



Midpeninsula Regional
Open Space District

R-21-74
Meeting 21-18
June 9, 2021

AGENDA ITEM 9

AGENDA ITEM

Permitting Approach for the Bear Creek Stables Project

GENERAL MANAGER'S RECOMMENDATIONS *den*

1. Receive an update on the Bear Creek Stables Project, including permitting status and challenges.
2. Affirm the Use Permit permitting approach for the Bear Creek Stables Project.

SUMMARY

On April 25, 2019, the Midpeninsula Regional Open Space District (District) Board of Directors (Board) considered various Project options for Bear Creek Stables and directed the General Manager to move forward with the Capital Maintenance and Repair Project (Project). Since then, District staff have worked with an expert consultant team to develop the permit-ready construction plans for the Project. These plans are substantially ready for submittal. For most of the last two years, District staff have been consulting with Santa Clara County Planning and Building Departments (County) on a permitting approach that contains total project costs by maintaining the site's legal non-conforming status and not triggering commercial permit conditions. Over the last six months, staff have concluded that Project permitting within the legal non-conforming status is infeasible due to County Zoning Ordinance code restrictions. At the June 9, 2021 Board meeting, staff will describe the permitting challenges and the new recommended alternative of obtaining a Use Permit for the site operations. Sufficient funds are included in the proposed fiscal year 2021-22 (FY22) budget for submittal of the Use Permit application. County staff are anticipated to attend the June 9 Board meeting to assist in responding to questions regarding the permitting process and potential implications and requirements related to securing a Use Permit.

DISCUSSION

Background

In 2000, the District acquired a 260-acre property as an addition to Bear Creek Redwoods Open Space Preserve (BCR Preserve) in unincorporated Santa Clara County. This acquisition included an equestrian stable (Stables) that has been in continuous operation since the 1940s. Stables were an allowable use under the County's original *Exclusive Agriculture* zoning designation for the site, but in 1975, the County's amended zoning ordinance required a Use Permit for equestrian facilities within *Exclusive Agriculture* zoning districts. However, this permit requirement did not apply to uses that had already been legally established, and the Stables continues to operate as a legal non-conforming use. According to [§ 4.50 of the Santa Clara County Zoning Ordinance](#), a

‘non-conforming use’ refers to a use that was legally established according to prior zoning and building laws, but does not conform to current zoning and building requirements.

The Stables has operated under this legal non-conforming use designation since 1975. Although the underlying zoning district has changed from *Exclusive Agriculture* to *Hillside*, the Stables are still not a use that is permitted by right on *Hillside*-zoned parcels. Such operations may only become formally authorized through a discretionary land use approval with a Use Permit. Until then, the County will not allow expansion or intensification of uses at the Stables. The Stables is allowed to board up to 72 horses under the legal non-conforming use designation.

Bear Creek Stables Project

On January 25, 2017, the Board approved the Bear Creek Redwoods Preserve Plan (Preserve Plan). The Preserve Plan designates the Stables for continued equestrian use and identified numerous actions for the Stables, including infrastructure improvements, hillside erosion control and revegetation, and public access enhancements. Cost estimates for the Bear Creek Stables Site Design included in the Preserve Plan increased significantly during design development and permitting consultation due to the need for extensive site engineering. Staff developed multiple Project options for Board consideration and on April 25, 2019, the Board approved a Project that maintains current equestrian programming and includes the following actions (depicted in Attachment 1):

- Repair key structures and demolish dilapidated structures.
- Replace the trailer restroom with a prefabricated flush restroom.
- Add a potable water system with a San Jose Water Company water line connection.
- Provide Americans with Disabilities Act (ADA) accessible parking and pathways.
- Conduct driveway and drainage repairs.
- Implement hillside erosion control and revegetation.
- Replace the caretaker residence.
- Retain equestrian programming, public access, and trailer permit parking at status quo.

Key Permitting Challenges to Maintaining Legal Non-conforming Use

Based on early consultations, the County confirmed that the repairs could be implemented without obtaining a Use Permit and without modifying existing site uses. Under this scenario, the District would seek approval for the Project under the legal non-conforming use designation through a series of individual planning and building permits issued by the County. While developing the documentation to support this permitting approach, District staff identified several significant challenges (described below) that interfere with fulfilling the Project in a practical and cost-effective manner. Other permitting considerations with unknown implications are discussed under the section titled: *Additional Project Considerations to Address Regardless of Permitting Approach*.

