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Summary of Reforms in Atherton Building Department

Putting the Building Department Back on the Tracks

Issue

Determine and evaluate the steps that the Town of Atherton has taken to deal with the deficiencies found in the residential construction permit approval process.

Summary

In February 2007 the San Mateo County Civil Grand Jury (Grand Jury) issued an Interim Report on some of the deficiencies of the Town of Atherton (Atherton or Town) Building Department building permit review and approval process. While Atherton's 41-page response to the three-page Interim Report was defiant, the Grand Jury observes that the Town is nonetheless working with the Menlo Park Fire Protection District (MPFPD), as recommended in the Interim Report, to define the role of each party and implement procedures to include MPFPD in the building permit review and approval process.

The Grand Jury has continued to monitor events in Atherton, and is pleased to report that substantial progress has been made to correct the deficiencies in the Building Department. The Town has remedied, or is in the process of remedying, many of the deficiencies identified in the several investigations of the Building Department, including: hiring new staff, purchasing a modern computerized permit tracking system, assigning responsibility for reviewing excavation and grading to the Public Works Department, preparing and implementing a Building Department Policy and Procedure Manual and hiring an outside firm to rewrite the zoning ordinance.

Regrettably, the Grand Jury has learned of management communication shortcomings in Atherton not previously reported. The Town Manager and the former Building Official were aware of serious employee misconduct in the Building Department. While the offender was eventually disciplined, some of the incidents might not have occurred had the responsible managers intervened in a timely manner. In addition, the Grand Jury has evidence that the Town Manager (and another senior Town official) failed to inform the council members of facts pertinent to business before the Town Council.

Many of the problems currently facing the Town of Atherton are a result of ambiguities in the poorly-written zoning ordinance, questionable interpretations of that ordinance by the former Building Official and a lack of supervision of the Building Department by the Town Manager.

The full impact of questionable practices in the Building Department may not be known for years, but the effects are beginning to surface. In the current year the Council has been asked to hear six appeals of Building Department decisions related to zoning ordinance violations. One of those appeals has since morphed into a lawsuit against the Town.

The Grand Jury recommends that the Atherton Town Council require that the Town Manager keep the Council fully informed about significant matters related to the administration and operation of the Town and also re-examine the Town's narrow policy of notifying neighbors of proposed construction only when the project requires a zoning variance. The Grand Jury further recommends that the Atherton Town Council direct the Town Manager to implement a written procedure for documenting and resolving citizen complaints and also to inform the community of measures taken to remediate the problems in the Building Department.



Reforms in Atherton Building Department

Putting the Building Department Back on the Tracks

Issue

Determine and evaluate the steps that the Town of Atherton has taken to deal with the deficiencies found in the residential construction permit approval process.

Background

The Town of Atherton (Atherton or Town) comprises approximately 2,500 households and 7,200 residents. Construction activity in Atherton has increased in recent years to a current level of approximately 40 new homes per year. In the years 2000 through 2005 the Atherton Building Department (Building Department) issued a total of 3,392 building permits. The value for permitting purposes of these projects amounted to approximately \$686 million.¹

The Building Department issues building permits for and inspects large projects such as new residences, new ancillary buildings, and alterations to existing buildings. The Building Department also issues a large number of building permits for smaller projects such as the replacement of furnaces, water heaters, windows and roofs. California building departments must be managed by a certified Building Official with the authority to issue building permits and approve all aspects of construction projects. Building Department employees involved in the building permit application review and approval process and in field inspection of construction projects are also certified to perform those duties.

¹ "Building Permit and Process Audit – Phase I Report", Town of Atherton Finance Department, 2006.

Interim Grand Jury Report

The 2006-2007 San Mateo County Civil Grand Jury (Grand Jury) issued an Interim Report² in February 2007 describing some of the deficiencies of the Atherton Building Department building permit review and approval process. The Interim Report noted that Atherton's process did not ensure that the Menlo Park Fire Protection District (MPFPD) was included in the review and approval of all projects for which such approval was prudent or appropriate.

