

ADDITIONAL MATERIALS SUBMITTED BY APPLICANT

- **October 14, 2008 Letter from Applicant**
- **Colored Renderings (1, 2 and 4)**
- **Massing Analysis (1-4)**
- **Photo Simulations**
- **370 and 401 Colusa Avenue Building Section & Street Distance Comparison;**
- **Distance Between 401 Colusa Project and Oakview Neighbors;**
- **Applicant's Legal Analysis**

14 OCT '08

CONTRA COSTA
COUNTY

2008 OCT 14 P 1:53

Ryan Hernandez, Senior Planner
Department of Conservation and Development
651 Pine Street
2nd Floor -- North Wing
Martinez, CA 94553-1295

DEPARTMENT OF
CONSERVATION
AND DEVELOPMENT

re: 401 Colusa Avenue, Kensington

Mr. Hernandez,

We are re-submitting our project at 401 Colusa, revised pursuant to comments made at and prior to the August County Planning Commission Hearing. These revisions do not comport entirely with the August Staff recommendations, but do respond to public comment in a way that we feel is appropriate and fair. Note that our project was already sculpted by public comment, prior to the August Hearing, so we see these current modifications as an extension of an already well-established pattern of response to community concerns.

Application Description: what we have changed.

We have re-styled the building to be more historicist rather than modernist, adding art-tile detailing, and cornices, and removing the wood slat siding previously proposed. We have removed a large bay from the Colusa Avenue façade, and several projecting balconies. We have removed one bedroom from Unit #1 by carving a roof deck out of the second floor southeast corner of the building. This and the bay removal have reduced the square footage of unit #1 by 105 sq. ft. We have also removed the exit stair penthouse at the east end of the third floor; this and the aforementioned roof deck are intended to diminish the scale of building presented to our neighbor at 411 Colusa, and to allow more light to reach her property. Note that she, our only abutting neighbor, does not disapprove of our proposal.

We have retained the overall height of the building, with the exception of removing the clerestory from atop the stair hall of Unit #2. We have retained Unit #3 per our original submittal, for reasons explained later herein. Our application now more closely matches the renderings presented at the August Hearing. These renderings, which are enclosed here, show our proposal to be wholly appropriate to its context. Please include them in your

Staff Report. (X-Circle.jpg; X-Oakview.jpg) I expect to send another rendered view in a day or two.

August Staff Recommendation was based on faulty analysis, and unfounded.

Staff recommended removal of Unit#3 in its entirety, and cited the small size of the parcel and The Kensington Policies of the General Plan as rationale for that recommendation. Staff specifically cited Policy 3-192, which deals with view preservation. However, the removal of unit #3 will do nothing to preserve any view. It is probable that Staff meant instead to cite Policy 3-193, which has to do with consistency with surrounding development. In either case, we believe that the Staff Recommendation is unfounded, in that it is based on both a faulty analysis of the proposed design, and improper application of the law.

Staff used a “square foot” analysis to compare the two projects, when a “cubic foot” analysis is the proper measure of building bulk. In a comparative cubic foot analysis of the original P-1 Development Plan and our proposal, they are quite similar in bulk compared to their respective parcel sizes. As a ratio of cu. ft. of building to sq. ft. of parcel area, the P-1 measures 23:1; our current proposal measures 24:1, the slight increase being understandable considering the logistical constraints of the smaller parcel.

If the proposed and current developments are measured on the combined 401 and 411 parcels respectively, the proposed ratio is approximately 14:1 – a great improvement over the approved massing. Furthermore, if and when 411 Colusa is redeveloped under the P-1, it will not come close to the approved ratio. Overall, the combined ratio of 401 and 411 is likely to build out at more like 17:1 (based on 36,000 cubic feet of development at 411 Colusa). It would take a twenty-four-foot-tall structure *entirely* filling the parcel at 411, combined with our current proposal, to reach the same ratio as the approved P-1 plan (23:1). The August Staff Recommendation does not take this two-parcel build-out into account; nor does it use proper measurement units as its basis. Contextual aerial view comparisons of these various building bulks are enclosed here. Please include them in your staff report. (Massing1.jpg; Massing2.jpg; Massing3.jpg; Massing4.jpg; Dist P1.jpg; Dist Prop.jpg)

According to County Zoning Ordinance, modifications to an approved P-1 Development Plan must exhibit consistency with the intent of the original P-1 zone. Modifications must also comply with the current County General Plan. In this case, it is the General Plan’s “Policies for the Kensington Area” that are most salient.

The August Staff Report does recognize that our proposal is consistent with the approved Development Plan. In “B. Findings to Establish a Planned Unit District” (behind the first blue divider) item 3., Staff finds that our

proposed development “is consistent with the 1983 Final Development Plan”. In Item 4., Staff further states that our proposal is “more in character with the surrounding neighborhood” than is the 1983 Development Plan. This is accurate; its improvements can be measured in height, bulk, scale, grain, vitality, and in neighborhood access to light and air.

The approved P-1 Plan was found, among other things, to “fit harmoniously into and (to) have no adverse effects upon the adjacent or surrounding development”. It seems to us that the current Commissioners are trying improperly to rescind that finding. In applying the Kensington Policies, they are determining arbitrarily that our proposed project is too tall, or too massive, in spite of the FACT that it is measurably less so than the 1983-approved “harmonious” structure. A building that is found to be “harmonious” with its surroundings cannot at the same time be too tall or too massive, or unreasonably block significant views.

Inconsistency with recent decisions.

In the August Staff Report, on page S-8, Section “C. Building Height”, Staff seeks to justify limiting our building to be predominantly two-stories in spite of the fact that there are other three- and four-story buildings in the surrounding development, both existing and recently-approved. Staff states, “The difference is the impact to surrounding residential neighborhood.” This is a false pretext to applying Kensington Policy 3-193 as a limiting factor in the review of our project. In reality, this Policy should SUPPORT our proposal, in that: 1.) There is a three story apartment building directly across Oakview Avenue from our site (3 story Oakvw Apt.jpg – please include); 2.) There is a four-story apartment building immediately adjacent to single family dwellings at the west end of the Circle commercial area; and 3.) The Planning Commission, the Supervisor, and the Colusa Circle Improvement Association within the past year all approved a nearby three-story commercial structure, taller than ours, immediately across the street from, and closer to single family dwellings (see attached comparative section drawings). If our project is inconsistent (incompatible) with nearby development, it is due to exhibiting a *greater* sensitivity to its environment and its neighbors, not less. Comparative Sections and Views of our Proposal and the recently approved project at 370 Colusa are enclosed. Please include them in your Staff Report. (Comp Sections.pdf; 370 Colu Vista.jpg; Oakview Vista.jpg).

Both Staff recommendation and Commissioner comments to date have been based on current political pressure, and fail to apply both proper consideration of the law, and proper recognition of the benefits to the neighborhood of the current proposal, compared with the P-1 Plan.

