERSONAL DELIVERY**

Mendocino County

AUG 09 2021

Planning & Building Services

Ignacio Gonzales
Coastal Permit Administrator
Planning and Building Services
County of Mendocino
860 N Bush St.
Ukiah, CA 95482
(pbs@mendocinocounty.org)

Re: Case No.: CDP 2018-0012
Hearing Date and Time: August 12, 2021 at 11:00 AM
Owner: Noah & Zoe Sheppard
Applicant: Noah Sheppard

Dear Coastal Permit Administrator Gonzales:

I. Introduction

I represent David and Holly Guggenheim, and I write in my capacity as their attorney. The Guggenheims are the owners of the real property commonly known as 10770 Calypso Ln. Mendocino, CA 95460 (Mendocino County APN: 119-090-47-00) ("Guggenheim Property"). The Guggenheim Property is located immediately to the west of the real property subject to the present coastal development permit ("Sheppard Property").

As detailed below, an approval of the applied for development permits would be contrary to law, would not be proceeding in a manner required by law, would be an abuse of discretion, and would ignore substantial flaws in the present application.

This letter specifically touches upon three primary issues of concern. The first is the lack of requisite proof of an adequate water supply that will not adversely affect existing users. The second is that the proposed development infringes upon vested property rights. And the third is that the Sheppard Property has been subject to unpermitted backfilling and grading of existing drainage courses that currently unlawfully divert water downhill from the Sheppard Property to

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the Guggenheim Property.

II. The Project Is Not Supported by Adequate Water Resources

The Sheppard Property is located within the geographic boundaries of both the Town of Mendocino and the Mendocino City Community Services District (“MCCSD”). The Town of Mendocino and MCCSD have long struggled with adequate water supply and are currently subject to Stage 4 (the highest level of) drought restrictions. (Declaration of Stage 4 Water Shortage Emergency, *available at* <https://mccsd.com/2020-pdf/Stage%204%20Water%20Shortage%20Emergency%20Info.pdf>.)

The County of Mendocino’s Coastal Groundwater Development Guidelines (*available at* <https://www.mendocinocounty.org/home/showdocument?id=2780>) (“Groundwater Guidelines”), state that among other things, “[n]o development shall be allowed in the County beyond proof of the capability of the adequate water supply,” (*id.* at p. 1); that “[a]ll new development shall be contingent upon proof of an adequate water supply during dry summer months which will accommodate the proposed development and will not deplete the groundwater table of contiguous or surrounding uses, (*id.* at p. 2); that “all new development and land use changes [in the Town of Mendocino] require hydrological studies, (*id.* at p. 3); that “Proof of Water shall be established by conducting a pump test(s) and comparing well yield, observed during pump testing, to the estimated water demand for the property . . . during dry season conditions, which are defined to be the period of August 20th to October 31st,” (*id.* at p. 4); that the minimum supply for individual residences should be 1.0 gal/min (*ibid.*); that [i]n no case will a supply of less than 0.5 gal/min. be considered acceptable for individual residences, (*id.* at pp. 4 & 9); that “a constant rate test shall be required in all cases to establish well yield,” (*id.* at p. 5); that [a]ll property owners within 1/4 mile of the pumped well should” be given notice of the pump test (*id.* at p. 10); any that any hydrological studies “should contain specific assessments of the impacts of the pumpage on all wells within the drawdown cone or within 300 feet, whichever is greater,” as well as “[l]etters from local well owners responding to the notice of the pump test, (*id.* at p. 16).

The Mendocino County Code requires that the granting or modification of an coastal development permit “shall be supported by findings which establish,” among other things, that “[t]he proposed development is in conformity with the certified local coastal program;” that “[t]he proposed development will be provided with adequate utilities, access roads, drainage and other necessary facilities;” that “[t]he proposed development will not have any significant adverse impacts on the environment within the meaning of the California Environmental Quality Act;” and that “[o]ther public services, including but not limited to, solid waste and public roadway capacity have been considered and are adequate to serve the proposed development.” (Mendocino Cnty. Code § 20.532.095.)

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Similarly, MCCSD Ordinance 2020-1 requires that an MCCSD Groundwater Extraction Permit “shall be obtained prior to: 1. issuance of a Mendocino County Use Permit or Coastal Development Permit; 2. Issuance of a Mendocino County Building Permit for other than minor repair and maintenance; or 3. Issuance of a Mendocino County Well Permit.”

Here, the County cannot approve the project because of a lack of groundwater resources.