One of the goals of the Interim Report was to motivate the Town and MPFPD to work together to implement changes in the building permit review and approval process to ensure that the fire district is included in that process. Unfortunately, the report was followed by a recriminatory exchange between the Town and MPFPD which was reported in local newspapers. Atherton's response to the Interim Report reflected this antagonism; however, tempers have now cooled and the parties are cooperating to better define the role of MPFPD in the Atherton building permit review and approval process.

The Grand Jury has continued to monitor events in Atherton, and is pleased to report that substantial progress has been made to correct the deficiencies in the Building Department. The Grand Jury commends Atherton for its vigorous efforts to implement improvements in the Building Department, but as reported in the Findings, improvement is needed in Atherton's management communications.

Atherton Investigates its Building Department

A March 2006 letter from the Town's independent accountants noted that the Building Department did not have written policies and procedures governing the permit application, review and approval process or for the calculation of related fees. Based on this letter, the Town initiated a series of six investigations and studies.

The first investigation dealt with Building Department employee conduct and resulted in belated disciplinary measures against two employees. The Grand Jury did not further investigate these personnel matters.

The Atherton Finance Department then initiated a three-phase³ audit of the Building Department. These audits described deficiencies in the building permit review and approval process, data entry and recordkeeping and the calculation and collection of permit fees. The audits also found that permits had been approved for projects that violated the Town zoning ordinance and that Town employees made errors in assessing fees for excavation permits and gave preferential treatment to some applicants. The matter of incorrect excavation permit fees became moot when the Town rescinded the excavation permit fee and refunded the fees that had been collected.

² http://www.sanmateocourt.org/grandjury/2006/reports/Atherton_Building_Dep.pdf

³ Town of Atherton, Building Permit and Process Audit, Phases I, II, & III, dated June 26, July 26, and October 18, 2006, respectively.

Another study⁴, by a consultant, determined the zoning ordinance enforcement needs for the Town, reviewed the status of existing Building Department programs and discussed staffing. The consultant found deficiencies in existing zoning ordinance enforcement efforts. Finally, a report⁵ by the then interim Planning and Building Administrator⁶ evaluated Building Department operations and included an extensive set of recommendations for improving the Department.

Each of the problems listed below were identified in two or more of the above reports:

- Permits were issued for construction projects that violated the zoning ordinance
- Building permit fees were assessed incorrectly
- Building Department recordkeeping was inaccurate and incomplete
- There was no requirement that a qualified planning professional certify that a proposed project conformed to the zoning ordinance
- There was no formal review of grading, drainage, and other site development issues
- Zoning ordinance enforcement was handled only on a reactive basis, in response to complaints

Investigation

The Grand Jury interviewed Atherton officials and employees, surveyed six other San Mateo County cities, interviewed the Building Official of a comparable town, and reviewed many relevant documents, including:

- The six reports commissioned by the Town and described above
- Town of Atherton Administrative Procedures, Zoning Ordinance, employee Code of Conduct, Atherton Building Department procedures, organization charts, etc.
- Confidential reports on personnel matters

Findings

Related to the Building Department

The Town has remedied, or is in the process of remedying, many of the deficiencies identified in the studies cited above. More specifically:

- A new Building Official has been appointed.
- The Town is in the process of hiring a Senior Building Inspector and has started the process of hiring a Permit Technician to process routine building permit applications.
- The Town is in the final stages of purchasing a new, computerized permit tracking system that also is capable of tracking citizen complaints.
- Responsibility for reviewing and approving excavation, grading, drainage and other civil engineering issues has been transferred from the Building Department to the

⁴ “Code Enforcement Assessment Report,” CSG Consultants, Inc., October 18, 2006.

⁵ “Assessment of Town of Atherton Planning and Building Department,” Gary Binger, October 12, 2006.

⁶ The title of the combined positions of Building Official and Planning Official, no longer used.

Public Works Department. The Town has contracted with an outside firm to provide the required professional services under the supervision of the Public Works Director.

- The Town has contracted with a second outside firm to rewrite the zoning ordinance to improve clarity, eliminate ambiguities, improve readability and ensure consistency with the Town General Plan.
- The Town has created a new Building Department Policy, Procedure and Interpretation Manual and is working to improve the business practices in the Department.

