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Via Hand Delivery

Re: Vander Meulen Appeal Supplemental Letter

Board of Supervisors:

This letter serves to supplement the letter of Appeal already submitted to the Board of Supervisors ("BOS") and to address those issues raised in the Staff Report pertaining to the September 13, 2016 hearing.

The Director's original Notice of Determination ("NOD") dated January 12, 2016 stated as follows:

(1) "I have determined that the ***recreational operation of motorized vehicles*** is NOT compatible with the Purpose and Intent of residential zoning; is not incidental and subordinate to residential uses; ***and is, therefore, not a use permitted within the residential zone designations as enumerated in Chapter 35.23*** (Residential Zones) of the LUDC."

(2) "Furthermore, analysis of the activities on your property indicates that ***the recreational operation of motorized vehicles constitutes a recreational facility*** as defined within the LUDC [which] requires approval/issuance of a Conditional Use Permit."

Acknowledging an obvious defect in the above broad pronouncements, the Planning Commission unilaterally altered the language of the NOD to the following: "the operation of recreational motor vehicles ***that adversely affects other properties in the vicinity*** is not a permitted use" in residentially zoned properties (including Appellant's).

This alteration makes no difference to the illegality and impropriety of the NOD itself. The simple question this appeal raises is the following: Do words and law matter anymore?

I. Background

On or about August 19, 2015, a Santa Barbara County Planning & Development Department ("P&D") Supervising Planner issued a letter to the Appellant stating that "on August 17, 2015 P&D received two complaints that on August 15, 2015 motorized vehicles (motorcycles) were using the arena [an unimproved dirt oval on the Property]," and that, "after considering the facts and circumstances surrounding the violation, a fine in the amount of $100.00 has been assessed." The Appellant paid this fine on September 3, 2015 with an

accompanying Reservation of Rights Letter to contest the findings of the violation, the conclusions of the violation, and the fine itself.

On September 8, 2015, this office submitted a letter of Request for Clarification to P&D. Within said letter, this office explained its opinion that periodic recreational use of motorized vehicles on both the unimproved dirt oval (the "Oval") and the remainder of the Appellant's unimproved Property was, in fact, a permitted "accessory use." More importantly, this office requested a clarification related to what use P&D believed ***was allowed*** on both the Oval and the remaining unimproved portions of the Property (i.e. the trails, bare ground, etc.). Stated differently, the Appellant sought a determination as to what activity he ***could*** undertake on the Property without running afoul of the standards enumerated in the Santa Barbara County Land Use and Development Code ("LUDC"). Specifically, among other requests, this office requested answers to the following questions;

(1) "Is the County of Santa Barbara asserting that Mr. Vander Meulen ***is never allowed to ride motorcycles for personal recreation on any portion*** of his 7.5 acre Property at any time?" (emphasis in original)

(2) "If Mr. Vander Meulen is allowed to ride motorcycles on some portions of his 7.5 acre property for personal recreation, please identify the specific areas on said Property in which he is allowed to do so."

(3) "If Mr. Vander Meulen is allowed to ride motorcycles on some portion of this 7.5 acre property for personal recreation, please identify the number of persons that can ride motorcycles on the Property at any given time."

(4) "If Mr. Vander Meulen is allowed to ride motorcycles on his 7.5 acre property for personal recreation, please identify any restrictions and/or thresholds (along with the specific corresponding authority) with which Mr. Vander Meulen may need to comply."

On September 29, 2015, this office received a response in the form of ambiguous answers to the above questions from the Supervising Planner. The pertinent responses are as follows:

(1) "Planning & Development ***has never asserted that Mr. Vander Meulen is not allowed to ride motorcycles for personal, noncommercial recreation or other uses accessory*** and subordinate to the residential zone designation of his property" (emphasis added).

(2) "Mr. Vander Meulen may use any portion of his residential property for personal, noncommercial recreation that does not conflict with the residential zone designation or those uses permitted within residential zones."

Aside from the admission that Mr. Vander Meulen's "personal non-commercial" riding of motorcycles could be conducted on the Property as an "accessory use," the Supervising Planner did not, in fact, truly answer ***any*** of the questions posed and certainly did not clarify, in any legitimate respect, the riding activity Mr. Vander Meulen ***could*** undertake on his Property without running afoul of the LUDC. As such, this office contacted the Planning Director, Dr. Russell, via email and in person, in order to obtain such information. Among other emails of note is one from Dr. Russell to this office dated October 26, 2015. Within said email, Dr. Russell stated the following;

(1) "It really is not possible to determine exactly how many people or motorcycle riders ***would be the limit for an accessory use***...to specify an exact number, ***beyond which would no longer be accessory***, would probably be unfair."[1]

[1] Exactly why it would be "unfair" to communicate such parameters is unknown.

