



Staff Report

Date: December 14, 2017 Council Meeting
To: Mayor Robbins and Council Members
From: Joe Chinn, Town Manager
Sal Lucido, Contract Building Official
Subject: 73 Winship Avenue Settlement Agreement to the Appeal of Construction Penalties

Staff Recommendation

Town Council approval of Resolution No. 2030 accepting the reduced penalty of \$52,500 as negotiated between Town staff and the appellant for the appeal of construction penalties-against the real property at 73 Winship Avenue.

Project Summary

Owners:	Brian and Erica Hunt
Location:	73 Winship Avenue (APN 072-162-15)
Project:	Renovation/Addition of a Historic SFD with a new 2,640 square foot unfinished basement. Project also includes reconstruction of the attached garage to the east of the residence with grading and new landscaping including a new swimming pool south of the main residence.
Town File Number:	Variance, Design Review and Demolition Permit No. 1890
Permit Number(s):	17997
Project Valuation:	\$814,318
Permit Issued Date:	6/3/14
Construction Completion Deadline:	12/3/15 (18 months)
Project Final date:	2/5/17 (440 days past deadline)
Calculated Penalties:	\$357,500
Remaining Construction Deposit:	\$32,572.72
Negotiated Penalty:	\$52,500.00
Additional Amount Owed:	\$19,927.28

Background

The duration of construction projects in Ross is governed by the Time Limits for Completion of Construction Ordinance (Ross Municipal Code, Chapter 15.50). The ordinance establishes procedures, timelines, and penalties to ensure that projects are completed in a timely fashion with the least amount of impact on the surrounding neighborhoods. Under the Ordinance, this project had 18 months to complete construction based on valuation.

On January 10, 2013, Council approved Variance, Design Review and Demolition Permit No. 1890 for the following improvements:

1. Modifications to the main residence with limited window and exterior door replacement and to add a new 2,640 square foot, unfinished, basement for storage and mechanical.
2. Reconstruction of the attached garage to the east of the residence.
3. New landscaping is proposed including a new swimming pool south of the main residence.
4. Design review is required for grading to distribute soil from the basement and pool excavation to create a landscaped, soil berm, up to 24 inches tall, within the west and north yard setback areas. 630 cubic yards of cut and 630 cubic yards of fill are proposed.
5. A fence height variance was requested to allow an 8-foot-tall concrete fence along Sir Francis Drake Boulevard. The fence would be buried 2 feet in the soil berm, for an apparent height of 6 feet.

Construction documents were submitted in May of 2013. After several submittals to address corrections, the plans were ready for approval in November of 2013. The applicant requested and was granted a one-year extension on the permit approval. Subsequently, Building Permit 17997 was issued as an Owner-Builder permit for construction by the Hunts on June 3, 2014. Work commenced immediately, but a portion of the construction was stopped three months into the project on the accessory dwelling unit (cottage) due to a scope change that triggered fire sprinklers. Work continued while revised plans were submitted and approved, and the stop work order was lifted 6 weeks later. Construction proceeded in a steady manner. The Hunt appeal letter states, "We had between eight and fifteen workers on the project at any time."

The Town did receive some complaints during construction such as: excessive dirt on the roadway due to improper wash-down; loud music; several complaints of construction vehicles blocking access on Oak Way; and a general email complaint that "The ongoing project has caused hardship on our current tenants for the past two years and is presenting rental challenges for our property". However, the Hunts quickly resolved specific complaints received about the project.

On October 1, 2015, the applicant notified the Town Manager and Building Official via Email that they were not going to meet the construction deadline. The Town Manager and Building Inspector met with the Hunts in January 2016, where they explained why the project was off track with respect to meeting deadlines. The majority of issues were related to unanticipated foundation work, rot repair and the nature of the historic renovation challenges for this structure. At that time, the Hunts thought the project would be completed in late summer or early fall of 2016.

The project received final construction approval on February 15, 2017. On April 11, 2017, the Town sent a letter to the owner advising that the project completion of construction was 440 days beyond the 18-month time limit specified in the Ordinance and thus is subject to construction penalties in the amount of \$357,500.

On April 20, 2017, the Town received a properly filed letter of appeal from the appellant. Staff contacted the appellant to schedule a meeting date to discuss the appeal. Staff met with the applicant over the next several months answering questions and granting extensions for more time to prepare the appeal. A council meeting date was set for November of 2017.

