



Contra Costa County Board of Supervisors 651 Pine Street
Room 107
Martinez, CA 94553

Chair
Candace Andersen

Vice Chair
Diane Burgis

Supervisors
John M. Gioia
Karen Mitchoff
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August 24, 2020

Re: **Appeal of the August 12, 2020, Decision of the Contra Costa County
Planning Commission on DP#19-3019**

RECEIVED on 08/24/2020
By Contra Costa County
Department of Conservation and Development

Dear Chair Andersen and Honorable Members of the Board of Supervisors:

On behalf of the owners of 118 St. Albans Road (the “Appellants”), we submit this request to Appeal the Planning Commission’s Approval of Development Plan Application DP# 19-3019 to construct an expansive three-story addition onto a three-story residence in Kensington (the “Project”).

This letter serves as Notice of Appeal under Contra Costa County Code 26-2.2406. In accordance with County requirements, this appeal is accompanied by an appeal filing fee of \$250. This appeal is based on each of the reasons stated in this letter and in the attached and referenced exhibits.

We reserve the right to supplement our grounds for appeal prior to the hearing of the County's Board of Supervisors.¹

I. Reasons for the Appeal

This application should not be before you. This land use approval should have been sent back to staff long ago to address neighbor concerns and to ensure compliance

¹ Gov. Code § 65009(b); PRC § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield* (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

with County Code, as staff regularly does with all other projects in Kensington. But in this case, staff has seemingly worked overtime on behalf of this particular applicant to push project approval in the face of obvious inconsistencies with County Code. During the process, the County has caused several procedural and substantial due process violations, has identified variance exceptions that do not exist in County Code, has kept opponents of the Project in the dark about the approval process, has biasedly testified on behalf of the applicant, has coached the applicant on ways to avoid a variance, and has ignored substantial evidence on the record showing this Project violates the Kensington Combining District Ordinance (“KCD Ordinance”) to grant the applicant the special privilege of constructing an enormous deck and three-story addition that will impact the long-range views, privacy, and property values of the neighbors.

It appears that County staff and some of the Planning Commissioners believe that this applicant should have a *right* to build because they moved the original design to the other side of their house. While the Appellants sincerely appreciate the necessary redesign, the revised Project needs to comply with County Code and to avoid impacting Appellants’ long-range views, privacy, and use and enjoyment of their home, which it does not.

Appellants have tried to work with these neighbors to resolve the issue, but have been unsuccessful. They tried to highlight their concerns many times and were ignored by the applicant. Before the Planning Commission Hearing, Appellants approached the applicant to see whether they would fix the misrepresentations in the application. The applicant had no issues with misrepresentations and stated “We don’t care. As long as the County believes us, that’s all that matters.” During the Planning Commission Hearing, applicants told Commissioners that they were willing to revise the Project to reduce the enormous deck, but when Appellants approached them after the hearing to follow up on this offer, they were completely unwilling to make project changes.² As we have been unable to reach resolution either with the applicant or with the help of County staff, we are forced to bring this before the Board of Supervisors to protect Appellants’ due process rights and to ensure the Project complies with both the KCD Ordinance and planning and zoning law.

As detailed in the Appeal Letter to the Planning Commission (“PC Appeal Letter”) (attached separately as **Exhibit O**), the County has violated planning and zoning laws by approving the Project without issuing a variance. County staff also failed to consider substantial evidence on the record showing the potential for significant impacts to Appellants’ privacy, long-range views, and property values. Approving the Project without fully mitigating these impacts violates the special protections afforded to Kensington residents under the unique KCD Ordinance crafted by Supervisor Gioia.

The approval process to date has been riddled with both substantive and procedural due process violations, including bias testimony, violations of the Brown Act and the Public Records Act (“PRA”), and repeated failures to notify Appellants and other opponents of the Project during Project review. We look to the Board of Supervisors, an

² We also note that these same neighbors, who suggested that installing story poles would be too costly, have constructed a deck in their front yard within the last two weeks without obtaining any County approvals that we could find.

impartial body of elected officials hired to protect the public, to ensure a fair process that protects Kensington residents and minimizes view and privacy impacts on neighbors.

