

Tammy Cloud-McMinn

From: Lee Andelin <lee@aac.law>
Sent: Tuesday, March 12, 2024 1:47 PM
To: City Clerk
Cc: Gina Herrera; Arie Spangler; Robin Nuschy; Torrey Wolf
Subject: Agenda Item No. 8 – Appeal of City Engineer Decisions – Sarem Residence (4005 Skyline Road)
Attachments: AAC Letter to City Council.pdf

Ms. Freisinger,

Please see the attached letter for distribution to the city councilmembers.

Lee

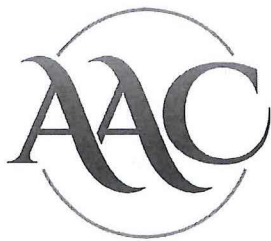
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Coastal Property Rights, Land Use & Litigation

March 12, 2024

VIA EMAIL

Carlsbad City Council
c/o Sherry Freisinger, City Clerk
1200 Carlsbad Village Drive
Carlsbad, California 92008
clerk@carlsbadca.gov

Re: Agenda Item No. 8 – Appeal of City Engineer Decisions – Sarem Residence (4005 Skyline Road)

Dear Mayor Blackburn, Mayor Pro Tem Bhat-Patel, and Honorable Councilmembers:

The purpose of this letter is to briefly address the staff report for this agenda item. The thrust of staff's argument is that the final signoff of construction and release of deposit are ministerial acts, and that city engineer's action is supported by the certification of the Sarems' engineer and therefore cannot be questioned.

While the final signoff and release of deposit may be ministerial acts, nothing in the city's appeal ordinance requires the city council to afford such extreme deference to the city engineer—or more accurately, the Sarems' engineer. The appeal statute simply states the following:

An individual may appeal the decision of the city engineer made in regard to administration of this chapter to the city council within 10 calendar days following the decision. Appeals shall be in writing, filed with the city clerk and shall state the basis for the appeal. Fees for filing an appeal shall be in an amount as established by resolution of the city council. The decision of the city council shall be final.

(Carlsbad Mun. Code, § 15.16.160.A)

While it may be natural for the city council to want to defer to the city engineer's expertise in close cases, nothing in the ordinance states that the city council must defer to the city engineer in all cases. Notably, the ordinance states that the *city council's* decision, not the *city engineer's* decision, is final.

In any event, the decisions to provide final signoff and release of deposit must be supported by substantial evidence and must be consistent with city standards. The videos we have provided

show concentrated streams of water flowing underneath the Sarems' fence, and a stormwater system that clearly is *not* functioning as intended.¹ The only "evidence" in support of these decisions is the certification of the Sarems' engineer. The sum total of the engineer's certification is as follows:

The permanent BMPs associate [sic] with this project are functional. They have been installed, inspected and are in full conformance with the approved grading plans and City standards."

(Toal Engineering Letter, Aug. 23, 2023, p. 1.)²

This certification is conspicuously written in the passive voice and lacking in detail. It leaves open many critical questions: Who conducted the inspection(s) and when? Were inspections conducted during construction before pipes, connections, and other components were buried? What inspection, if any, was performed by Toal Engineering after construction? Was the system tested? If so, how? What standards was the system measured against? How did it perform against those standards? There have been numerous natural tests subsequent to construction, including a tropical storm on August 11, 2023, and several subsequent winter storms, and the system has proven to be an abject failure.

The deficiencies of the Toal Engineering certification are even more glaring in light of the Sarems' recent complaints filed in superior court against their contractors. The Sarems allege the following against their general contractor:

In December 2022, there were significant rain events at the Subject Property. As a result of the construction issues identified above, the Subject Property experienced significant flooding issues and resultant damage. The rear of the Subject Property flooded and there were mudslides. *The flooding and mudslides extended to the neighbor's property and resulted in significant damage to the property.*

The cause of the flooding and damage was the failure of BMG and the landscape [sic] to install the drainage components in compliance with the grading permit and plans and specifications. As a result, the drainage and water retention basin

¹ <https://www.dropbox.com/scl/fi/avujcg1k23786uk48ivqu/Stormwater-Runoff-4020-Sunnyhill-1.22.24-Event.MOV?rlkey=ppxuto4l28q2pnptus741hz8l&dl=0> (January 22, 2024, storm event)

<https://www.dropbox.com/scl/fi/ehu7ao2b118m86y4xknxw/Stormwater-Runoff-4020-Sunnyhill-1.22.24-Video-2.MOV?rlkey=g119arltfhnrf9orcf2atj9ug&dl=0> (January 22, 2024, storm event)

<https://www.dropbox.com/scl/fi/d9g4o90zci6k6k27x0d17/Stormwater-Runoff-4020-Sunnyhill-1.22.24-Video-3.MOV?rlkey=z3re7xe0l66mhgv4sjxc2t4ej&dl=0> (January 22, 2024, storm event)

<https://www.dropbox.com/scl/fi/d9g4o90zci6k6k27x0d17/Stormwater-Runoff-4020-Sunnyhill-1.22.24-Video-3.MOV?rlkey=z3re7xe0l66mhgv4sjxc2t4ej&dl=0> (January 22, 2024, storm event)

² The staff report makes vague reference to three engineering reports but does not indicate which other than the Toal Engineering letter of August 23, 2023, are relevant to the instant decisions.

improvements did not function as intended. However, BMG had represented to SAREM the drainage improvements had been inspected and approved in accordance with the civil engineering plans and grading permit. This was false.