On June 6, 2017, the Town received an additional appeal letter. Staff met with the applicant to discuss options and answer questions.

On October 19, 2017, the Town received a revised final appeal document, provided in the original appeal staff report for the November 9, 2017 Town Council Meeting. The appellant and Town staff continued the November 9 Council item for 73 Winship Avenue based on settlement discussions that occurred on November 7.

Discussion

An owner may appeal a construction completion penalty, "on the grounds that the property owners were unable to comply with the construction time limit for reasons beyond the control of themselves and their representatives." The grounds for appeal include, but are not limited to, "labor stoppages; acts of war or terrorism; and natural disasters." Grounds for appeal do not include, "delays caused by the winter-rainy season; the use of custom and/or imported materials; the use of highly specialized subcontractors; significant, numerous, or late design changes; access difficulties associated with the site; failure of materials suppliers to provide such materials in a timely manner; or by delays associated with project financing." (RMC §15.50.090(a))

The ordinance further provides, "When appealing penalties ... the appellant shall submit documentary and other evidence sufficient to establish that design decisions, construction drawings and documents, bids and construction contracts, permit applications, and compliance with all required permit conditions were undertaken in a diligent and timely manner. Required documentary and other evidence shall demonstrate to the Town Council's satisfaction that construction delays resulted from circumstances fully out of his or her control and despite diligent and clearly documented efforts to achieve construction completion within those time limits established in this chapter. Penalties made pursuant to this section shall not be modified or cancelled unless the evidence required in this section is submitted at the time of appeal."

On Tuesday, November 7, 2017, staff met with the appellant to discuss additional considerations for days credit to the construction timeline penalties. At this meeting, the appellant and Town staff verbally agreed that a reduction of 305 days is appropriate due to the historic renovation of the house that contributes to the heritage of the Ross community, the manual recycling techniques used by the project, and an unfortunate injury to the construction foreman which caused additional delays. The Owner agrees that the proposed penalty amount of \$52,500 is

appropriate and is willing to pay this amount pursuant to a written settlement agreement with the Town.

The Town Council must hold a hearing on the appeal and may affirm the negotiated penalty or otherwise modify or cancel the penalty. If Council chooses to modify the negotiated penalty, it will likely be necessary to continue the hearing so that Council can review the full breadth of documentation provided by the appellant and the Town staff.

Staff recommends that the Town Council approve the attached Resolution No. 2030. The Resolution states that the Town Council determines that the construction delay penalties shall be in the sum of \$52,500 and that the payment by the Owner shall be made in the manner provided by the Late Construction Penalty Settlement Agreement (the "Settlement Agreement") attached to the Resolution. Brian and Erica Hunt have already signed the Settlement Agreement. The Resolution authorizes the Mayor to execute the Settlement Agreement on behalf of the Town.

Fiscal, resource and timeline impacts

If the Town Council upholds the penalties, a portion of the penalties will be deposited into the General Fund to offset the additional staff costs associated with processing the appeal and the much larger remaining portion will be deposited into the Facilities and Equipment Fund.

Alternative actions

The Town Council may increase or reduce the construction completion penalty. However, any modification to the agreed amount will likely require a new hearing date for the full breadth of documentation to be presented by the appellant and Town staff.

Environmental Review

Not Applicable.

Attachments:

- Resolution No. 2030 including the Settlement Agreement

TOWN OF ROSS

RESOLUTION NO. 2030

A RESOLUTION OF THE TOWN OF ROSS DETERMINING THE FINAL AMOUNT OF CONSTRUCTION DELAY PENALTIES FOR 73 WINSHIP AVENUE, ROSS, CALIFORNIA (APN 072-162-15)

The Town Council of the Town of Ross hereby finds, determines, orders and resolves as follows:

Section 1. Findings.

1. Ross Municipal Code, Chapter 15.50, Time Limits for Completion of Construction requires property owners seeking to improve their properties to complete construction in a reasonable amount of time as provided in the Code in order to ensure that neighborhood quality of life is maintained and that activities associated with construction, such as increased noise, traffic and associated impacts, are managed in a reasonable way.

2. There exists certain real property within the Town of Ross known as 73 Winship Avenue, Ross, California 94957 (APN 072-162-15) (the "Property") which is owned by Brian and Erica Hunt (the "Owner").