We are embroiled in a planning review that has to date responded with inappropriate weight given to a very vocal but misguided opposition. It's interesting to note that our only abutting neighbor, in her one story dwelling, does not object to our project. Even so, there are people who live blocks and blocks away who feel it is appropriate to protest unrelentingly. It must be recognized that, while vocal opposition to prominent development projects is quite expected, Applicants do hold certain rights when making reasonable applications for development (even if they are quiet about those rights). A planning review process that willfully ignores these rights is but a travesty.

At the August Hearing, the Commissioners in their comments did not ever address the law as it applies to modifying a P-1 Development Plan. Instead, they simply responded arbitrarily to public comments (political pressure), and resorted to scolding the Applicant without basis. If the Commission will please engage the law, it will see that the current Proposal is more than reasonable, and is quite acceptable. Since the project is consistent with (or better than) the approved Development Plan, and it is in compliance with the current General Plan, then it should be approved, with reasonable conditions.

Staff would benefit from a similar engagement with the law. The August Staff Report is internally inconsistent, with strange discord between its assessments and its summary recommendations. The latter seem to reflect not the product of an impartial planning analysis in light of County laws, but rather a flatly political response that favors a single-minded and very loud opposition. This is glaringly improper.

It has been suggested to us that the Planning Department/Commission has some extraordinary subjective discretion in the review of our Application, beyond that described by Ordinance. This would be an unfounded position, and we re-state firmly that:

- Our Proposal is consistent with the intent of the original P-1 Zoning;
- Our Proposal is consistent the County General Plan, including its Policies for the Kensington Area;
- Our Proposed General Plan Amendment inherently reduces the impact of our development on the neighborhood; any related claim of special discretion would be contrived.

The Applicant has all along made a rational and cogent case as to why this well-designed project should be approved. If the Planning Department/Commission were to deny our proposal, or to recommend significant modification thereof, then it would need to present a similarly cogent argument for that decision. Under an appropriately objective analysis, our proposal is shown to be quite acceptably programmed, sited, scaled, and detailed. Just as importantly, it retains a reasonable portion of the applicant's vested legal rights to an established scale of development. We respectfully request that Staff consider the modifications we have recently made, and recommend approval of our proposal, intact.

Sincerely,

Andrew Woolman
Applicant and Project Architect

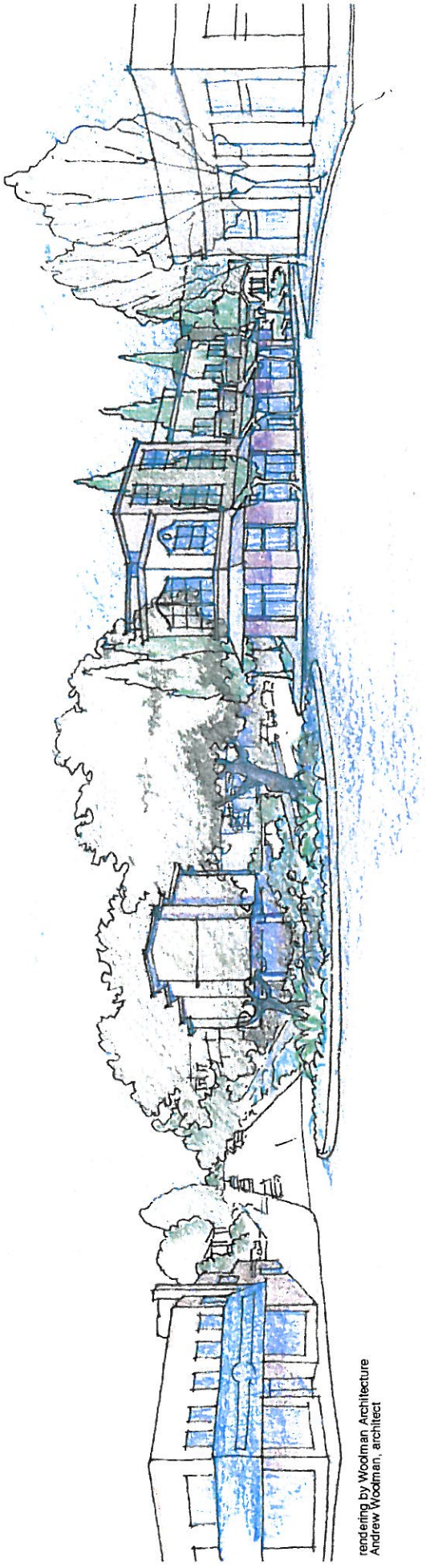
Cc: Circle Partners; J. Reed

attachments

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COUNTY

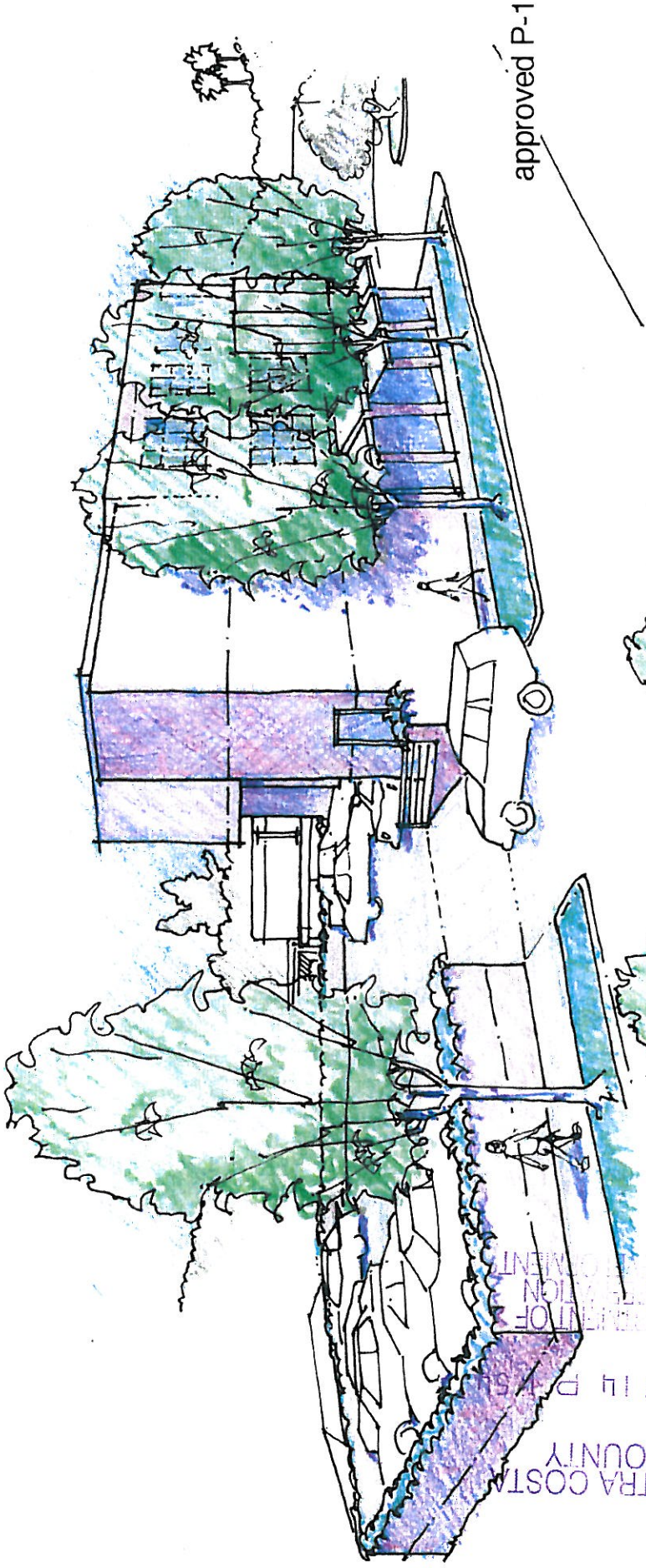
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DEPARTMENT OF
COMMUNITY DEVELOPMENT
AND PLANNING