Annual Repairs Limitations

The [County Zoning Ordinance](#) (§.50.020) restricts structural modifications to buildings designated as non-conforming uses as follows: alterations cannot exceed 25 percent of the building's construction valuation within any 12-month period. Because the County's formula to determine values has not been recently updated, calculated values are low and allow for minimal yearly repairs. County staff would consider allowing the District to implement repairs up to 25 percent of the structure's construction cost estimate, allowing for more significant repairs to be made annually. However, each subsequent 12-month period would still only allow for 25 percent

of remaining construction costs, and as these costs are reduced, the allowed repairs each year would also be reduced.

This limitation prevents the District from completing certain discrete tasks when costs exceed the maximum allowance. For example, if concrete foundation repairs exceed the annual cost allowance, this improvement would need to be performed over a two-year period, during which the building would be in a half-completed status with possibly reduced structural integrity. Furthermore, the annual repair limit is based on remaining construction costs; as tasks are completed, the remaining construction costs diminish, and so do the annual repair limits, thereby further restricting the ability to complete repairs each year. While the County is considering this flexible approach to determine the proposed annual repair limit, this approach still limits the District in completing all the necessary repairs in a timely and cost-effective manner.

Maintaining the Number of Existing Paddocks

Installation of a septic system and leach field for a new flush restroom requires permanent relocation of several existing paddocks. As specified by the County Zoning Ordinance (§4.50.020), a structure containing a non-conforming use (i.e., paddocks) cannot be reconstructed. Thus, the removal of paddocks without the ability to build new paddocks would reduce the total number of horses that can be boarded at the Stables. This reduction would result in fiscal implications that may significantly affect the financial viability of the Stables operation.

Temporary Construction Operations Plan

The District would need to temporarily relocate existing Stables activities that currently occur in the repair area during construction, including the covered hay storage, veterinarian area, and concessionaire space. Typically, the District would submit to the County a temporary operations plan to address site access, staging, facilities, and electricity for these services during construction. Unfortunately, the County Zoning Ordinance related to non-conforming uses does not specify a permitting mechanism that the County can rely on to permit the temporary relocation of operational Stables activities.

Use Permit Considerations

Based on extensive consultation with County staff and the identification of significant permitting challenges under the non-conforming use, the General Manager understands that the only viable alternative to proceed with the Project is to obtain a Use Permit for the site. The County has supported District staff in exploring every possible way to permit the Project under the non-conforming use, but the County is constrained by limitations of the County's Zoning Ordinance for non-conforming uses. The County is encouraging the District to apply for a Use Permit to implement the Project and they are willing to negotiate phased improvements and corresponding permit conditions to meet District goals. If through the Use Permit process, unfavorable permit conditions are imposed that result in an expanded Project scope and considerable near-term or long-term costs, the permit application can be withdrawn, and there is no obligation to proceed further with Project. However, if this is the case, the District will need to consider next steps for the Project and operation of the site.

Advantages of Applying for a Use Permit

- Provides a holistic approach to permitting and implementing a suite of improvements and activities associated with the Stables.
- Provides an opportunity to work with the County to define phased improvements and corresponding permit conditions.

- Brings the Stables into alignment with the County's Zoning Ordinance and therefore eliminates Zoning Ordinance limitations associated with non-conforming uses.
- Supports a phased approach for implementing proposed and potential future improvements and repairs. Phased work would be described in the Conditions of Approval. Provides a mechanism to complete minor routine repairs that do not change uses, alter approved structures, change the site configuration, or modify or delete any Conditions of Approval.
- Allows for the potential expansion of public uses; during future lease negotiations, prospective tenants would be able to propose expanded programming as part of a sustainable business model.
- Due to the recent closures of equestrian facilities within the County, and the Board of Supervisors' interest in maintaining boarding facilities, the County would work closely with the District in developing permit conditions to meet District goals for the Stables site plan.