3. On January 10, 2013, the Town Council approved a Variance, Design Review and Demolition Permit, File No. 1890 (the "Project"). The required building permit was issued on June 3, 2014. Based on the valuation of the Project at \$814,318, construction was required to be completed within 18 months under Chapter 15.50 of the Municipal Code. This deadline was December 3, 2015.

4. On February 15, 2017, the Town of Ross Building Department provided its final determination and acceptance of the improvements. Staff has accepted this determination as the date of completion of the Project that was 440 days beyond the 18 month construction completion deadline.

5. On April 11, 2017, the Town sent a letter to the Owner advising them that the construction penalties under Chapter 15.50 amounted to the sum of \$357,500. On April 20, 2017, the Town received a timely filed appeal of this penalty determination. Following the appeal letter staff met with the applicant to discuss the appeal and grant an extension for more time to prepare the appeal. On June 6, 2017, the Town received an additional appeal letter. Staff met with the applicant to discuss options and answer questions. On October 19, 2017, the owner submitted supplemental materials in support of the appeal. A public hearing was scheduled for November 9, 2017, but was continued at the request of the Owner.

6. On Tuesday, November 7, 2017, staff met with the appellant to discuss additional considerations for days credit to the construction timeline penalties. At this meeting, the

appellant and Town staff verbally agreed that a reduction of 305 days is appropriate due to the historic renovation of the house that contributes to the heritage of the Ross community, the manual recycling techniques used by the project, and an unfortunate injury to the construction foreman which caused additional delays. The Owner agrees that the proposed penalty amount of \$52,500 is appropriate and is willing to pay this amount pursuant to a written settlement agreement with the Town.

7. The appeal hearing before the Town Council was properly set for the December 14, 2017 Town Council meeting. The Owner agreed that the appeal could be heard on the consent calendar provided that the Town Council agrees that the appropriate amount of the penalty is \$52,500.

Section 2. Decision.

1. The facts and findings set forth in Section 1 of this Resolution are true and correct and hereby adopted by the Town Council.

2. The Town Council hereby determines that the construction delay penalties shall be in the sum of \$52,500 and that the payment by the Owner shall be made in the manner provided by the Late Construction Penalty Settlement Agreement attached hereto.

3. The Mayor is hereby authorized to execute on behalf of the Town the attached Late Construction Penalty Settlement Agreement.

4. The Town Clerk is directed to certify to the adoption of this Resolution and transmit copies of this Resolution by certified mail, return receipt requested to the Property Owner, and to cause a certified copy of this Resolution to be placed permanently in Town records.

The foregoing resolution was duly and regularly adopted by the Ross Town Council at its regular meeting held on the 14th day of December, 2017, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

Elizabeth Robbins, Mayor

ATTEST:

Linda Lopez, Town Clerk

LATE CONSTRUCTION PENALTY SETTLEMENT AGREEMENT

73 Winship Avenue, Town of Ross

This Settlement Agreement (“Agreement”) is entered into this 14th day of December, 2017 by and between the Town of Ross (“Town”) and Brian and Erica Hunt (“Hunts”), collectively referred to as the “Parties.”

Recitals

- A. Chapter 15.50 of the Ross Municipal Code imposes time limits on the completion of construction projects within the Town. For projects with a value in excess of \$500,000, the maximum construction period is eighteen months. Any project exceeding the construction time limits is subject to the payment of penalties prescribed by Chapter 15.50.
- B. On April 11, 2017, the Town’s Building Official issued a written determination (“Determination”) that the remodeling of the Hunt’s historic home located at 73 Winship Avenue (“Project”) was 440 days late and that a penalty of \$357,500 was owed by the Hunts, including the construction deposit of \$32,572.72 on file with the Town.
- C. A dispute has arisen between the Parties regarding these late construction penalties.
- D. Although Town staff believed that some reduction in the penalties was warranted, the Hunts contended that due to the unique circumstances involved in the remodeling of their historic home, no penalties should be assessed by the Town.
- E. The Hunts timely filed an appeal of the Town’s determination and a hearing was initially scheduled before the Town Council for its November 9, 2017 meeting.
- F. The Parties desire to avoid the cost, delay and uncertainty related to the final determination of the late construction penalties and desire to resolve their dispute pursuant to the terms of this Agreement.