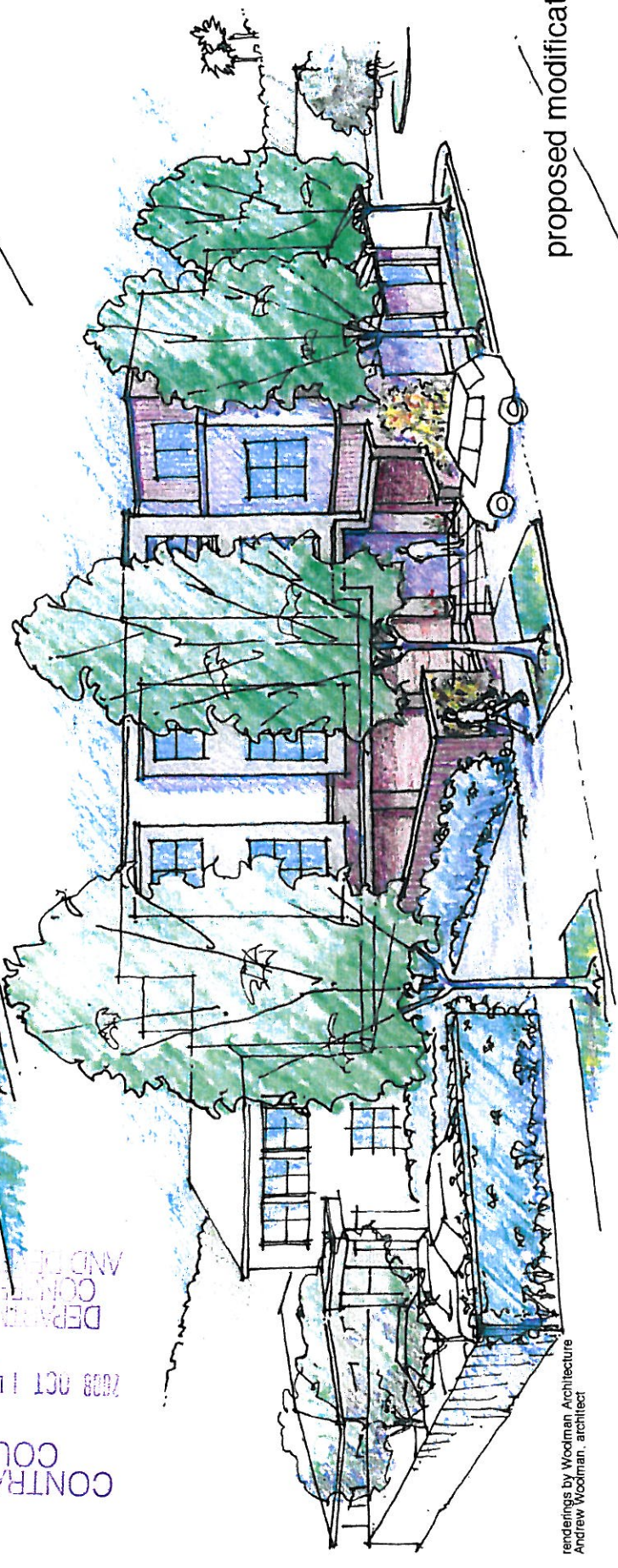


rendering by Woodman Architecture
Andrew Woodman, architect

401 Colusa Avenue - View Across Colusa Circle



approved P-1



proposed modification

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 DEPARTMENT OF
 CONSTRUCTION
 AND PLANNING

renderings by Woodman Architecture
 Andrew Woodman, architect

401 Colusa Avenue - View from Oakview Avenue Residence

401 Colusa Avenue

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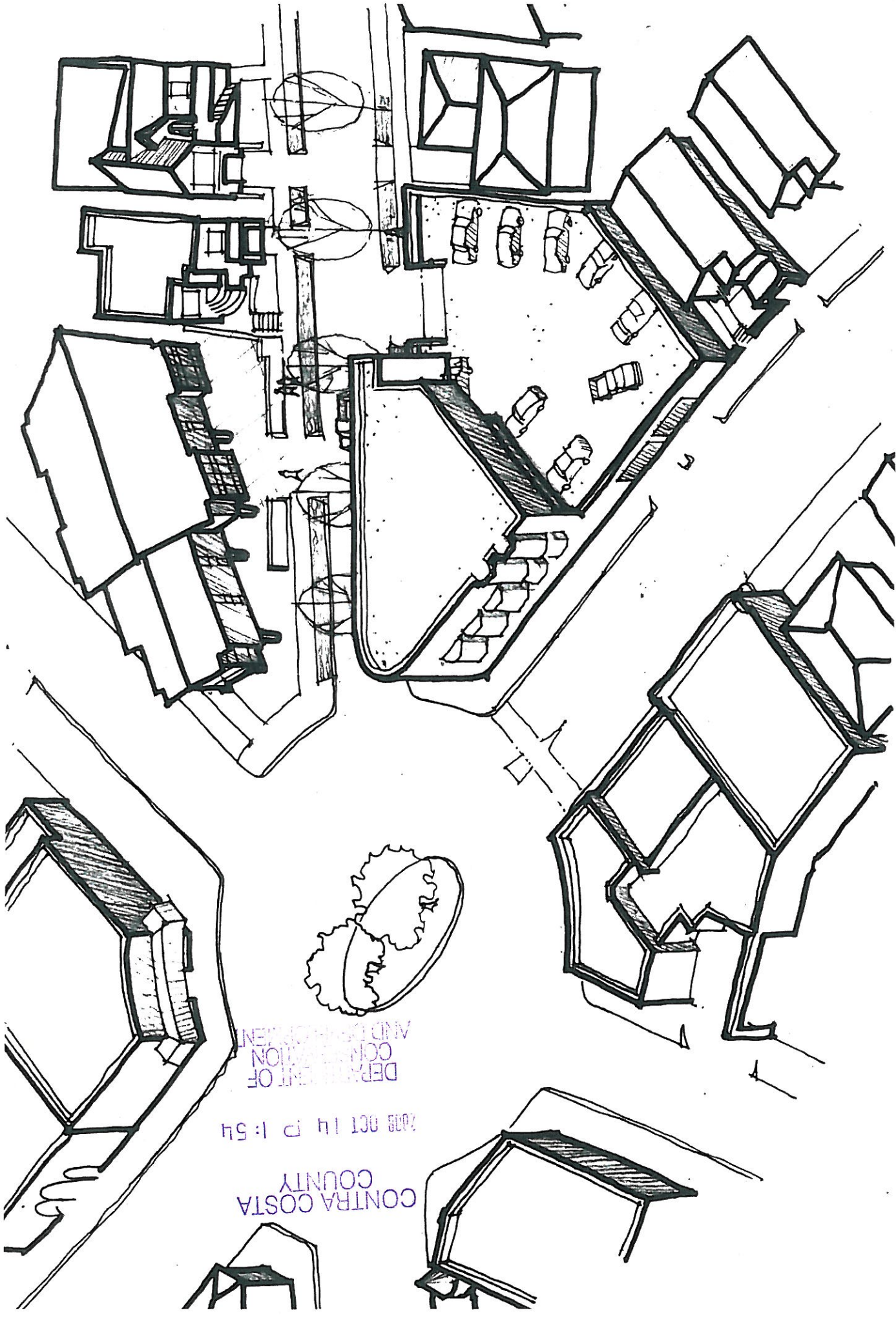
DEPARTMENT OF CONSERVATION
AND DEVELOPMENT