(2) ***"Of course, Mr. Vander Muelen (sic) can ride motorcycles on his property and have family and friends do so also. That is not the issue."*** (emphasis added).

(3) "I suggest that Mr. Vander Meulen be proactive in taking measures that would clearly address the issue of ***accessory use***...perhaps the number and location of people riding at one time might be worth considering. Perhaps there are other things that could be done."

Ultimately, Dr. Russell did make some vague suggestions as to measures for Mr. Vander Meulen to take and Mr. Vander Meulen complied with those measures. Notwithstanding this compliance, the Director issued the NOD on January 16, 2016.

II. Discussion

A. The Director Has Already State That Recreational Riding of Motorcycles on Appellant's Residential Property Is Both a "Permitted Use" and an "Accessory Use" Consistent with the LUDC, and Therefore, the NOD Clearly Modified the Standards and Uses Allowed by the LUDC.

As noted above, well before the issuance of the NOD, both Staff and the Director issued determinations that the Appellant's riding of motorcycles for recreational purposes – the very activity that is now altered by the NOD – was not only a "permitted use," but an "accessory use." The above statements by the Staff and the Director bear repeating;

(1) "Planning & Development has never asserted that Mr. Vander Meulen is not allowed to ride motorcycles for personal, noncommercial recreation ***or other uses*** **accessory and subordinate** to the residential zone designation of his property" (Staff Letter, September 29, 2016).

(2) "It really is not possible to determine exactly how many people or motorcycle riders would be the limit for an accessory use...to specify an exact number, ***beyond which would no longer be accessory***, would probably be unfair." (Director Email, October 26, 2015).

These statements merely reflect a continuance of long established Santa Barbara County standards. The recreational operation of motorized vehicles on residentially zoned properties has ***always*** been treated as an allowed use and accessory use. As the above statements make clear, both Staff and the Director objectively determined that the specific activity undertaken by the Appellant (the recreational use of motorized vehicles on residential property) was both a "permitted use" and an "accessory use" consistent with the LUDC. In doing so, the Director necessarily found that such riding **did not** adversely affect properties in the vicinity. Indeed, the definition of "accessory use" in the LUDC prohibits "adverse effects" on surrounding properties.

B. The NOD Clearly (a) Modifies a Formerly Allowed Use, and (b) Creates a New Definition (New Standard) for the Term "Accessory Use" and Both Activities Are Defined in the LUDC as an "Amendment" Which Requires Adherence to the Public Process.

As stated in the Staff Report, Santa Barbara County Land Use and Development Code ("LUDC") §35.12.020 does, in fact, give the Director the authority to ***interpret*** any provision of the LUDC. The Director has issued such "interpretations" in the past. On September 2, 2014,

for example, the Director released a "Determination of Interpretation" relative to the phrase "Charitable Function" wherein he defined the term as "an event or activity whose primary purpose is of a charitable or noncommercial nature."

Such an act, however, is wholly distinguishable from what the Director has done in the instant case: disallowing a formerly allowed use, and creating a new standard by redefining the application of "accessory use."

Under the plain language of LUDC 35.104, et. seq. ("Amendments"), the neither the Director nor any other non-legislative, unelected official can unilaterally amend the provisions of the LUDC.

Under the specific language of LUDC §35.104.020(B), the term "amendment" means the following:

(a) modifying or adding a "new standard or requirement,"
(b) modifying or adding an "allowed use," or
(c) modifying or adding a procedure applicable to land use or developments.

The Director has done just that via the NOD. Again, Staff and the Director have already asserted (in writing) that the riding of motorized vehicles on residentially property – and specifically, the Appellant's riding on the Appellant's property – **was** an "accessory use" and therefore **did not** adversely affect other properties in the vicinity. It is therefore indisputable that, even after the Planning Commission's revision, the NOD clearly (a) modified (by prohibition) a formally "allowed use" and (b) created a new standard (however ambiguous) for the term "accessory use." These actions constitute an "amendment" under the plain language of the LUDC.