As noted above, the Grand Jury conducted a survey of six other cities in the County to determine the practices and procedures used in their building departments and also visited the building department in a town that is comparable in size and demographics to Atherton. Atherton was the only community surveyed in which the positions of Building Official and Planning Administrator were combined and duties of both positions assigned to one person. The Town has recently rewritten the Building Official's job description and appointed a new Building Official. Town planners do not report to and are not supervised by the Building Official. The Town Council has also approved a plan to hire a contract planner to assist the Building Department staff in reviewing building permit applications for conformance with the zoning ordinance.

Five of the six cities surveyed notify residents when substantial construction projects are proposed in their neighborhood. In Atherton, for all practical purposes, residents are notified of new construction only when such construction requires a conditional use permit or a zoning ordinance variance.

Five of the six cities surveyed have formal, written procedures for handling citizen complaints. Atherton has prepared such procedures but has not yet permanently adopted them.

The Building Department has updated information sheets for applicants to reflect newly-adopted Town ordinances.

As recommended in the Interim Report, the Town is currently working with the MPFPD to define the role of each party and implement procedures to include MPFPD in the building permit review and approval process. Council members also recently stated their willingness to consider revision of the Town sprinkler ordinance to require sprinklers in all future basements.

Other Important Issues in Atherton

In recent years Atherton experienced several incidents of misconduct by an employee, and multiple witnesses told the Grand Jury that senior Town officials were aware of these incidents. The nature of this misconduct was such that an impartial observer could reasonably conclude that disciplinary measures were justified and appropriate. These acts of misconduct persisted in Atherton because of inattention or inaction by senior Town officials. While an investigation was eventually undertaken and the offender was disciplined, some of

the incidents might not have occurred had the responsible senior Town officials intervened in a timely manner.

The International City/County Management Association (ICMA) is the professional association for city and town managers. The ICMA Code of Ethics, developed in 1924 and last revised in 2004, includes the following guideline on information sharing:

“The member [*e.g., the Town Manager, ed.*] should openly share information with the governing body while diligently carrying out the member's responsibilities as set forth in the charter or enabling legislation.”

The Grand Jury has observed that the ICMA guideline on information sharing is not always followed in Atherton. The Grand Jury has heard some council members make statements in Town Council meetings that indicate that the Town Manager has failed to inform the council members of facts pertinent to Building Department issues before the Council. One example of this occurred during the March 21, 2007 meeting, at which a council member stated that the fire district had never asked to participate in the building permit review and approval process.

The Grand Jury received testimony that directly contradicts this statement. The Grand Jury was told that in 2001, MPFPD requested a meeting with Town officials to discuss MPFPD participation in the building permit review process. The Grand Jury was told that the Town Manager, the former Building Official and the Town Attorney attended this meeting, and that the meeting ended acrimoniously when the Town officials rejected the MPFPD request. If the Town Manager had not previously informed the council members of this meeting, he could have done so after the erroneous statement by a council member was made. The Grand Jury has confirmed in subsequent interviews that this was never done.

The agendas for the first four Council meetings in 2007 collectively include six appeals to the Council requesting that certain decisions or representations made by the former Building Official be allowed to stand, those decisions having been subsequently countermanded by the current Building Official. There were no such appeals in 2006. The Council has sought and obtained advice from two outside law firms to guide the Council as they attempt to resolve these appeals.

Conclusions

The problems of the Building Department were caused by the wide spectrum of deficiencies listed above and the absence of supervision and control by senior Town officials. It is fair to say that the former Building Official and the Building Department were not properly monitored and controlled by the Town Manager.

Many of the residential construction-related problems currently facing the Town of Atherton are a result of ambiguities in the poorly-written zoning ordinance and questionable interpretations of that ordinance by the former Building Official.

The full impact of past questionable practices in the Building Department may not be known for years, but the effects are beginning to surface. One of the six appeals to the Council discussed above, in which the Council denied the property owner's appeal, has morphed into a lawsuit against the Town.

The Grand Jury understands the dilemma facing the Town Council. If the Council attempts to force owners of non-conforming properties to comply with the zoning ordinances, litigation may result. If the Council ignores the violations, future accusations of unfair treatment may surface.

The Town has made substantial progress in implementing some of the recommendations of the several investigations of the Building Department, as summarized in a recent memo⁷ by the former Acting Building Official.