Appellants are only requesting equal treatment under the law to protect their property rights. They have never, nor would they ever, suggest that the applicant cannot build, which has been falsely stated by County staff and the applicant. Merely, the applicant cannot build in such a way as to impact neighbor's long range views, privacy, and property values as specifically prohibited under the KCD Ordinance and in violation of County Code.

There is a simple solution here that will allow the applicant to expand their home and will protect Appellants' property rights. Uphold the appeal, require a redesign in the Project to legally avoid a variance and to reduce the size of the proposed addition to avoid impacts to long-range views, privacy, and property values in compliance with County Code and the KCD Ordinance. That is all that is required. This resolution should have happened long ago. We look to this Board of Supervisors to rectify these wrongs and resolve the issue once and for all to avoid a protracted legal battle in court.

a. A Variance is Required for the Project

A variance is required to comply with both minimum 8' setback requirements and to construct a three-story addition onto a three-story residence.

i. Variance is Required to Construct a Three-Story Addition

The Project proposes to construct a three-story addition onto a three-story structure in violation of CCC Code §84-4.802, which requires that all building heights be capped at 2 ½ stories. Any proposed expansion of the third story, a non-conforming structure, requires a variance. For purposes of determining the number of stories of a structure, the bottom level counts as a story if the finished floor level directly above the basement is more than six feet above grade at any point (CCC Code §82-4.266). A basement is further defined in the KCD Ordinance as “*any area* in a building or structure where the finished floor directly above the area is less than four feet above preconstruction grade or finished grade, whichever is lower.” (CCC Code §82- 74.404). On the applicant's house, the finished floor directly above the basement is over 7' above grade. These definitions confirm that the lower level of the Project house is considered the first story under County Code and the two floors above it are the second and third stories. Every staff report to date on this Project has confirmed that the existing residence is three-stories, a nonconforming use, and that the Project includes an addition to all three stories.³ An expansion of the third story, requires a variance.

Instead of requiring a variance for the obvious three-story addition on a three-story structure, staff has used the definition of crawl space to conclude that a variance is not required because the Project is proposed on the south side of the structure above the crawl space. This analysis is flawed for several reasons. First, stories are determined using Section 82-4.266 of the Code, and the definition of a ‘crawl space’ is irrelevant to this

³ We note that the applicants identified the structure as having three-stories in the original application, but then conspicuously identified the same structure as only having two-stories in the revised July 2019 application.

analysis. Second, County staff has ignored the fact that the Project includes a three-story addition, including a 5-foot expansion of the basement. And finally, following this interpretation would lead to the wholly illogical conclusion that the top floor of the house is both a second and third story.

When asked about this issue at the Planning Commission hearing, Mr. Hernandez admitted that he has never seen the basement, is unsure whether walls will be knocked down on the first floor, and is unaware of the height of the ‘crawl space’ on the south side and whether it is currently used for storage. He also failed to acknowledge that the application includes expanding the first story and suggested that the walls on the first story would not need to be impacted. This response is not only false, it is particularly troubling as the ‘crawl space loophole’ is the lynchpin to the County’s variance exemption. It is clear from the application that the Project includes an expansion of all three stories, which requires a variance in Kensington.

We raised this fact with the Kensington Municipal Advisory Committee (“KMAC”) during their review of the Project in October 2019, but they ignored the issue, incredulously suggesting that the law “wasn’t relevant to their decision”. We then asked the Zoning Administrator (“ZA”) to research the legality of staff’s variance interpretation as we can find **no precedent** for such a novel interpretation, and she declined, instead relying solely on staff’s illogical interpretation. We then asked the Planning Commissioners to research this issue thinking that they surely would want to ensure the legality of the decision, but they declined, citing staff’s interpretation as gospel. To date, the County has failed to obtain a legal opinion regarding staff’s novel interpretation of variance requirements for this Project.