Disadvantages of Applying for a Use Permit

- The Use Permit process opens up the entire operations of the Stables to public review, comments, and critique submitted to the County as they review the Use Permit application.
- Requires discretionary approval from the County Planning Commission with an uncertainty of new requirements and/or restrictions that do not currently exist under the legal non-conforming use status; some of these new requirements and/or restrictions may be imposed in response to public comments about the operations.
- May require additional time and consultant services to address comments from the County and/or public, potentially delaying the Project schedule and increasing costs. Delays and additional costs would also result if the Use Permit process triggers the need for new expanded site work such as upgrades to the driveway and/or parking.

Use Permit Process

According to the County Zoning Ordinance ([§5.65](#)), a Use Permit is required for uses that are generally appropriate within the relevant zoning district, but for which the intensity, impacts, or other location-specific characteristics affect approval considerations or conditions. The County issues Use Permits through an application process that includes staff review and findings, public noticing, and review and approval from the Planning Commission.

Use Permit applications typically contain the following components:

- Site plan and project description.
- Legal property information, such as an assessor's parcel map and grant deed.
- Information outlining implications on human communities and the natural environment.
- Additional information as identified by County staff.

The District would submit the Use Permit application along with an approximately \$14,000 filing fee. County staff would review the application for completeness and notify the District if additional information must be provided. County staff would also develop conditions of approval for consideration by the Planning Commission. If the District and County cannot agree upon conditions under the Use Permit, the District could withdraw the Use Permit application although the \$14,000 filing fee may not be refundable.

Once County staff confirms completeness of the Use Permit application, the findings and recommended conditions of approval are presented to the Planning Commission at a public hearing. The Planning Commission may then grant a Use Permit if the proposed use is

compatible with its surroundings, satisfies appropriate standards, and is consistent with the intent of applicable regulatory controls. Attachment 2 outlines the official findings needed to support approval of a Use Permit.

If the District finds the Planning Commission decision unfavorable, the District could submit for an appeal as outlined in the Zoning Ordinance, Chapter 5.30, § 5.30.010 to § 5.30.070. Appeals provide an opportunity for the County's reconsideration of land use decisions in a public hearing. The District must file the appeal and pay the fee prior to the close of business on the 15th day after the Planning Commission's decision on the Use Permit. The Board of Supervisors is the appeal authority for a Use Permit.

Additional Project Considerations to Address Regardless of Permitting Approach

There are remaining questions with unknown implications that require further consultation with the County once a permit application has been submitted. These issues will need to be addressed regardless of the permitting approach. If staff is directed to proceed with applying for a Use Permit, staff will consult with the County to understand how these considerations are regulated under a Use Permit.

- *Permit Conditions Triggered by the Proposed Public Access Improvements:* The Project's new restroom and ADA access improvements may impose unanticipated permit conditions such as commercial access requirements (increased driveway width and parking requirement), which given constrained site conditions and engineering requirements, would trigger additional grading and retaining walls that increase cost. These improvements are beyond the approved Project budget.
- *Unpermitted Structures:* The Stables area includes two unpermitted structures. The District must confirm the age of these structures before the County can determine which building code to apply. Depending on the applicable building code, improvements to these two structures may result in substantive and costly upgrades. For example, if these buildings are determined to be relatively new (dating after 1970s), building code upgrades likely will be triggered. These costs are also beyond the approved Project budget and could require staff to evaluate deferring structures repairs or removing this portion of the work from the Project.

Project Schedule

Development of the Use Permit application and required submittals will require approximately three months. Once submitted, the County will require between six and nine months to process the application. During this time, the District's design team will finalize construction documents based on the County's comments provided during plan review and prepare them for the bidding process. Separately and running slightly after the Use Permit process begins, the District will also submit permit applications to secure the necessary building permits. Construction would begin once all permits are secured. The following table outlines a Project schedule based on this approach.

Milestones	Tentative Schedule
Use Permit	Summer 2021 – Spring 2022
Finalize Construction Documents	Fall 2021 – Summer 2022
Building Permits	Summer 2022 – Fall 2022

Bidding Process	Winter 2022 – Early Spring 2023
Board of Directors – Award of Construction Contract	Early Spring 2023
Initiate Construction	Spring 2023

Project Construction Costs

The Project's current total costs remain relatively unchanged from the previous report in April 2020 (R-20-34) at \$4.5M to \$5M, which is also within the approved Project budget. There are potential challenges to staying within this cost, including the yearly escalation of construction costs. Staff will continue to refine the scope of the Project and find value engineering opportunities to maintain the Project budget.