Compared to the other six cities surveyed by the Grand Jury, Atherton was the only one that did not have a formal, written procedure for handling complaints related to zoning or construction projects and did not routinely inform neighbors of proposed construction projects.

To maintain the independence and integrity of the planning (or zoning) review process, employee and contract planners should not report to, or be supervised by, the Building Official.

The Grand Jury recognizes that the winds of change are gusting in Atherton. Discussions with the fire district are underway, new employees are being hired, new policies and procedures are being implemented, contracts with outside firms are being negotiated and executed, the Council faces several contentious and potentially litigious issues and the Town Manager has resigned. While the Grand Jury has attempted to make this report as current as possible, the pace of change in Atherton may make parts of this report out-of-date when the report is finally published.

Recommendations

The Grand Jury recommends that the Atherton Town Council:

1. Require that the Town Manager keep the Council fully informed about all significant matters related to the administration and operation of the Town. The Council should consider revising the Town Manager's job description and the Atherton Municipal Code to include this requirement.
2. Re-examine the narrow policy of notifying neighbors of proposed substantial construction projects only when the project requires a conditional use permit or a zoning code variance.

⁷ "Audit Recommendations Phases I, II & III." by former Acting Building Official to City Manager, March 8, 2007.

3. Direct the Town Manager to implement a formal, written procedure for documenting a citizen's complaint, the actions taken to investigate and resolve the complaint, and the Town's response to the complainant.
4. Direct the Town Manager to inform the community of measures that have been and are being implemented to remediate the Building Department problems.



Town of Atherton

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September 20, 2007

Hon. John L. Grandsaert
Judge of the Superior Court
County of San Mateo
400 County Center
Redwood City, CA 94063-1655

Re: Response to Grand Jury Report
Reforms in Atherton Building Department
Putting the Building Department Back on the Tracks

Dear Judge Grandsaert:

This letter responds to the report of the San Mateo County Civil Grand Jury entitled: Summary of Reforms in Atherton Building Department and Putting the Building Department Back on the Tracks.

The Town appreciates the statement in the report that the Grand Jury recognizes the substantial progress which the Town has made to correct deficiencies in the Building Department. This includes:

- acquisition of a modern computerized permit tracking system (capable of tracking citizen complaints);
- assignment of the responsibility for review of excavation and grading to the Public Works Department;
- preparation and implementation of a Building Department Policy and Procedure Manual;
- retention of an outside firm which has reviewed and is preparing recommendations for revisions to the Town Zoning Ordinance;
- retention of a contract planner who will report directly to the City Manager, hiring a new permit technician to process routine building permit applications;
- pursuing the process of hiring a senior building inspector;

- retention of the services of a contract code enforcement officer who has created a mechanism for documenting complaints of zoning ordinance violations and the response to such complaints;
- revising the ordinance regarding fire sprinklers to require fire sprinklers in conformance with the statutes of the Menlo Park Fire Protection District (MPFPD). There is a further requirement for sprinklers in the basements of all structures regardless of size of the basement.

MPFPD Review of Building Plans

The Grand Jury references an interim report issued in February 2007 which noted that the Town Building Department review and approval process did not insure that the MPFPD was included in the review and approval of all projects for which approval was prudent or appropriate. As explained below, after meetings in 2001 and 2002, insofar as the Town was aware, this issue did not arise again until 2006.

Beginning in 2001, the City Manager reported to the City Council on four (4) different occasions of meetings with the MPFPD. The City Manager has no recollection of any meeting with the MPFPD ending acrimoniously. The first meeting occurred in the Fall of 2001. During the week of October 18, 2001 there was a meeting attended by the City Manager, Building Official and MPFPD personnel regarding the review by the MPFPD of building plans. The MPFPD wanted plans sent to their office for review. The Building Official expressed concern about the security risk of releasing plans from Town offices. A MPFPD director demanded a retraction of the report after which there was another meeting with the MPFPD on the week of October 26, 2001. At that time, it was mutually agreed that plans would be viewed by Menlo Park Fire District personnel at the Building Department offices in the Town of Atherton.