Surprised by staff’s claim that the County regularly relies on the novel interpretation that a structure can be both two and three stories when considering variances, we filed a formal PRA request asking the County to provide any precedent in which they relied on this approach. The County formally replied in December 2019, stating that “[t]he Department has not identified any other ‘legal precedent, findings, records, memorandum, or guidance that would support th[is] Legal Conclusion’”. (See **Exhibit A**.) This finding is not surprising as the County regularly requires variances for third story additions within this zoning district and does not distinguish small portions of the third story as a ‘second story’ where the basement does not fully cover the entire house. (See Staff Report for #DP16-3040, April 17, 2017, County denied a request for a variance for a three-story structure in Kensington, requiring the applicant to redesign the project to be two stories.)

Mr. Hernandez’s explanation during the Planning Commission Hearing further supports our interpretation that a variance should be required for this Project. At the hearing, he clarified unequivocally that a three-story structure and three-story addition would require a variance, which is exactly what is being proposed here. He then offered a strange claim that based on the definition of a crawl space, again irrelevant to the analysis, the house should be considered two-stories on one side and three-stories on the other. He did not provide *any* reasoning for using an interpretation that would render the top floor *of the very same structure* both the second and third story, which defies logic and is inconsistent with the County’s finding on countless other projects. County Counsel has thus far deferred making a legal finding on this issue and even suggested that the County regularly uses this interpretation. If that were true, the County would have had no difficulty

producing precedent requested in the December 2019 PRA request, but instead they offered none. The Board of Supervisors has the discretion, authority, and duty to interpret County Code to ensure that any project proposed complies with the law.

We strongly recommend that County Counsel research the issue before finalizing a staff report for this decision. In addition to leaving the County open to legal liability in this case, we anticipate that using this variance interpretation would lead to inconsistent land use regulation and applicants working to skirt variance requirements by doing construction in stages. Indeed, if this approval is upheld, there is nothing preventing this applicant from coming to the County next year to build out the crawl space creating an expansive three-story structure without ever obtaining a variance.

It is well settled law in California that a County cannot pick and choose which portions of the code to apply. (See *Broadway, Laguna etc. Assn. v. Board of Permit Appeals*, (1967) 66 Cal.2d 767, 779-780; See also *Orinda Assn v Board of Supervisors*, 182 Cal.App.3d 1145 (1986).) And courts have a strict policy against the extension or enlargement of nonconforming uses (See *County of San Diego v McClurken*, 37 Cal.2d 683, 686-87 (1951). County staff has made a finding that squarely conflicts with its own code and would allow for the expansion of a nonconforming use without a variance. This decision must be overturned and a variance must be required for the proposed expansion of the third story of a three-story building that violates the zoning limit to protect not only the rights of the aggrieved neighbors, but also the County's precedent and integrity in consistently applying land use law.

ii. Variance is Required to Meet Minimum Setbacks

Similarly, this Project needs a variance to address setback requirements which in this district requires that all *new construction* provides at least 3' on each side and a minimum aggregate of at least 8 feet total. (CCC §82-14.004.) This minimum reflects an extremely small allowance for construction on tiny lots in Kensington and must be maintained. The ZA and the Planning Commissioners incorrectly concluded that the Project meets setback requirements despite substantial evidence to the contrary.

The applicant has filed several misrepresentations regarding the dimensions of the proposed Project related to setbacks, making it difficult to discern the correct dimensions and imperative that the County confirm these measurements onsite. On July 15, 2019, the applicant submitted an application identifying the right side setback as 2' 3 ½" from the side yard. (**Exhibit B-1**.) Once the applicant realized that the setbacks might be an issue, they filed a revised application on July 25, 2019, showing the same side setback as 3'. (See **Exhibit B-2**.) These plans show two different measurements for the same side without any redesign or explanation as to why this measurement would have changed. To add insult to injury, the applicant's architect went further to suggest by email that the Project provides over 10' aggregate, which is not at all correct and reflects this applicant's willingness to say anything to obtain approval and underscores the need for the County to make independent findings on the ground. (**Exhibit B-3**, email from applicant's architect to County.)

Critically, County Code requires that the setback measurement be taken at the point where new construction starts, which, as shown on the plans provided in **Exhibit B-4**, includes a new roofline and accordingly, goes beyond the line currently marked as 'new'

versus ‘existing’ on the project plans. This is yet another misrepresentation on the application that has to be addressed. It is clear from Exhibit B-4 that the newly constructed roofline will establish a setback that is significantly less than the 8’ aggregate requirement and cannot be addressed by a Condition of Approval to add 2” as suggested during the ZA hearing. Accordingly, we similarly request to have County Counsel weigh in on this novel interpretation before the County prepares a staff report.