rendering by Woolman Architecture
Andrew Woolman, architect

15 OCT '03

401 Colusa Avenue - View Across E. Colusa Avenue
(also showing 411 Colusa developed as a lot line structure)

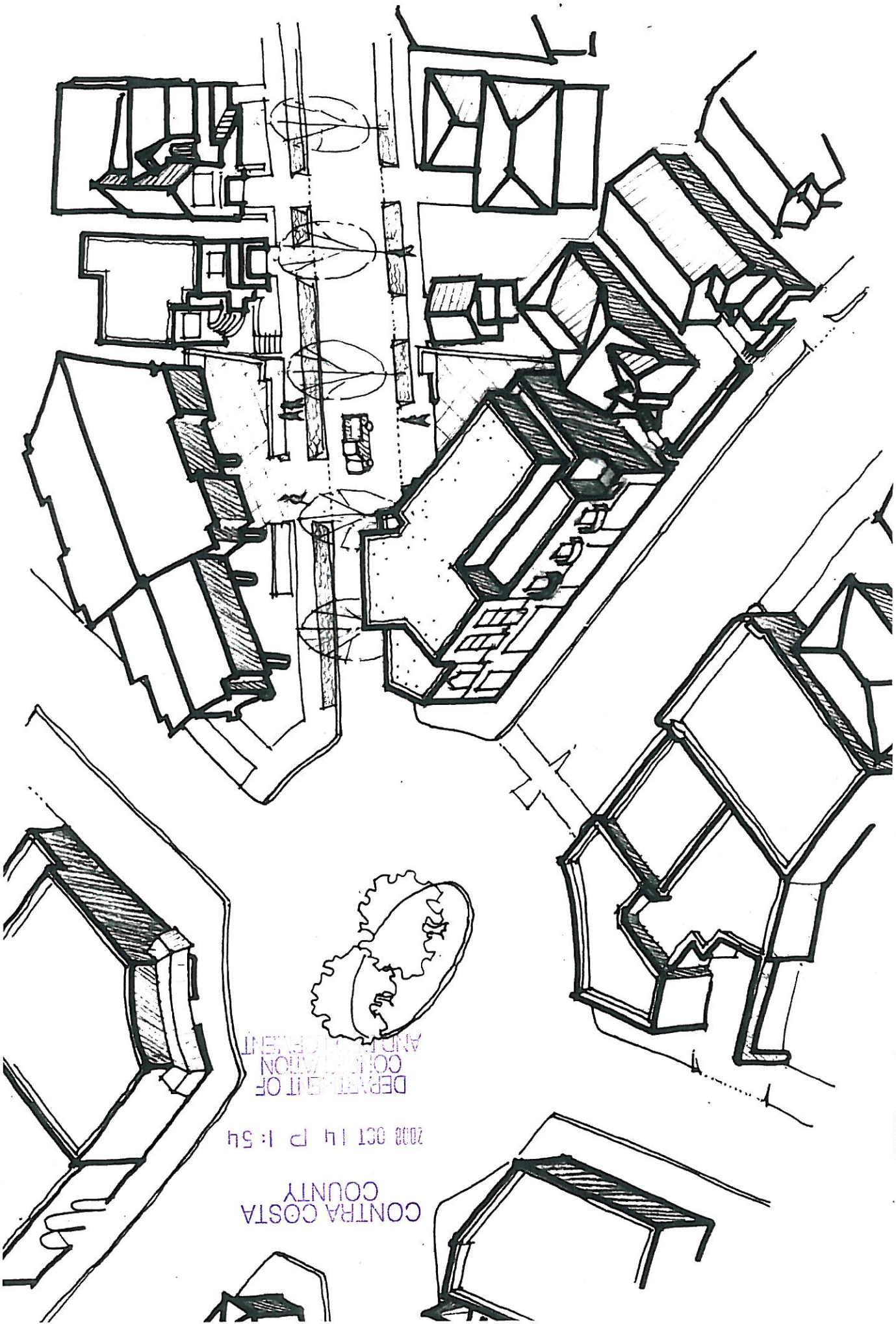


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DEPARTMENT OF
CONSTRUCTION AND
PERMITTING

Massing Analysis
401 + 411 Colusa Avenue - Approved P-1
207,394 cu. ft. of building : 8,994 sq. ft. parcel(s)