Agreement

The Parties agree as follows:

- 1. The Determination is rescinded and the total amount of late construction penalties to be imposed by the Town in connection with the Project shall be in the sum of \$52,500. This sum of money shall be paid by the Hunts in the following manner:
 - a. The deposit on file with the Town in the sum of \$32,572.72 shall be forfeited immediately to the Town upon the execution of this Agreement.
 - b. The Hunts shall pay the sum of \$5,000 to the Town on or before December 15, 2017.
 - c. The Hunts shall pay the sum of \$4,927.28 to the Town on or before June 15, 2018.

- d. The Hunts shall pay the sum of \$10,000 to the Town on or before December 15, 2108.
2. In the event the Hunts sell their real property located at 73 Winship before December 15, 2018, the entire remaining balance of the penalties due to the Town shall be paid to the Town prior to the close of escrow for the sale of their residence.
3. This Agreement involves the settlement of disputed claims between the Parties and shall not be construed as an admission of liability by either Party.
4. **General Release and Discharge of Claims:** Upon the execution of this Agreement, each Party does hereby fully and forever release and discharge the other Party including any and all of their predecessors, successors, assigns, representatives, officials, employees, attorneys, and agents (hereinafter collectively referred to as "Released Parties"), of and from any and all actions, claims, demands, rights, damages, costs, litigation expenses, attorneys' fees, expert fees, consultant fees, other fees, penalties or interest arising from any and all actions of the Released Parties, which each Party has or may hereafter accrue, including without limitation, any and all known and unknown, foreseen and unforeseen claims, damages, and injury, relating to, or in any way, directly or indirectly, involving or arising out of any facts or circumstances related to the late construction penalties for the Project.
5. **Waiver of Claims:** It is the intention of the Parties, in executing this Agreement, that this Agreement is effective as a full and final accord and satisfaction and general release of all claims, debts, damages, liabilities, demands, obligations, costs, expenses, disputes, actions or causes of action, that each Party may have against the other Party by reason of any acts, circumstances or transactions relating in any way to the late construction penalties for the Project. The Parties acknowledge that they are familiar with California Civil Code section 1542 and that they hereby expressly waive the protection of that section, which provides as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH
THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS
OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE,
WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY
AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

In connection with such waiver and agreement, each of the Parties acknowledges that they are aware that they or their attorney may hereafter discover claims or facts or legal theories in addition to or different from those which they know or believe to exist with respect to this matter, but that it is the intention hereby to fully, finally, and forever settle and release all of the claims, known or unknown, suspected or unsuspected, which now exist or heretofore have existed by reason of any acts, circumstances, facts, events, or transactions relating in any way to the late construction penalties for the Project.

6. **Integrated Agreement:** This Agreement contains the entire understanding and agreement between the Parties, and the terms and conditions contained herein shall inure to the

benefit of, and be binding upon, the heirs, representatives, successors and assigns of each of the Parties. No other representations, covenants, undertakings, or other prior or contemporaneous agreements, oral or written, respecting such matters, which are not specifically incorporated herein, shall be deemed in any way to exist or bind any of the Parties. The Parties acknowledge that this Agreement has been executed without reliance upon any such promise, representation, or warranty not contained herein.

7. Modification: No modification or amendment of this Agreement shall be binding unless executed in writing by the Parties.
8. Construction: This Agreement shall not be construed against the Party preparing it, but shall be construed as if the Parties jointly prepared this Agreement. Any uncertainty and ambiguity shall not be interpreted against any one Party. This Agreement is to be performed in California and it is to be interpreted, enforced, and governed by and under the laws of the State of California.
9. Attorneys' Fees and Costs: Should suit be brought to enforce or interpret any part of this Agreement, the prevailing party shall be entitled to recover their attorneys' fees.
10. Counterparts: This Agreement may be executed in duplicate counterparts, each of which shall be deemed an original and all of which shall constitute an agreement to be effective as of the date of signing. Further, signatures transmitted and memorialized by electronic mail or facsimile shall be deemed to have the same weight and effect as an original signature. The Parties may agree that an original signature will be substituted at some later time for any electronic or facsimile signature.
11. Captions and Interpretations: The paragraph titles and captions are inserted in this Agreement as a matter of convenience. As such, the paragraph titles or captions are not intended to define or describe the scope of any provision.

Town of Ross

Elizabeth Robbins, Mayor

Property Owners



Brian Hunt



Erica Hunt