In January 2002 the City Manager and building official met with the MPFPD. At that time it was agreed that plans would be submitted directly to the MPFPD regarding site access and water pressure requirements relating to fire flow. There was no request for a delegation of authority from the MPFPD to the town regarding approval of building permits.

From January 2002 through 2006 there was never any communication from the MPFPD to the City Manager concerning the review of building plans. The City Manager was never informed that anything to the contrary of what had been agreed to in January of 2002. The first time the City Manager became aware of any issue concerning MPFPD's not reviewing the plans was upon the appointment of the current Chief of the MPFPD and the commencement of the Grand Jury investigation.

Public Employees Discipline

The Grand Jury observes at page 4 of the report that investigations by the Town of its Building Department began with one which dealt with employee conduct and resulted in "belated" disciplinary measures against two employees. The report observes that the Grand Jury did not further investigate these personnel matters. However, despite this statement, at page 6 of the report there is reference to several incidents of unidentified misconduct by an employee, the nature of which was such that an impartial observer could reasonably conclude the disciplinary measures were justified and appropriate. On page 7 of the report there is the statement that "while an investigation was eventually undertaken and the offender was disciplined, some of the incidents might not have occurred had the responsive senior town officials intervened in a timely manner." This allegation is without adequate foundation, in view of the earlier statement that no further investigation was conducted upon personnel matters for which discipline resulted.

As reported previously, the Town has conducted investigations of allegations of employee misconduct related to operations of the Town's Building Department. These investigations have been lengthy, thorough, and the reports of them, along with conclusions and recommendations for employee discipline have been provided to the Grand Jury. Disciplinary action has been taken in a degree supported by the findings and conclusions of an independent investigator and consultation with legal counsel with due regard for the constitutional rights of public employees.

Resident Notification of Building Permit

The Grand Jury report states, at page 6, that in Atherton, for all practical purposes, residents are notified of new construction only when a construction acquires a conditional use permit or zoning ordinance variance. This is not accurate. In Atherton, neighbors are notified of any project which not exempt under the California Environmental Quality Act. Notification is also provided whenever a heritage tree is removed (Chapter 8.10 Atherton Municipal Code). Neighbor notification is also done when a conditional use permit is required under the provisions of the Atherton Municipal Code (Chapter 17.52) as well as variances under the provisions of Atherton Municipal Code (Chapter 17.56).

Significant construction projects invariably involve tree removal. The Town of Atherton was incorporated in 1923 as a large lot (one acre and above) residential community. The Town has enacted regulations which prescribe a building area on each lot with generous setbacks from neighboring properties. Floor area ratio restrictions regulate bulk and mass of structures built within the prescribed building area. Height limitations effectively keep Atherton homes at a two-story limit. Town requirements for landscape screening have resulted in a unique community with an urban forest, largely the result of intentional development activities. The extensive landscaping planted, maintained and enjoyed by Atherton residents obviates the detailed controls of residential property development employed by other communities. It is the principal reason for the fact that Atherton has

not adopted design review regulations such as those in effect in than many other communities.

Conclusion

In conclusion, addressing the four (4) recommendations of the Grand Jury report the Town states:

1. The Atherton City Council does require the Manager to keep the Council fully informed of all significant matters related to administration and operation of the Town. (Section 2.12.070 of the Atherton Municipal Code). It should be noted that the City Manager did keep the Council informed of issues with the MPFPD as described on page 2 above.

2. As recited above, the practical reality of development in Atherton does not require examination or has not resulted in a "narrow" policy of notifying neighbors of substantial construction projects.

3. As described above, the new computerized system being installed in the Building Department will implement procedures for documenting citizens' complaints, actions taken to investigate and resolve them, and documentation of the Town's response.

4. The community is being informed of the measures which have been implemented to remediate Building Department problems. This letter has been reviewed and discussed at a public meeting of the City Council on September 19, 2007.

Very truly yours,

MARC G. HYNES
City Attorney, Town of Atherton

MGH:cwb

cc: Mayor and City Councilmembers, Town of Atherton
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Michael Murphy, Chief Deputy County Counsel
Acting City Clerk
Interim City Manager

Hon. John L. Grandsaert
Judge of the Superior Court
9/25/2007
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