Much of the information provided by the applicant in relation to groundwater is false. As one example, the claim that the subject parcel has two wells is false. While there are two wells physically present within the general metes and bounds of the subject parcel, the applicant lacks legal ownership of the shallow groundwater well WW2065 (“1981 Well”). The 1981 Well is owned by the Guggenheims appurtenant to their ownership of the Guggenheim Property pursuant to an exclusive easement recorded in the Official Records of Mendocino County as Document No. 2013-11525, recorded July 28, 2013. Not only does this 2013 conveyance of the 1981 Well to the Guggenheims mean that Sheppard cannot rely upon the 1981 Well as a source of water, but it also eviscerates all hydrological studies existing prior to 2013 because a central tenant of hydrological studies is an evaluation of the effects of drawdown on a subject well upon wells on neighboring parcels. Similarly, Groundwater well WW16552F appears to be only a monitoring well and not a production well. The Sheppard Property simply does not have two wells, a pump house, or on site water storage.

Moreover, the Staff Report relies upon erroneous information. The Staff Report states that a hydrological study has only been performed on APN 119-090-35. (Staff Report, p.11.) Yet obviously, this project concerns APN 119-090-46. In other words, no hydrological study has been performed on this parcel. APN 119-090-35 is a different larger parcel with two twenty year old established wells that cannot be added to analysis of APN 119-090-46.

Even if this information were correct, correspondence from the MCCSD appearing on page 12 Staff Report states that any groundwater “allotment would not exceed 276 gallons per day, based on the aquifer test data and the conclusions of the approved Hydrological Study.” 276 gallons per a day equates to 0.1917 gallons per minute. This figure falls below the County’s Groundwater Guideline’s prohibition against development that is not supported by a supply of at least half a gallon per minute as described above.

Moreover, even if the County were still to rely upon the applicant’s incorrect information, the County would still be relying upon two additional false premises. The first false premise is that the MCCSD’s groundwater extraction permit regime back in 2005 and 2007 was the same as now. In reality, however, the MCCSD’s groundwater scheme and associated permits were invalidated by the First District Court of Appeal in 2019 in *Gomes v. Mendocino City Community Services District* (2019) 35 Cal.App.5th 249, and a newer—and in many ways more stringent regime—was implemented in 2020 through MCCSD enactments including Ordinance

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2020-1, Ordinance 2020-2, Ordinance 2020-3, the MCCSD's Water Shortage Contingency Plan, Resolution 2020-269, Resolution 2020-271, Resolution 2020-272, and Resolution 2020-273. These enactments are public record, and apply to the property and development in question, but are wholly overlooked by the current Staff Report. And second, climate change has severely impacted groundwater supply in the Town of Mendocino and the town is struggling with groundwater supply in ways that it simply did not in the past. This has been well documented by extensive reporting. (*See, e.g.*, CBS/AP, As Drought Deepens, Mendocino Runs Low on Water, available at <https://sanfrancisco.cbslocal.com/2021/07/23/after-little-rain-mendocino-runs-low-water/>.)

Moreover, the applicant cannot cure any of the above-described deficiencies at this time, because the MCCSD's Stage 4 emergency drought restrictions include a moratorium "on issuance of Groundwater Extraction Permits for new uses or changes in use, aquifer pump tests, or drilling new water wells." (MCCSD Ordinance 2020-272.) There is no expiration date or end in sight for this moratorium.