Approved P-1
Ratio 23:1

sheet
1



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COUNTY

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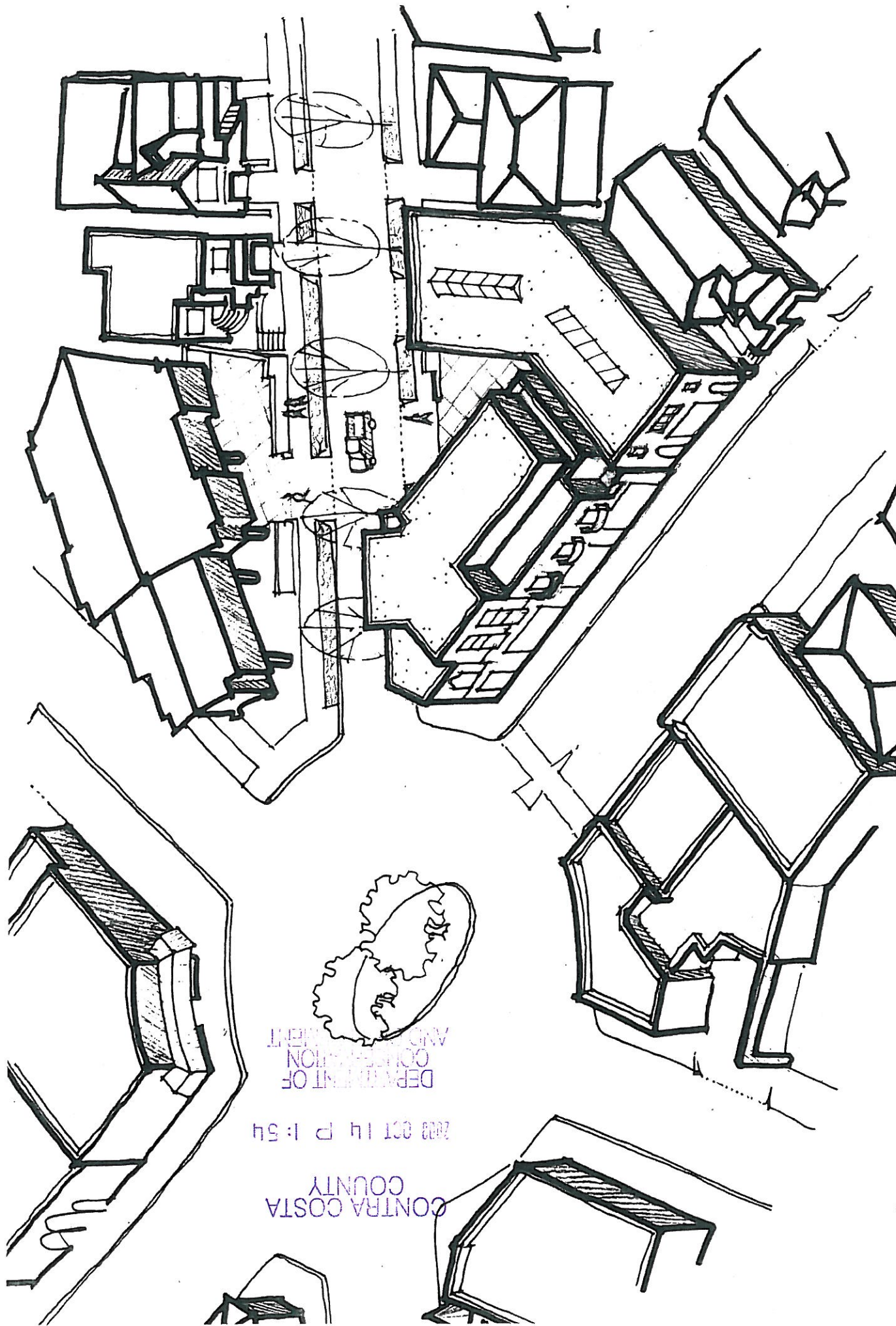
DEPARTMENT OF
CONSTRUCTION
AND PLANNING

Massing Analysis
401 + 411 Colusa Avenue - Proposed Development
129,295 cu. ft. of building : 8,994 sq. ft. parcel(s)

Proposed Development
Ratio 14:1

sheet

2



DEPARTMENT OF
COMMISSION
AND PLANNING

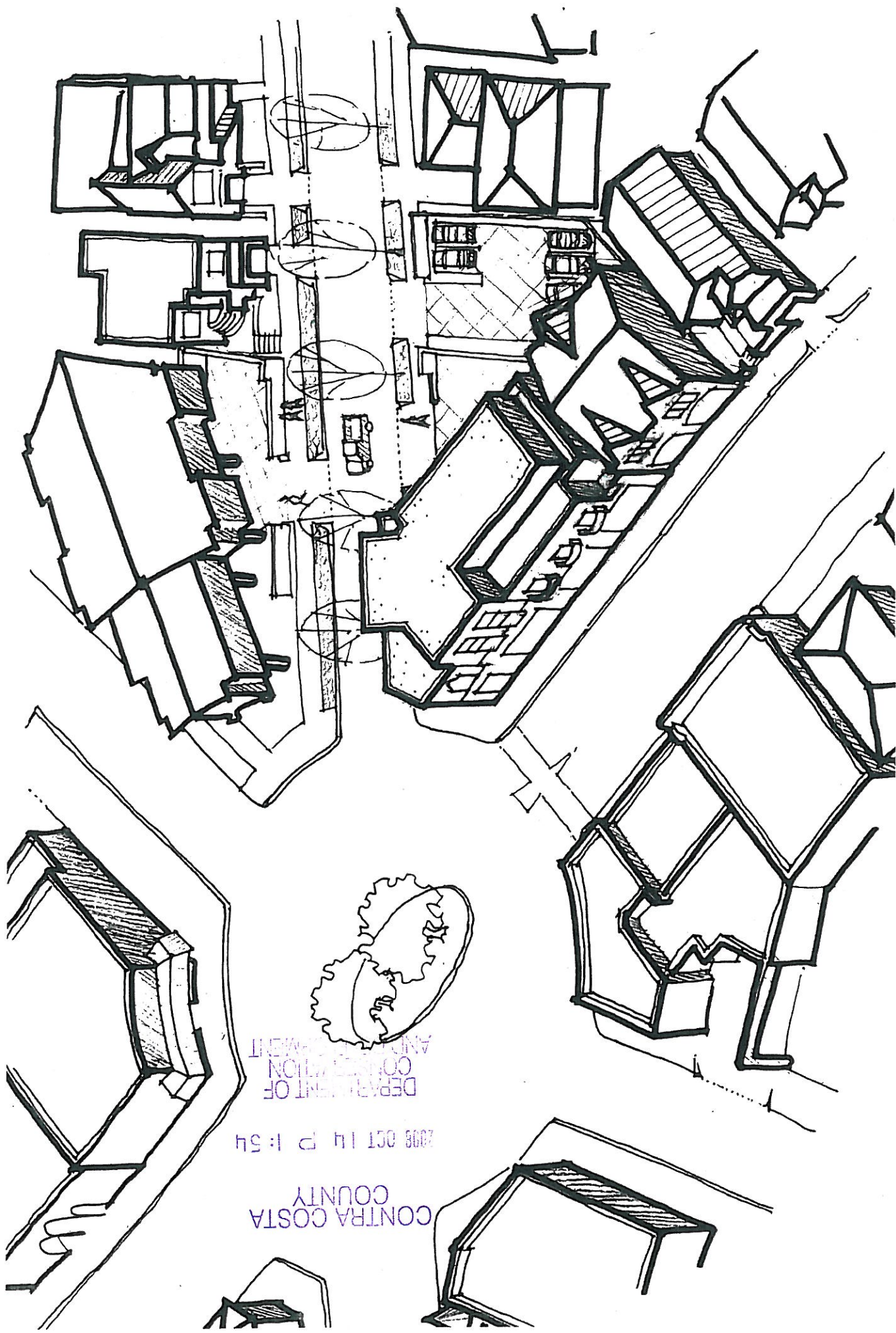
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Massing Analysis
401 + 411 Colusa Avenue - Hypothetical Build-out
207,394 cu. ft. of building : 8,994 sq. ft. parcel(s)