Applications to amend the LUDC are governed under the specific procedure enumerated in LUDC §35.104. To wit;

(1) The proposed amendment must be "initiated" (§35,104.030);
(2) The proposed amendment must be processed (§35.104.040);
(3) The proposed amendment must be acted upon, which includes at least "one noticed public hearing" at the Planning Commission (§35.104.050(B)(1)) and "at least one noticed public hearing" at the Board of Supervisors" (§35.104.050(B)(2)); and,
(4) Should the Board of Supervisors approve the amendment, it must formally adopt said amendment by ordinance (§35.104.050(B)(2)(c)).

By issuing the NOD, the Director has both (a) modified (prohibited) a formerly allowed use, and (b) "created a new standard" by redefining the application of "accessory use."

C. You Can Ride, But We Aren't Going to Tell You When, Where, or How: Vagueness, Ambiguousness, and the Right To Know.

Out of respect for the process, the Appellant has not conducted any motorcycle riding activity on the Property since the issuance of the NOD. However, it is clear that, even if the NOD is upheld (and it cannot be without undergoing the public process), the Appellant is allowed to conduct at least some form of "recreational" vehicle riding on the Property. As the Planning Commission finding states, the only motorcycle riding prohibited on the property are those "that adversely affect other properties in the vicinity." However, the parameters associated

with such riding remain a mystery as P&D have steadfastly refused to (or been unable to) answer any questions in order to solve this mystery.

The Staff Report suggests that the "level" of Appellant's riding is the central issue to resolving the mystery. It states, for example that;

(1) "the level of recreational use of motorize vehicle on the subject property has adversely affected other properties in the vicinity," and,

(2) "the level of recreational motor bike activities that have occurred on the subject property were not permissible."

As already stated, this office submitted letters to both Staff and the Director on numerous occasions (among others, on September 8, 2015, December 16, 2015, and July 15, 2016) requesting basic instructions pertaining to what type (what "level") of riding ***could*** be undertaken. The Appellant has 7 acres of property, including the small dirt Oval, numerous riding trails, and acres of unimproved open ground upon which to ride and he must be made aware – has a right to be made aware – where, what type of vehicles, and what "level" of riding can take place on the Property. However, as the record reflects, all of these requests were met with a same answer: "we don't know." The bottom line is this: ***If the Director has enough information to come to the conclusion that previous "levels" of riding were impermissible, he should clearly have enough information to inform the Appellants what "levels" of riding are, in fact, permissible.***

An ordinance is unconstitutionally vague[2] if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits or if it authorizes or even encourages arbitrary and discriminatory enforcement." Gospel Missions of America (2005) 419 F.3d 1042, 1047. *See also* Nunez v. San Diego (1997) 114 F.3d 935, 940 ("To avoid unconstitutional vagueness, an ordinance must (1) define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited; and (2) establish standards to permit police to enforce the law in a non-arbitrary, non-discriminatory manner"). "The need for definiteness is greater when the ordinance imposes criminal penalties on individual behavior [which is the case here as expressed by the plain language of the NOD]." Nunez at 114 F.3d at 940.

In the instant case, it is clear that neither the Director nor Staff can determine "what conduct is prohibited." At the risk of being repetitive, it must be pointed out that, when the Appellants submitted written requests for guidance regarding the motorized recreational activity that he could and couldn't undertake on the Property, he was told the following:

(1) On September 29, 2015 (three months before the NOD), Supervising Planner Petra Leyva stated that "Planning & Development has never asserted that Mr. Vander Meulen is not allowed to ride motorcycles for personal, noncommercial recreation *or other uses accessory and subordinate to the residential zone designations of his property.*"

(2) On October 26, 2015 (two months before the NOD), the Appellant was again informed by the Director that he ***could*** ride motorcycles on the Property (*"Of course, Mr. Vander Muelen (sic) can ride motorcycles on his property and have family and friends do so also."*). However, the Director was unable to provide the Appellant any

[2] It should be noted for the record that the Staff Report is erroneous in its assertion that "only the Director's Determination is under appeal, not the terms contained within the LUDC." Instead, both the Determination and the term contained in the LUDC are intertwined such that both are (and were at the Planning Commission hearing) subject to this appeal.

parameters for such riding *("It really is not possible to determine exactly how many people or motorcycle riders would be the limit for an 'accessory use'. Not only is it not possible to do so, but to specify an exact number, beyond which would no longer be accessory, would probably be unfair").*

Again, the Director's inability to define "what conduct is and is not prohibited" (what "level" of riding is acceptable), is prima facie evidence that the statute (or, at a bare minimum, its application in this case) is, in fact, vague and ambiguous.