FISCAL IMPACT

The proposed FY22 budget includes \$694,847 for the Bear Creek Stables Project MAA21-004. If affirmed, there are sufficient funds in the proposed FY22 budget for the submittal of the Use Permit Application. Funding for future years budgets will be requested as part of the annual Budget and Action Plan process.

MAA21-004 Bear Creek Stables Project	Prior Year Actuals	FY21 Amended	FY22 Proposed	FY23 Projected	Estimated Future Years	TOTAL
District Funded (Fund 30):	\$717,189	\$116,713	\$694,847	\$2,502,586	\$0	\$4,031,335
Committed General Fund Capital (Fund 40) funds:	\$0	\$0	\$0	\$500,000	\$0	\$500,000
Allocation of available MAA interest earnings:	\$0	\$0	\$0	\$1,223,530	\$0	\$1,223,530
Total Budget:	\$717,189	\$116,713	\$694,847	\$4,226,116	\$0	\$5,754,865
Spent-to-Date (as of 05/18/2021):	(\$717,189)	(\$45,257)	\$0	\$0	\$0	(\$762,446)
Encumbrances:	\$0	(\$600)	\$0	\$0	\$0	(\$600)
Use Permit Application:	\$0	\$0	(\$14,000)	\$0	\$0	(\$14,000)
Budget Remaining (Proposed):	\$0	\$70,856	\$680,847	\$4,226,116	\$0	\$4,977,819

The following table outlines the Measure AA 21 Bear Creek Redwoods: Public Recreation and Interpretive Projects Portfolio allocation, costs-to-date, projected future project expenditures and projected portfolio balance remaining.

MAA21 Bear Creek Redwoods: Public Recreation and Interpretive Projects Portfolio Allocation:	\$17,478,000
Grant Income (through FY25):	\$5,316,530
Committed General Fund Capital (Fund 40) funds:	\$700,000

Allocation of available MAA interest earnings:	\$1,223,530
Total Portfolio Allocation:	\$24,718,060
Life-to-Date Spent (as of 05/18/2021):	(\$11,054,160)
Encumbrances:	(\$105,067)
Remaining FY21 Project Budgets:	(\$117,131)
Future MAA21 project costs (projected through FY25):	(\$12,764,497)
Total Portfolio Expenditures:	(\$24,040,855)
Portfolio Balance Remaining (Proposed):	\$677,205

The following table outlines the Measure AA 21 allocation, projected life of project expenditures and projected portfolio balance remaining.

MAA21 Bear Creek Redwoods: Public Recreation and Interpretive Projects Portfolio Allocation:	\$17,478,000
Grant Income (through FY25):	\$5,316,530
Committed General Fund Capital (Fund 40) funds:	\$700,000
Allocation of available MAA interest earnings:	\$1,223,530
Total Portfolio Allocation:	\$24,718,060
Projected Project Expenditures (life of project):	
21-001 Moody Gulch Fence & Gate Improvements	(\$847)
21-002 Bear Creek Redwoods Preserve Plan	\$14,369
21-003 Bear Creek Redwoods Stables Water System	\$0
21-004 Bear Creek Stables Project	(\$5,754,865)
21-005 Bear Creek Redwoods Public Access	(\$5,542,970)
21-006 Bear Creek Redwoods Alma College Cleanup and Stabilization	(\$6,615,888)
21-007 Bear Creek Redwoods Preserve Plan Invasive Weed Treatment	(\$1,443,693)
21-008 Bear Creek Redwoods Ponds Restoration and Water Rights	(\$681,560)
21-009 Bear Creek Redwoods Webb Creek Bridge	(\$487,492)
21-010 Bear Creek Redwoods Landfill Characterization and Remediation	(\$476,034)
21-011 Phase II Trail Improvements, Bear Creek Redwoods OSP	(\$2,960,960)
21-012 Bear Creek Redwood Tree Restoration	(\$90,915)
Total Portfolio Expenditures:	(\$24,040,855)
Portfolio Balance Remaining (Proposed):	\$677,205