Build-out to match P-1
Ratio 23:1

sheet
3



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DEPARTMENT OF
CONSTRUCTION
AND PLANNING

**Feasible Build-out of 411
Ratio 17:1**

Massing Analysis
401 + 411 Colusa Avenue - Hypothetical Build-out
150,295 cu. ft. of building : 8,994 sq. ft. parcel(s)

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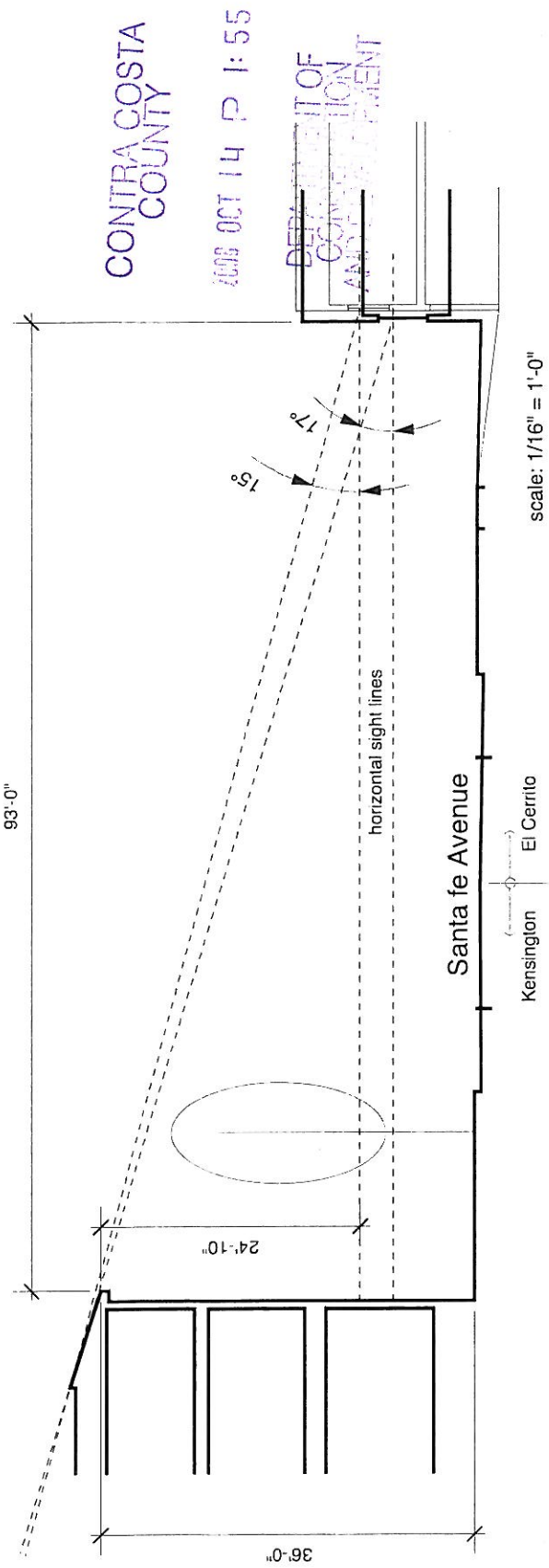