The City of Carlsbad was notified of the flooding/mudslide events. The project civil engineer, Toal Engineering, was advised of the flooding and mudslides. The City and Toal Engineering initiated an investigation. It was determined the *cause of the flooding and mudslides was the defective work of the landscape contractor and BMG's failure to supervise the installation* and secured the required testing of the drainage system.

(Complaint, *Sarem v. BMG Construction*, Nov. 15, 2023, ¶¶ 10–12, italics added.)

In this pleading, the Sarems admit that flooding and mudslides occurred during construction (due to failure to implement construction BMPs, which is undisputed) and caused damage to the neighboring property, i.e., the Edwards'. These events appear to have resulted in conditions that are still unresolved. Notably, the Sarems admit that the stormwater capture system was *not* inspected during construction.

The Sarems also filed a complaint against their landscaping subcontractor, which states:

First, the Toal Engineering plans called for the installation of a solid drain line from the water retention basin to the emitters. CW DESIGN supplied and supplied a perforated drain line.

Second, CW DESIGN installed the drain lines with negative slope such that any *draining water captured by the emitters did not flow to the water retention basin but back towards the rear of the Subject Property and a neighbor's property*. The drain lines were also installed at improper heights and not in conformance with the Toal Engineering plans and the City of Carlsbad grading permit.

Third, CW DESIGN *installed the emitters at the wrong height* such that water intended to drain from the Subject Property could not do so.

Fourth, CW DESIGN installed the remainder of the drain lines on the Subject Property with negative slope such that water captured by the system flow back towards the residence on the Subject Property as opposed to the intend location.

Fifth, when CW DESIGN installed the drain lines, it failed to compact the soil to the specifications provided in the Toal Engineering plans and the City of Carlsbad grading permit.

Sixth, pursuant to the City of Carlsbad grading permit, CW DESIGN was *required to have the drainage system it installed inspected and tested by Toal Engineering during construction. CW DESIGN failed to do so. This proved to be a monumental*

failure.

(Complaint, *Sarem v. Chicweed Design & Landscape, LLC*, Dec. 18, 2023, ¶¶ 9–13, italics added.)

These allegations provide important information about where things went wrong. To start with, the Sarems' landscaping subcontractor did *not* follow the plans and city standards in several respects. And the Sarems state that the system was *not* inspected and tested by Toal Engineering during construction as required. The Sarems further state that "[f]rom December 2022 through July 2023," the landscaping subcontractor "attempted to repair and correct the drainage issues at the Subject Property. It was unable to do so." (*Id.*, ¶ 19.) Shortly thereafter, on August 11, 2023, a tropical storm came through, and the system performed inadequately. Given these known issues and the miserable performance of the system, the inspection, testing, and certification by Toal Engineering should have been much more thorough and detailed. Under the circumstances, the vague, passive-voice certification by Toal Engineering is not substantial evidence to support a decision to provide final signoff on construction and release the Sarems' deposit.

Note that even though the grading permit has been issued and construction is purportedly complete, the city is not without power to require corrections and improvements to the system to bring it up to city standards. The Sarems' grading and erosion control agreement states:

If the City Engineer determines that erosion control measures or devices are not adequate or are not being maintained in an acceptable manner, or that a hazardous condition exists due to erosion, or to work being done, applicant shall take immediate action to construct or install additional erosion control devices or repair the existing erosion control devices or correct the hazardous condition upon notification by the City Engineer.

(Grading and Erosion Control Agreement, pp. 2–3, italics added.)

Further, the municipal code provides:

The issuance of a grading permit based on approved grading plans, construction SWPPP, specifications and other data shall not prevent the City Engineer from thereafter requiring correction of errors in said plans, specifications and other data, or from preventing grading operations being carried on thereunder when in violation of this chapter or any other chapter of this code.

(Carlsbad Mun. Code, § 15.16.100(B), italics added.)

Regardless of whether or not a grading permit has been issued or is required to be issued, it is unlawful for any person to commit or cause to be committed the following acts or, to maintain or cause to be maintained a property in such a manner as to result in the commission of the following acts:

1. Grading in such a manner as to become a hazard to life and limb or to *endanger property* or to adversely affect the safe use or stability of a public property, place or way; [or]
2. Grading *without application of appropriate stormwater best management practices (BMPs)* in accordance with the provisions of this title, city standards and municipal permit”

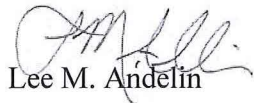
(Carlsbad Mun. Code, § 15.16.170(B), italics added.)

If the Sarems do not comply voluntarily, the city can exercise numerous remedies including issuing a notice with orders requiring “corrective action” and restoration of “all cash deposits and/or other securities”; recording a violation on the property; prohibiting issuance of additional permits; imposing criminal penalties; and bringing an action for abatement or for other corrective actions. (Carlsbad Mun. Code, § 15.16.190.) It would be a dereliction of duty for the city to simply throw its hands up and say, “what’s done is done.”

Thank you for your attention to this matter.

Very truly yours,

AANNESTAD ANDELIN & CORN LLP


Lee M. Andelin

cc: Arie Spangler
Gina Herrera