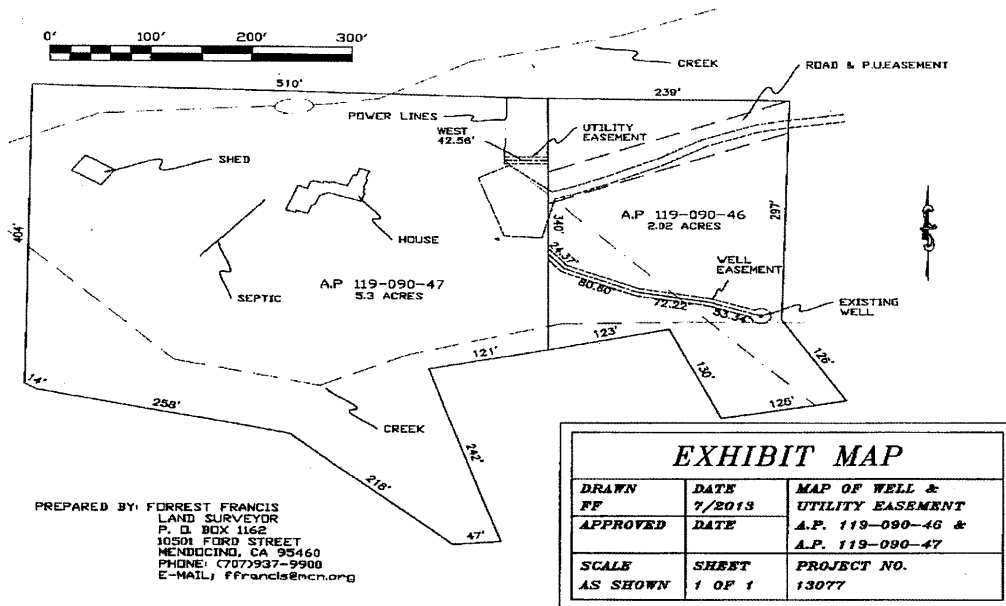
In concluding this subject, one must recall that the lack of water can affect not just a subject parcel, but also neighboring parcels, including through increased fire risk. These requirements are not mere formalities. The staff report recognizes the subject area as a "critical water area," (Staff Report, Attachment Y,) for good reason. The foregoing alone means the current application must be denied.

III. The Development Footprint Infringes Upon Vested Easement Rights

Even if water supply issues alone did not foreclose any approval of the project, the project also cannot be approved because it impermissibly infringes upon the vested property rights of the Guggenheims.

It is a well settled principal that real property is not fungible. Real property is regarded as unique. (*See, e.g., Real Estate Analytics, LLC v. Vallas* (2008) 160 Cal.App.4th 463, 466.) The Sheppard Parcel is burdened by two separate vested easements that benefit the Guggenheims appurtenant to their ownership of the Guggenheim Parcel. A foundational false premise of the present application is that these easements either do not exist or can simply be trampled upon. Neither Sheppard nor the county has the power to disregard these easements.

As depicted below, the Guggenheims are benefitted by both a forty-foot-wide roadway and public utility easement, and an exclusive easement granting access to—and rights of use in—a groundwater well.



The forty-foot-wide roadway and public utility easement is a deeded easement reflected in the Official Records of Mendocino County as Document No. 2013-11524, recorded July 26, 2013. Its metes and bounds are precisely described in that instrument:

A NON-EXCLUSIVE EASEMENT AND RIGHT OF WAY FOR ROADWAY AND PUBLIC UTILITY PURPOSES OVER A STRIP OF LAND 60.00 FEET IN UNIFORM WIDTH LYING IN AND BEING A PORTION OF SECTION 29, TOWNSHIP 17 NORTH, RANGE 17 WEST MOUNT DIABLO BASE AND MERIDIAN.

COMMENCING AT A THREE-QUARTER INCH REBAR MONUMENT TAGGED L. S. 3184 AS SAID MONUMENT IS DELINEATED ON THAT RECORD OF SURVEY FILED IN MAP CASE 2, DRAWER 37, PAGE 31, MENDOCINO COUNTY RECORDS, SAID MONUMENT MARKS THE SOUTHEAST CORNER OF THE LANDS OF MCELROY AS DESCRIBED IN BOOK 1240 OF OFFICIAL RECORDS, PAGE 243, MENDOCINO COUNTY RECORDS; THENCE SOUTH 60° 58' 06" WEST, 30.33 FEET TO A POINT IN THE CENTERLINE OF THE EASEMENT BEING DESCRIBED, SAID POINT BEING THE TRUE POINT OF BEGINNING; THENCE ALONG THE CENTERLINE OF SAID EASEMENT AS FOLLOWS: NORTH 20° 34' 33" WEST, 294.91 FEET; THENCE ALONG A TANGENT CURVE TO THE LEFT HAVING A CENTRAL ANGLE OF 34° 59' 27" WITH A RADIUS OF 125.00 FEET FOR A DISTANCE OF 76.34 FEET; THENCE NORTH 55° 34' 00" WEST, 260.24 FEET; THENCE ALONG A TANGENT CURVE TO THE LEFT HAVING A CENTRAL ANGLE OF 33° 44' 09" WITH A RADIUS OF 125.00 FEET FOR A DISTANCE OF 73.60 FEET; THENCE NORTH 89° 18' 09" WEST 414.12 FEET, MORE OR LESS, TO THE WEST LINE OF TRACT ONE ABOVE AND BEING THE TERMINUS OF THIS EASEMENT.