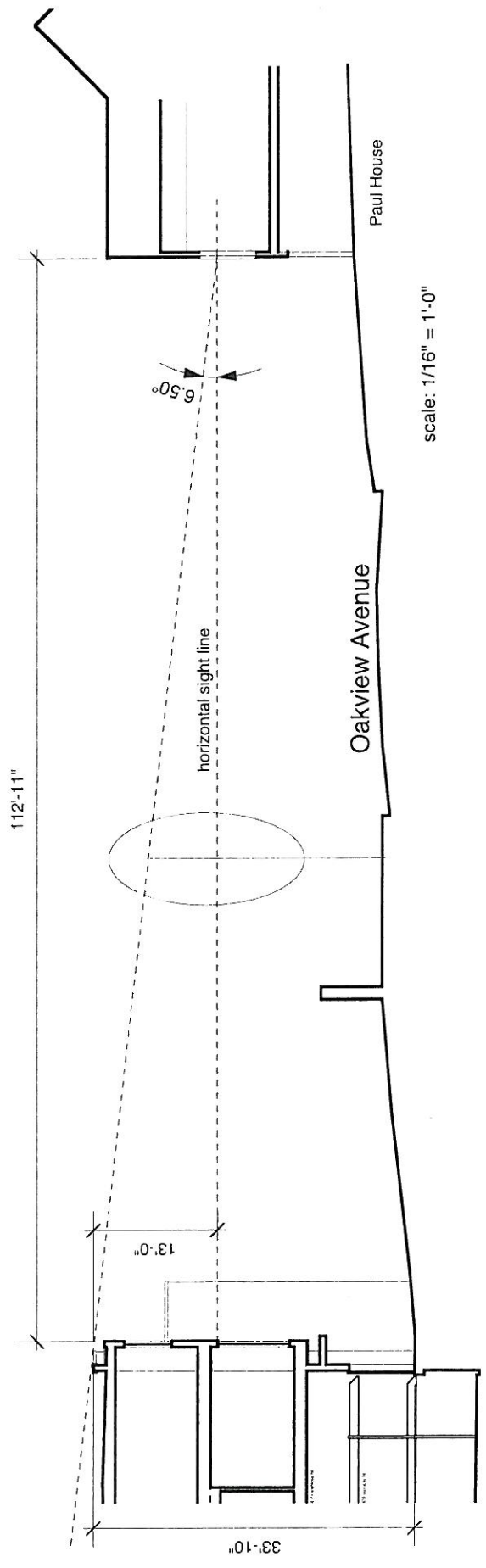
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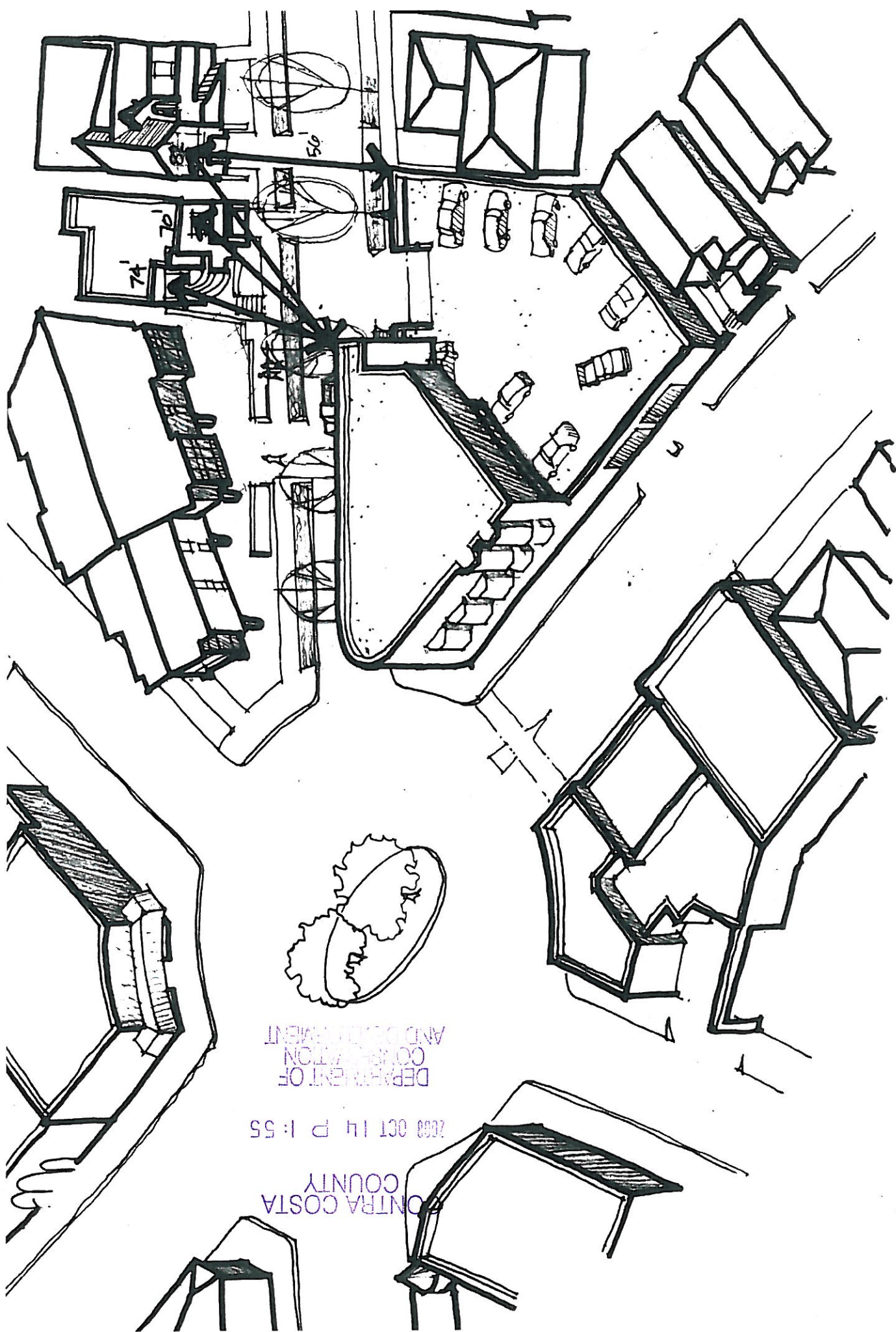
DEPARTMENT OF
CONSERVATION
AND DEVELOPMENT



370 Colusa Avenue - Approved 2008



401 Colusa Avenue - Denied Approval 2008, based on height, incompatibility.



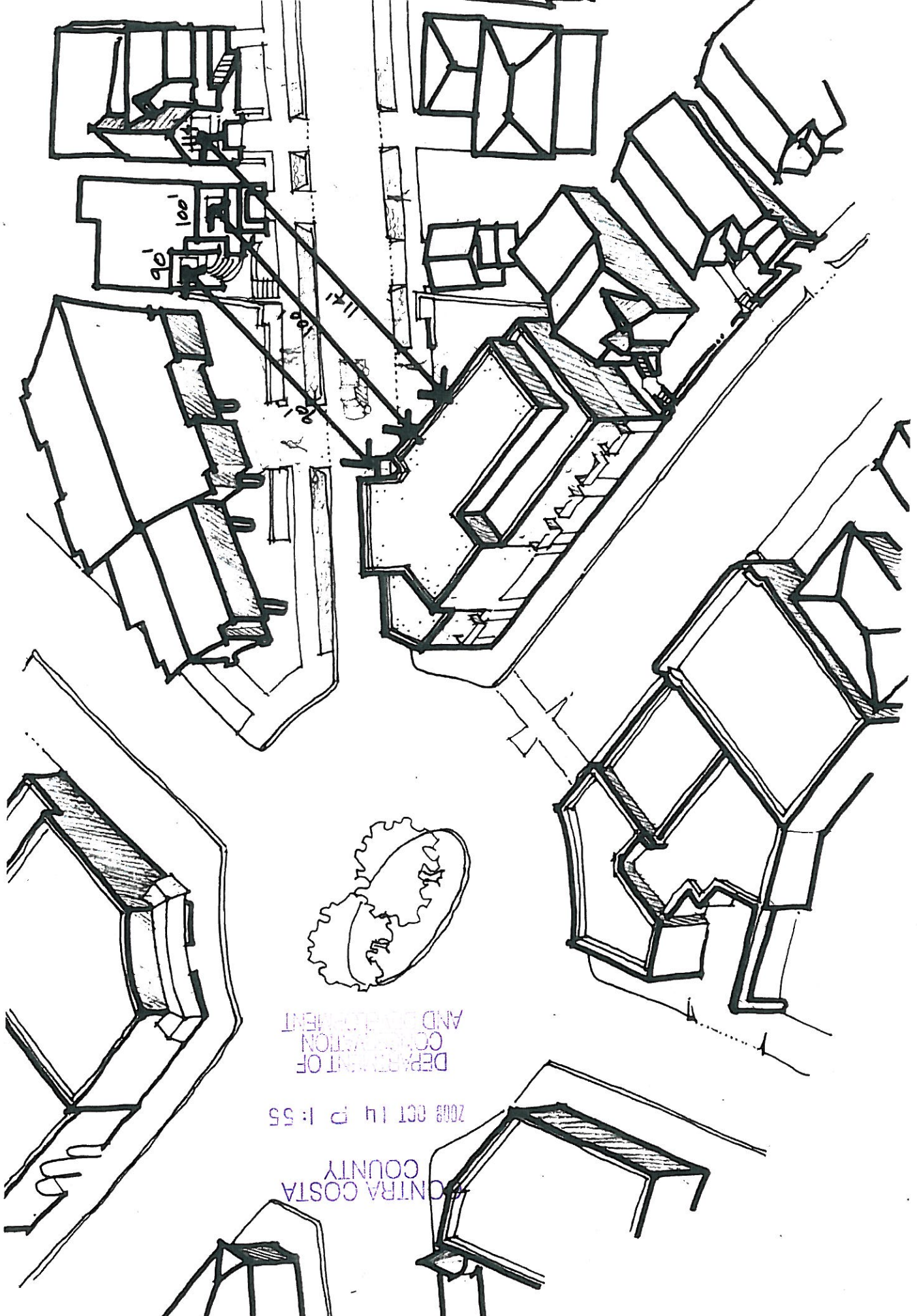
74'