It is paramount that the County vigorously implement its variance regulations to adequately protect the community. Any court reviewing the County’s decision would “meaningfully review grants of variances [or failure to require a variance] in order to protect the interests of those who hold rights in property nearby the parcel for which a variance is sought.” (See *Orinda Assn v. Board of Supervisors*, 182 Cal.App.3d 1145, 1162 (1986). CA courts have clarified that if the interest of neighboring property owners in preventing unjustified variance awards [or exemptions] for neighboring land is not sufficiently protected, the consequences would be dire. *See Id.* On the contrary, the County’s primary responsibility is to ensure that such ordinances are fairly and consistently applied to protect the community it regulates. Implementing variance protections correctly is particularly important here, where long-range views and privacy are at stake.

b. The Project Does Not Comply With the Kensington Combining District

The Project currently violates the KCD Ordinance, which requires the County to affirmatively “*minimize* impacts upon surrounding neighbors; [and] *protect* the value and enjoyment of the neighbors’ property” (CCC §84-74.1206.) The KCD Ordinance goes so far as to allow sun shadow analysis for even the smallest structures to ensure neighbors are protected from proposed development in Kensington. These important protections, established by Supervisor Gioia, explain why the County – in all other instances – has taken a very hard look at proposed additions in Kensington and regularly denies variances for three-story expansions and expansive decks.

As evidenced in the attached and on the record, the Project, even on the south side of the house, will impact long-range views, privacy, and property values of the neighbors, in direct contradiction to KCD Ordinance requirements. While the County is allowed to balance interests between neighbors, the ZA and the Planning Commission have focused their decisions exclusively on the applicant’s interests. During her ruling on January 22, 2020, the ZA only recited Section 84-74.204(a) of the KCD Ordinance to benefit the applicant and neglected to cite Sections 84-74.204 (b), 84-74.1206 (a) and 84-74.1206(b), all of which require the County to protect the surrounding neighbor’s long-range views, use, value, enjoyment, and privacy.

At the Planning Commission Hearing, certain Commissioners repeatedly referenced the applicant’s right to enhance their property, but failed to make any kind of finding regarding the minimization of impacts required for neighbors. Development is not a right. No one is entitled to build in the State of California simply because they moved a project to the other side of the house. That is not how the land use process works. A person may be granted the entitlement to build if, *and only if*, their project complies with planning and zoning laws, which this Project currently does not.

i. The Project Does Not Minimize Impacts to Long-Range Views of the Bay Bridge and Downtown San Francisco

The Project, as proposed, will cause significant long-range view and privacy impacts. In addition to expanding the basement (first story), the Project proposes to add an enormous new deck and addition onto the second story that together would extend approximately 16 feet (10' 8" deck + 5' 2 ½" addition) behind the existing structure as well as an over 7' 2 ½" foot expansion of the top third story. The second and third-story expansions will directly impact Appellants' long-range views from their kitchen window and the master bathroom. As described below and in the attached, the Project will extend beyond the house's original footprint and will expand the bulk and perception of the overall building. It is visually obtrusive and will block long range views of San Francisco, the Bay Bridge, and the Bay. (See the PC Appeal Letter, **Exhibit O** for additional detail.)

At every step, County staff has been surprisingly unwilling to ask the applicant to install story poles to clarify the extent of impacts of the revised Project or to reduce the size of the deck. The KMAC refused to require story poles even after the applicant offered to install them. (See **Exhibit C**, KMAC's failure to accept applicant's offer to install story poles even though it would clearly help to address the neighbor's concerns.) The ZA also refused to require story poles even though there was an obvious discrepancy regarding view impacts. The Planning Commission denied the request to have story poles installed because they believed it was too late in the process, even though this simple act would have clarified the actual impacts.