The present application fundamentally disregards the above-described easement rights both by suggesting that either the applicant or County can unilaterally restrict or limit the

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easement, and by ignoring setbacks relating to the easement.

Put simply, the Guggenheims have every right to use their easement as they see fit, yet the present application is premised upon the incorrect assumption that either the applicant or the County can simply re-write the easement to limit its effect.

“An easement created by express or implied grant or reservation is a vested interest in real property, and it cannot be lost or terminated by mere nonuse, however long it may continue. The easement does not terminate unless the owner also manifests an intent to abandon the future use.” (*See generally* Miller & Starr, 6 Cal. Real Est. (4th Ed., 2021) Ch. 15—Easements, § 15:78.). “[T]he unreasonable, unwarrantable or unlawful use by a person of his own property so as to interfere with the rights of others is a nuisance.” (*McBride v. Smith* (2018) 18 Cal.App.5th 1160, 1180.)

The applicant states that they will unilaterally relocate an existing driveway within the easement over the Guggenheims strenuous objections. This is simply contrary to law. Just because the Guggenheims’ current driveway has not been developed to its permitted forty-foot width does not mean their rights have in any way been diminished.

Similarly, the minimum front and rear yard setbacks for Mendocino Rural Residential District properties such as this are twenty feet. (Mendocino County Code section 20.644.030.) Nevertheless, portions of the proposed structure encroach within ten feet of the easement and decking extending therefrom is located even closer to the easement. This, again, is simply not permissible.

Even if the County had the power to condemn some portion of the easement—which it does not—such condemnation would come with great consequence. “When the government physically takes possession of an interest in property . . . , it has a categorical duty to compensate the former owner.” (*Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency* (2002) 535 U.S. 302, 322.) Not only would the Guggenheims be entitled to the lost value of their real property rights from the County, but they would also be entitled to “reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of” the need to bring an action. (Code Civ. Proc. § 1036.)

Functionally, the current driveway represents the sole means of escape for the Guggenheims in both day-to-day life and in the event of emergencies that might range from medical events to wildfire. The easement is presently located on stable ridgetop ground, but the applicant wants to unilaterally move it to a steep hillside. In such a location, turnouts will be lacking and erosion will be a constant worry. The Guggenheims could easily be trapped by

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falling trees or slides if the road is relocated. CalFIRE's Fire Hazard Severity Map, (*available at* https://osfm.fire.ca.gov/media/6713/fhszs_map23.pdf), identifies the subject area as being a High Fire Hazard Severity Zone. The suggestion of the staff report that these changes would not have significant impacts upon safety, (Staff Report, p. 29,) are incorrect. The Guggenheims could easily be faced with no route of egress due to falling trees in a wildfire or storm.

Additionally, and still for the sake of argument, even if the applicant could unilaterally move the road, the new proposed driveway would be within the one-hundred-foot buffer zone protecting riparian vegetation on the north creek. (Staff Report, p. 7 & Attachment L.) From an environmental standpoint, at least seven large and mature Douglas Fir trees would need to be cut to construct the new driveway.

The easement issues preclude approval of the present application.

IV. The Project Site Has Been Subject to Unpermitted Grading

Within the past three years, the applicant filled-in substantial water trenches and concrete culverts on the Shepard Property, and graded and compacted the fill material. This was done without a permit and in a manner that caused substantial additional water to flow onto the Guggenheim Property contrary to County Code. (*Cf.* Mendocino County Code § 20.492.025 [“flows in excess of natural flows resulting from project development shall be mitigated”].) This is also contrary to law. “It is . . . incumbent upon every person to take reasonable care in using his property to avoid injury to adjacent property through the flow of surface waters. Failure to exercise reasonable care may result in liability by an upper to a lower landowner.” (*Locklin v. City of Lafayette* (1994) 7 Cal.4th 327, 352.) Until the grading issue has been remedied, the present project cannot be meaningfully evaluated insofar as remedial measures may change the lay of the land. The Guggenheims intend to pursue this issue—along with the issue of the dangerously rickety supports upon which the presently stored manufactories homes are perched—with code enforcement in the near future.

V. Conclusion

For the foregoing reasons, David and Holly Guggenheim respectfully ask that the present permit application be denied. It is founded upon inaccurate information, ignores long settled principals of real estate law, and manifests a disregard for both neighbors and the environment. The County would not be proceeding in a manner required by law and would be abusing its discretion in approving the present application.

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Respectfully submitted,



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