70'

56'

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DEPARTMENT OF
CORRECTION
AND DETENTION

Distance from Neighbors to Approved P-1 Development



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COUNTY
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DEPARTMENT OF
CONSTRUCTION
AND DEVELOPMENT

Distance from Neighbors to Proposed Development

NICHOLS, CATTERTON, DOWNING & REED, INC.
A PROFESSIONAL LEGAL CORPORATION

CONTRA COSTA COUNTY

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PROBATE & ESTATE PLANNING
SPECIALIST CERTIFIED BY
THE STATE BAR BOARD OF
SPECIALIZATION

October 13, 2008

To Whom it may Concern:

I have been requested by Andrew Woolman and the Circle Partnership to do a legal analysis of the application for the 401 Colusa Avenue Mixed Use Development Project (GPO5-0006, MS06-0011, DPO-63026) and in particular to look at its present status and the staff report submitted for the Contra Costa County Planning Commission Meeting of August 12, 2008.

In general, the staff report accurately states the legal status of the project, that the owners have a vested right to develop the project. However, the staff report goes on to suggest that because the applicant is seeking modification of the approved development, even though the modified plan is consistent with the prior project approval, the planning commission may impose conditions to assure that the modifications remain consistent with Kensington Area Policies outlined in the present General Plan. The staff's factual findings appears flawed, leading to the imposition of an unnecessary condition requiring the removal of one condominium unit on the third floor of the building.

VESTED RIGHT IN THE DEVELOPMENT

"The doctrine of vested rights protects property owners from changes in zoning or other land use regulations which occur before the completion of the owner's development project." Russian Hill Improvement Assn. v. Board of Permit Appeals (1967) 66 Cal.2d 34, 39. "Where a building permit to erect a specific type of building is issued by a county or city and the permittee acts upon it and incurs obligations, or in good faith commences construction, his rights become vested and the government body is thereafter estopped" ... from revoking the permit because of subsequently enacted zoning ordinances or regulations. Anderson v. City Council of the City of Pleasant Hill (1964) 229 Cal.App.2d 79 at 89. An actual building permit is not required. Tosh v. California Coastal Com (1979) 99 Cal.App.3d 388, 392-393.

The applicant purchased the property specifically to construct the building pursuant to the prior approval and paid a premium for that right. As the staff report states: "That approval was exercised when Phase I was developed in 1985 so the project approval remains valid..." The prior approval (Resolution 83/880) states at #7:

"B. The proposed planned unit development and final development plan are each consistent with the county general plan for the reasons contained above (finding 1)."

"C.....and the development will be an attractive and efficient center which will fit harmoniously into and will have no adverse effects upon the adjacent and surrounding development"

The Resolution referenced consideration of the Kensington General Plan and testimony from people around the Colusa Circle area. Subsequent to this approval, Policies for the Kensington Area (3-191 to 3-195) were adopted replacing the prior Kensington General Plan provisions. It is on the basis of these later Policies for the Kensington Area that the staff recommends removal of one condominium unit from the third floor of the project.

Because of the prior approval and the applicant's reliance upon that approval when the Circle Partnership purchased the property, the applicant has a vested right; it seems unlikely a court would find the plans limited by the subsequently enacted Policies of the Kensington Area. As more fully discussed below, even if the Policies of the Kensington Area are taken into consideration, there is no factual reason to require removal of the third condominium unit.

The important thing to consider here is that the prior approval found that a building with three floors and a greater building mass would fit harmoniously into the neighborhood and would not adversely affect it. Now, the staff report suggests that it is necessary, applying Kensington Area Policies, to remove part of the third floor, apparently to protect neighborhood views and to reduce building mass. But the proposal actually improves neighborhood views and reduces building mass as compared with the prior approved plans.

FACTUAL FINDINGS

The staff report states at item 3 that "the proposed development is consistent with the 1983 Final Development Plan" and at item 4 the proposal is "more in character with the surrounding neighborhood than the 1983 Development Plan." But the staff report, without any supporting argument, recommends as a condition of approval, the removal of one condominium unit from the third floor to reduce "the impact to the surrounding residential neighborhood." This analysis is flawed for many reasons:

1. There is a three story apartment building directly across the street (Oakview Ave.) from the site.
2. There is a four story apartment building adjacent to single story family dwellings at the west end of the Circle commercial area.
3. A three story commercial structure, taller than the applicant's proposal, also to be located at the west end of the Circle commercial area, was recently approved by the Planning Commission even though it was directly across the street from single story family dwellings.

It appears that the staff is advocating application of the Kensington Area Policy inconsistently within the neighborhood.

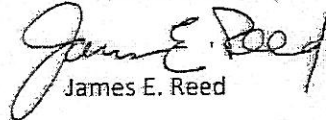
Testimony from neighbors that their Bay views would be affected by the proposed building apparently affected the staff recommendation. The applicant has done a preliminary study which demonstrates that only one neighbor's view of the Bay will be affected. It is important to note that removal of the one condominium unit will not restore this single neighbor's Bay view. When the prior Final Development Plan was approved, the construction would have had an even greater effect on blocking neighborhood views than the present proposal. If this matter ends up in court, I believe that expert testimony from a study of the effect on neighborhood views, will show the neighbors' testimony to be incorrect. The study will also indicate that this one neighbor's Bay view will soon be lost naturally by large trees growing into that view some distance away.

Although the staff report did not directly address the building mass as a reason to impose a size reduction, on page S-3 of the staff report it says that the "property's size of 4,792 square feet and the Kensington Policies 3-191 through 3-195 in the Contra Costa General Plan provides the basis to recommend the elimination of the third story condominium unit (914 square feet)." The present proposal, including the condominium unit recommended to be eliminated, is only half the size of the prior approved Final Development Plan. Again, this would directly contradict the 1983 finding that the much larger building was harmonious with and would not adversely affect the surrounding area.

CONCLUSION

The prior approval in Resolution No. 83/880 provides the applicant with a vested right that cannot be taken away by later policy changes. But even objectively applying the subsequently enacted Policies for the Kensington Area (3-191 through 3-195) there is no justification for requiring one condominium unit be eliminated. The size and height of applicant's proposed building is consistent with the neighborhood and has less of an impact than another building in the area recently approved by the Planning Commission. Removal of the condominium unit does not restore the Bay view of the only neighbor affected by the construction. If this proposal ends up in court, I feel confident that any politically motivated requirement to eliminate the condominium unit would be reversed as inconsistent with the law and its application.

Very truly yours,


James E. Reed