Consequently, we are left to rely on story poles from the previous application, which identifies the location of 7' and 10' behind the existing house, to estimate likely impacts of the revised Project. We have included KMAC photos from the master bathroom showing the location of where the original design was proposed, extending 7' and 10' from the existing structure. (**Exhibits D-2.**) The revised addition on the top floor will extend 7'2 ½" on the third story on the south side, directly into Appellants expansive southern view from the master bathroom of the Bay and the Bay Bridge.

The enormous deck and addition on the second story will cause even greater privacy and view impacts. Exhibit D-3 shows a photo taken by the KMAC from the kitchen window in connection with the previous design. The photo clearly shows that the existing deck does not cause any view or privacy impacts. Using the 7' story pole in the picture to extrapolate the likely location of the proposed new deck and addition (which will extend approximately 16' from the existing structure), you can see that the proposed new structure will cause significant view impacts of the Bay, the Bay Bridge, and downtown San Francisco from the kitchen window, a key selling point of the home. (**Exhibit D-4.**) The proposed deck will also cause significant privacy impacts to the master bathroom on the top floor, which currently enjoys total privacy (see discussion below). We also note that the rendering provided in the Planning Commission's Staff Report, created by the applicant, shows the proposed deck extending only to the 7' story pole mark, not 16' as proposed in the application, which is false and underscores the importance of having County staff confirm the actual dimensions on the ground through story poles rather than rely on misrepresentations from the applicant. (**Exhibit D-5.**)

ii. Project Does Not Minimize Impacts to Privacy

Even with inaccurate dimensions, the rendering created by the applicant (**Exhibit D-5**) establishes that the proposed new deck (which will be much larger than the rendering) will look directly into the master bathroom and will cause privacy impacts from the kitchen window as well. The Staff Report incredulously claimed that “the deck does not increase impacts to privacy more than what is existing.” (Planning Commission, Staff Report, p. 7.) This statement is patently false. *There currently are NO privacy or view impacts resulting from the existing deck.* (See **Exhibits D-2 through D-4.**) Accordingly, the new impacts proposed by the Project will be infinitely greater than existing conditions. This proposed deck and addition do not minimize impacts to privacy, but indeed cause significant impacts to a once completely private master bathroom and kitchen window view. Where once you could soak in a tub in complete privacy, Appellants will now have an enormous deck with its attendant people and parties looking directly into their bathroom. Where once you could wash dishes looking at a million dollar view of the Bay Bridge and San Francisco, Appellants would now be forced to stare at a massive deck. The staff report completely ignored this potential impact from the expansive deck and addition.

Commissioner Allen visited the property and recognized that the proposed deck will have significant privacy impacts to both the upper and lower levels of Appellants’ home. She also recognized that we have to assume that there will be people and parties on this deck that might look directly into the master bathroom and into the kitchen. (PC Hearing, August 12, 2020.) She then suggested reducing the size of the deck to truly ‘minimize’ privacy and view impacts as required by the KCD Ordinance. The applicant verbally offered to adjust the size of the deck to address impacts, but oddly, the Planning Commissioners did not take them up on their offer even though it could have significantly reduced privacy impacts and helped to make the Project consistent with the KCD Ordinance. Appellants have since asked the applicant whether they would follow through on their offer to reduce the size of their deck, and they refused stating that as long as they have the County’s approval, they have no interest in revising the Project to address reasonable neighbor concerns.

iii. Project Does Not Minimize Impacts to Property Values

As stated in a letter we provided from the prominent real estate agent who sold Appellants’ property, the Project will impact key selling points to Appellants’ home, significantly impacting their property value in violation of the KCD Ordinance. (See **Exhibit E.**) Rather than address this evidence, and ask the applicant to reduce the size of their structure to avoid these significant impacts, the staff report incredulously concludes that the Appellants’ property values will not be impacted because the applicant’s property values will be improved. This conclusion is nonsensical. The applicant’s property values would be increased by *directly stealing* Appellants’ views. This is exactly the type of project the KCD Ordinance was created to protect against. The ZA and the Planning Commission ignored the substantial evidence on the record and approved the Project without proposing to reduce the size of the addition to minimize property value impacts.

iv. Appellants' Use and Enjoyment of Their Home Will be Significantly Impacted by the Project

Commissioner Allen visited the property site and identified the significant privacy and view impacts associated with the enormous deck and addition being proposed. She acknowledged that the proposed Project would impact Appellants' use and enjoyment of their home and suggested a redesign to address this issue, but was overruled by Commissioners who had not visited the property.