BOARD AND COMMITTEE REVIEW

Since the approval of the Preserve Plan, this Project previously came before the full Board at the following public meetings:

- January 25, 2017:** The Board adopted a resolution certifying the Final Environmental Impact Report, adopting the Findings of Fact and Statement of Overriding Considerations, approving a Mitigation Monitoring and Reporting Plan, and approving the Bear Creek Redwoods Preserver Plan. ([R-17-15](#), [meeting minutes](#))
- April 25, 2019:** The Board considered various project options for the Stables and directed staff to move forward with Deferred Maintenance Repairs at the Stables in the near-term and the Preserve Plan Site Design as a long-term solution. ([R-19-53](#), [meeting minutes](#))

- **September 25, 2019:** Board FYI memorandum for revised scope and fee for design consultant, John Northmore Roberts & Associates. ([FYI Memo](#))
- **October 9, 2019:** The Board directed the General Manager to refrain from pursuing a public-private fundraising endeavor and focus on implementing Deferred Maintenance Repairs. ([R-19-131](#), [meeting minutes](#))
- **April 8, 2020:** The Board directed the General Manager to allocate \$1.223M of the available Interest on Measure AA Proceeds to close the known funding gap to implement the Stables Project. ([R-20-34](#), [meeting minutes](#))

PUBLIC NOTICE

Public notice was provided as required by the Brown Act. In addition, Bear Creek Stables interested parties were notified of the public meeting and a notice was also posted at the Stables location.

CEQA COMPLIANCE

Pending Board direction, staff would prepare a Use Permit application that requires documentation of the CEQA compliance obtained for the Bear Creek Redwoods Preserve Plan, which included analysis of the Project. This action will not require additional environmental review.

NEXT STEPS

If the Board supports applying for a Use Permit to implement the Project at the Bear Creek Stables, staff will proceed with completing and submitting the Use Permit application. Pending permitting, the District targets construction initiation in Spring 2023.

Separate and related, the Board will receive a presentation this summer on the draft goals and evaluation criteria for an upcoming Request for Proposals (RFP) to obtain a long-term lease at the Stables.

Attachments:

1. Bear Creek Stables Plan
2. Required Findings for Use Permit

Responsible Department Head:

Jane Mark, AICP, Planning Department Manager

Prepared by:

Jane Mark, AICP, Planning Department Manager

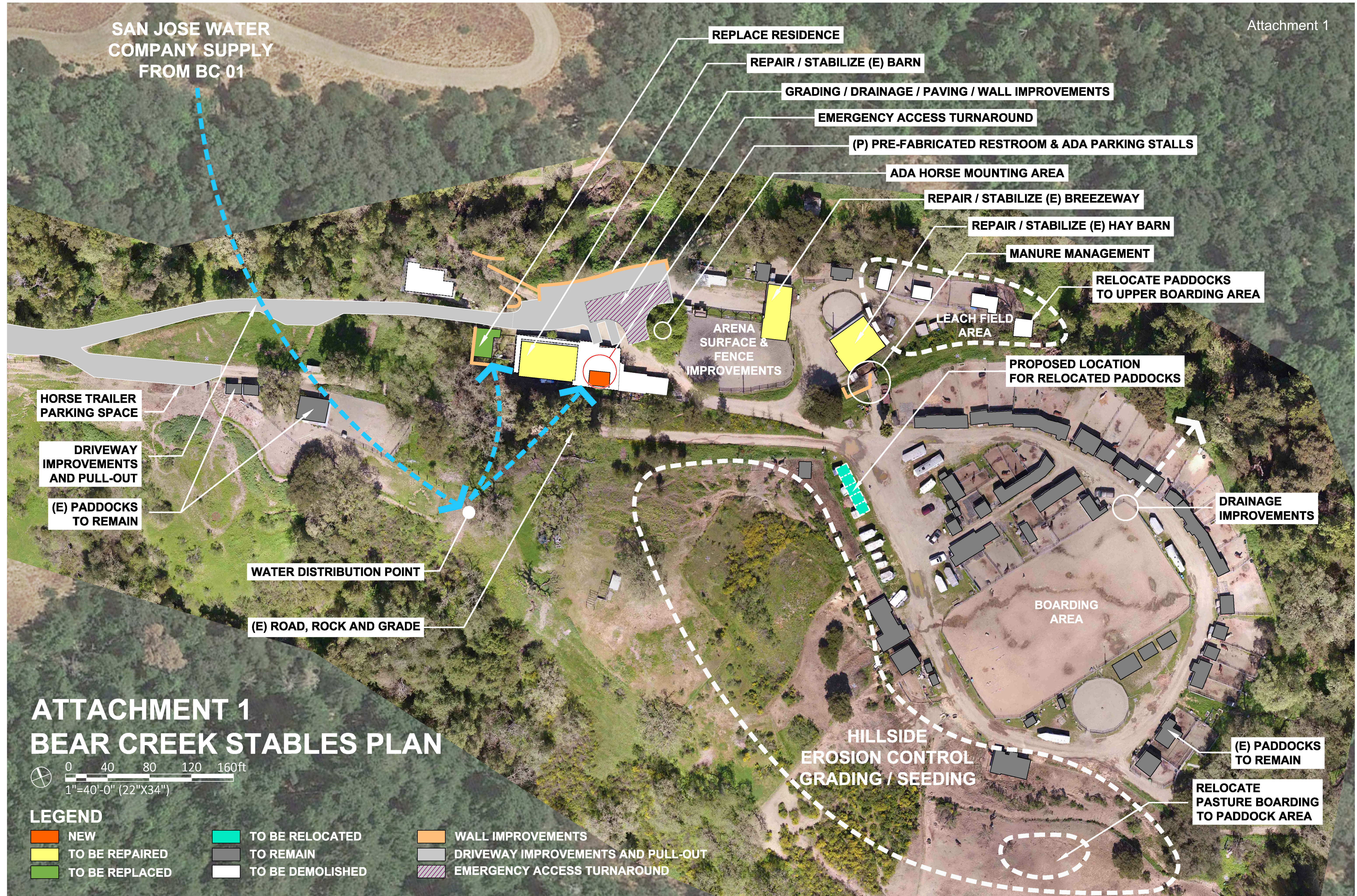
Gretchen Laustsen, Senior Planner, Planning Department

Alex Casbara, Planner III, Planning Department

Scott Reeves, Senior Capital Project Manager, Engineering & Construction Department

Staff Contact:

Gretchen Laustsen, Senior Planner, Planning Department



Required Findings for Use Permit

All Use Permits are subject to required findings, per Zoning Ordinance Section 5.65.030, where County staff would provide an explanation on how the Stables Repairs Project meets each of the required findings described below:

- A. The proposed use conforms with the general plan, with the zoning ordinance, and with all other standards and guidelines applicable to the proposed use that have been adopted by the Planning Commission or Board of Supervisors;
- B. The site is adequate for the proposed use, including but not limited to being of adequate size and shape to accommodate all facilities and development features to integrate the use into the surrounding area and to provide any necessary or appropriate buffers between the use and the surrounding area;
- C. The proposed use, by its nature, scale, intensity or design, will not impair the integrity and character of the zoning district and will not be significantly detrimental to any important and distinctive features of the site's natural setting;
- D. The proposed use would not be detrimental to public health, safety, or general welfare. In this respect, the Planning Commission shall further find, without limitation, that:
 - 1. Adequate off-street parking, loading and unloading areas (if applicable), and handicapped access will be provided;
 - 2. Appropriately designed site access will be provided, including safe and adequate access for fire and emergency vehicles (including secondary access where deemed necessary by the Fire Marshal);
 - 3. The use will not adversely affect water quality. Adequate wastewater treatment, disposal and sanitation facilities will be provided and will satisfy all applicable local, state and federal requirements;
 - 4. The use will not be detrimental to the adjacent area because of excessive noise, odor, dust or bright lights;
 - 5. The use will not substantially worsen traffic congestion affecting the surrounding area;
 - 6. Erosion on the site will adequately be controlled; and
 - 7. Adequate storm drainage exists or will be provided and will comply with all applicable local, state and federal requirements.

If all of the above findings cannot be made, the application shall be denied.