Because the Appellant knows he is able to ride recreational vehicles on the Property even after the NOD, and because the Director and Staff have refused to provide any guidance on the issue, the Appellant is now necessarily forced to conduct such activity "in the blind" and without knowledge of any governmentally imposed limitation save for one (adverse effect) which has not been defined and is unknowable. This is true even if the NOD is upheld. Such a situation is impermissible and both the statute and the NOD are, therefore, vague and ambiguous on their face.

D. <u>As a Matter of Policy, The Proper Venue for this Issue is the Judicial Branch of Government</u>.

As stated previously, the issue here is not one of compliance (because there is absolutely no prohibition of recreational use of motorized vehicles on residential property enumerated in either the LUDC or the NOD), but rather, a civil grievance between private parties. It is an issue that should be outside the realm of authority for the Planning & Development Department. We know that the Director and Staff are allowed to enforce use restrictions present in the LUDC. However, we know there is no blanket use restriction in this case because the Appellant is, by the Director's and Staff's (and the Planning Commission's) own admission, allowed to ride motorcycles for recreational use on the Property. Their inability to express any parameters for such riding (their inability to quantify any adverse effect) makes clear that they are unable to resolve the fundamental issue. Instead (and for obvious reasons), this is a question answerable by the judicial branch of government. Indeed, ***this is why we have Courts***.

There is a specific cause of action for such circumstances: Private Nuisance. In order to prove such a cause of action, a Plaintiff must provide evidence establishing; (1) that the Defendant created a condition that was harmful or offensive to the senses, or interfered with the comfortable enjoyment of Plaintiff's property, (2) that an ordinary person would be reasonably disturbed by the conduct, (3) that the Plaintiff was harmed by the conduct, and (4) that the seriousness of the harm outweighs the benefit of the conduct. Here, the Planning Director has impermissibly supplanted the role of the Court. Further, he has arrived at his own conclusions without evidence from the Plaintiff. Finally, he has done so without applying any knowable standard (he has cited neither decibel threshold, dust threshold, nor any other measurable standard with which to define the term "adverse effect"). No person knows how he reached his conclusions in this matter. In fact, no person knows what the conclusion actually prohibits. It is the epitome of overreach by a non-elected official.

E. <u>There is No "Sports and Outdoor Recreation Facility" on the Property, and, If the Director Believes There is Such a Facility, He Must be Made to Identify the Location and Appurtenances "On the Ground" that</u>

Constitute Such A "Facility" So As to Allow Appellants to Alter the Same to Avoid Such a Designation.

As already stated, the vast majority of the 7.5 acre Property is raw, unimproved ground. It is the same as the entirety of the adjacent properties to both the west and south.

Aside from the single family residence, and a small (2 ½ foot paneled) fence that surrounds the dirt Oval sometimes used for riding, there simply is no "facility" of any kind on the Property. There is no water spigot. There is no electrical wiring of any kind. There has been no grading or any other improvement made to the property. There is simply nothing but raw dirt. There can be no "facility."

The Appellant has, on numerous occasions, requested an explanation as to what conditions on the Property could conceivably constitute a "Sports and Recreation Facility" and what actions would need to be undertaken to remove the Property from such a designation. The best answer he received was the following:

> "I am not sure what would be best. If they [referring to the 2 ½ foot paneled fence] really do reduce noise, maybe they should remain, but if they really do not reduce the noise, perhaps removing them would make it less of a formal 'arena.'"

Even today the Appellant does not know what "condition" on the property designates it as a "Sports and Recreation Facility."

The bottom line is this: if there is a "structure" or "characteristic" on the Property brings any portion of the Property into the definition of a "Sports and Recreation Facility," the Director must identify said structure or characteristic. The Director must be required to inform the Appellant, with specificity;

(a) What location on the Property constitutes a "Sports and Recreation Facility," and
(b) The exact characteristics of that location that constitute a "Sports and Recreation Facility."

The Appellant has the right to tailor his conduct (and potentially remove and/or alter the alleged "facility") so as to be able to use motorized vehicles without obtaining a Conditional Use Permit. Should the Director be unable or unwilling to do so, the statute would inarguably be subject to being void for vagueness.

III. Conclusion

Based upon the foregoing, the Appellants respectfully request that the Board overturn the prohibitions enumerated in the Director's NOD and the Planning Commission's decision or, at the very least, either (a) require the proposed prohibitions to follow the mandates of the LUDC and be approved via public process, or (b) require the Director to inform the Appellant exactly what riding activity can, in fact, take place on the Property.

Sincerely,

BRENNEMAN, JUAREZ & ADAM

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