It is hard to understand why Commissioners would not entertain a potential resolution to this issue when the applicant agreed to make Project changes. Particularly, when the ones voting against the appeal had not viewed the subject property. Assessing the actual impacts of a project is difficult to do on paper. **We therefore invite all of the Supervisors to visit Appellants' home to view the existing long range views and privacy that will be significantly impacted by the Project before rendering their decision.** With the exception of Commissioner Allen, no other County staff have visited Appellants' home.

Prior to reviewing the revised application, the Project planner confirmed that even a Project on the south side of the house "would need to be designed to avoid impacting the neighbor's long range views, sunlight, etc. and likely would require a variance if it involves three stories, has certain overhangs, or has the potential to cause significant environmental impacts." She then promptly recommended approval of a three-story project without a variance, disregarding the significant impact long-range views and privacy caused by the revised design. (See **Exhibit F** for email from Margaret Mitchell May 2, 2019.)

The Project as currently proposed has not been designed to minimize impacts to surrounding neighbors, will not protect the value and enjoyment of the neighbor's property, and will not maintain the neighbor's property values. Accordingly, the Project does not comply with the KCD Ordinance and must be redesigned.

As previously proposed to County staff, a smaller addition could be constructed on the property that would avoid these significant impacts and would comply with the KCD Ordinance requirements. Rather than deny any development, as the applicant dramatically suggests, Appellants only want to have their views and privacy protected. The applicant could accomplish this by limiting the upper level addition to the size of the existing nook on the north side and reducing the deck to the previous footprint, to be an actual replacement deck. These changes would provide the applicant with a significant addition to their house while protecting the Appellants' property values and minimizing impacts to long-range views and privacy as required by the KCD Ordinance. These reasonable requests were not even considered in the ZA hearing and were overruled by a majority of the Planning Commissioners.

c. Decision Is Not Based on Substantial Evidence in the Record

As suggested above and described in the PC Appeal Letter attached, there are countless misstatements in the record that the County has relied on in making its findings to date, underscoring the need to overturn the approval and to confirm actual Project impacts on the ground. The various staff reports for the approval include the following misstatements:

- Appellants' views are only to the west and would not be impacted by a southern expansion – FALSE. See **Exhibit G**, which shows Appellants' kitchen and master bathroom views are primarily to the south.
- Appellants' house is higher on the street than the applicant's and therefore their views would not be impacted – FALSE. See **Exhibit H**, showing Appellants' house is lower than the applicant's.
- The proposed deck does not increase impacts to privacy more than existing – FALSE. See Exhibit D-2, showing the existing deck which cannot be viewed by Appellants' house. There are currently NO impacts associated with the existing deck.
- County staff claim that Appellants have been repeatedly unavailable for a site visit– FALSE. From Oct 2018- September 2019, Appellants tried repeatedly to have County staff visit the house, but were rebuffed. Staff finally offered to visit the house in October 2019 when Appellants were at a funeral. Appellants tried in earnest to reschedule a site visit in November, but their request went unanswered. (See **Exhibit I** for email correspondence with County.)
- The ZA Staff Report suggests the proposed deck is a 'replacement deck' extending only 1 ½' behind the existing deck - FALSE. See Exhibit D-1 which shows the proposed deck will extend 10' 8" behind the proposed 5' 2 ½'foot addition, resulting in a new approximately 16' extension behind the existing structure.
- Most houses on the block have decks – FALSE. All of the houses to the south of the applicant's house do not have decks because they are uphill and have better views. (See **Exhibit J**.)

We do not relish pointing out these mistakes, but it is important to recognize that the ZA relied on misstatements of fact and ignored substantial evidence on the record to find in favor of the applicant. The false statements also reflect a haphazard process focused on approving the Project at all costs.

d. Procedural and Substantive Due Process Violations

From the start, this process has been riddled with substantive and procedural due process violations that must be corrected by the Board to avoid potential legal liability. As highlighted in documents filed with the County, there have been several due process violations, including but not limited to: failure to provide adequate notice and violations of the Brown Act, failure to require story poles, 'impartial' decision-makers testifying on behalf of the applicant, and relying on biased testimony when rendering a decision. The Board has a duty to act to rectify these wrongs and ensure a fair review process.

i. Failure to Notify, Brown Act Violations

Throughout the process, the County has failed to provide mandatory notice to Appellants even though their property will be directly affected by the County's decision. Appellants have been forced to hire land use counsel and file approximately *15 different PRA requests* just to understand the development being proposed next door. Property

owners and affected citizens are entitled to constitutional due process and equal protection when a County regulates projects, but these Appellants have been left out of the process from the beginning and have had to force their way in to protect their property rights.

After voicing reasonable concerns and requesting status updates from the County on the initial application in January 2019, the County failed to inform Appellants that the applicant had submitted revised plans on February 12th and failed to notify them that the KMAC would be reviewing those plans at a meeting on February 26, 2019. Appellants had to scramble to attend the February KMAC meeting to voice their concerns. When individual rights are being deliberated in an administrative hearing, interested parties are required to be apprised of the application “so that [they] may have an opportunity to refute, test, and explain it, and the requirement of a hearing necessarily contemplates a decision in light of the evidence there introduced. (*Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152, 1172 (1996).) Without adequate notice, it “would be tantamount to requiring a hearing in form but not in substance, for the right of a hearing before an administrative tribunal would be meaningless if the tribunal were permitted to base its determination upon information received without the knowledge of the parties.” (*Id.*)

Once the original application was withdrawn in April 2019, the County planner committed by email on May 2, 2019, to providing direct notice to Appellants of any proposed revised designs or new applications, (see Exhibit F), but failed again to notify Appellants when a new application was filed in July and again in September. On July 29, 2019, Appellants sent an email to the County planner requesting to be informed, as parties in interest, of when the KMAC would review the application and of any updated applications. The County did not provide any updated applications, and instead, the Appellants only learned of a revised application from the neighbor who told them by email about a revised application submitted September 18, 2019.

Even then, Appellants could not obtain a copy of the revised September application, even though the planner promised to keep them informed. Appellants were forced to go to the Department of Conservation and Development (“DCD”) Office on September 30, 2019, to obtain a copy of the revised application, but were again denied. Appellants were told by DCD staff that there was no application on file, even though there clearly was. Appellants showed County staff an email from the neighbor confirming that an application had been filed, and the DCD Office staff still refused to provide them with a copy of the application, in direct violation of the PRA. Appellants were forced to file two different PRA requests in October just to receive a copy of the application that the County planner committed to providing back in May. It should not be this difficult for interested parties to obtain publicly available information, particularly when their property rights are being impacted.

Perhaps most egregious, the KMAC failed to comply with the Brown Act’s mandatory notice requirement for public meetings. (CA Gov Code 54956.) (See detailed discussion in the PC Appeal Letter, **Exhibit O**, pp 9-10.) Ms. Snyder, a KMAC member who volunteered to provide public notice for the KMAC meeting and consequently was the same KMAC member who coached the applicant on how to avoid a variance, provided notice to all neighbors surrounding the Project except the two opponents of the Project, the Appellants and Ms. Donna Stanton, the owner of 134 Windsor Road in Kensington. It is imperative that the County notify all residents if they fall within the distance requirements or if the decision will affect their property rights (See *Scott v City of Indian Wells*, 6 Cal.3d

541, 549 (1972).) When this issue was raised at the KMAC meeting in October, KMAC members denied any wrongdoing and claimed that Ms. Stanton's property was located outside of the noticing area. We have provided a copy of the KMAC notification area list, clearly showing both Ms. Stanton's and the Appellants' properties within the notification area (See Exhibit K to the PC Appeal Letter, **Exhibit O**.) KMAC members lied about their failure to notify opponents and then doubled down on this falsehood during the ZA hearing in direct violation of the Brown Act.

The California Constitution makes clear that “[t]he people have the right of access to information concerning the conduct of the people’s business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.” (California Constitution, Art. 1, section 3 (b)(1).) The Brown Act covers members of virtually every type of local government body, elected or appointed, decision-making or advisory. Public participation is paramount to the land use process. At the very least, these KMAC members, appointed to be impartial decision-makers, should have shown concern for shutting out interested parties and proposed a more formal notification process in the future to avoid these violations. Sadly, these KMAC members were unconcerned and the approval went forward.

Appellants have a known, vested interest in the subject application, will be uniquely and directly impacted by the Project, and have indicated they have substantial evidence to submit into the record. Yet, the County has repeatedly failed to notify them of the revised plans ostensibly designed to address their concerns in direct contradiction to planning and zoning laws and the Brown Act. Planning Commissioners did not even address these violations during their deliberations. We are hopeful that this honorable Board of Supervisors takes action to clarify the importance of providing public notice and including interested parties in the land use approval process. To rectify the situation, we seek an impartial determination that protects both parties’ property rights.

ii. Evidence of Bias

Perhaps most troubling, has been the substantial bias on the part of KMAC members, citizens who are duty-bound to impartially represent the County, and certain County staff, in reviewing and approving this application. Back in August 2018, three months before an application was filed, the applicant’s architect stated that County staff, Joseph Lawlor, told him, after confirming with his supervisor Mr. Hernandez, that a variance would be ‘no problem’, without ever having reviewed an application. (See Attachment A to the PC Appeal Letter, **Exhibit O**.) This type of pre-determined favoritism is wholly inappropriate in the land use process.

At the KMAC hearing in February 2019, once it became clear that it would be difficult to make the stringent variance findings, one of the KMAC members, Ms. Snyder, started coaching the applicant on ways to avoid a variance.⁴ We also found emails from

⁴ We also note that Ms. Snyder has failed to attend any other KMAC meeting except the ones involving this Project and the mandatory meetings scheduled by Supervisor Gioia. We find it suspicious that this same person also coached the applicant, failed to notify project opponents, and testified on behalf of the Project at the ZA Hearing.

County staff providing similar guidance on how to skirt County Code requirements. (See **Exhibit K.**)

This same KMAC member failed to notify the project opponents of the October meeting and then went so far as to testify *on behalf of the applicant* along with Mr. Tahara (KMAC Chair) at the ZA Hearing. If there is evidence of an "unacceptable probability of actual bias on the part of a decision-maker", that decision-maker must be disqualified from reviewing the application. (See *Nasha LLC v. City of Los Angeles*, 125 Cal. App. 4th 470, in which a Planning Commission decision was vacated because one of the Commissioners showed clear bias by speaking out against a pending project.) California law strictly prohibits public representatives from campaigning for, and certainly *testifying in favor of*, any project that they are reviewing. Rather than chastise the KMAC members for testifying on behalf of an applicant in a wholly inappropriate manner, the ZA relied on, and referenced, both the written and oral KMAC testimony during her ruling in January 2020. Courts regularly overturn decisions that rely on such biased testimony. *Id.*

To this day, we have not been able to review the biased written KMAC testimony relied upon by the ZA in the January ruling. We first requested a copy of the KMAC testimony directly from the ZA (See **Exhibit L**, email to ZA, January 8, 2020), who ignored the request. We then filed a PRA request on January 16, 2020, to view a copy of the testimony and were told in the PRA response that no such testimony exists, a blatant violation of the PRA. To this day, we have not received a copy of the evidence relied on by the ZA and used to refute Appellants' claims. The ZA abused her discretion by relying on biased testimony from KMAC members.

Unfortunately, it appears that in this case, the County has been unable to remain impartial. They seem to believe that because the Project has been moved from the north side to the south side, that the applicant should be entitled to build. The KMAC members in particular appear indifferent to, and irritated by, Appellants' concerns. We found emails showing the KMAC chair, Mr. Tahara, had clear disdain for Appellants and their very valid concerns. (See **Exhibit M**, email from Mr. Tahara wondering whether [Appellants were] 'even worked up over this [project].') These Appellants have never before challenged a land use application and do not delight in this process. Because the County has been unwilling to seriously consider their very valid property rights concerns, they have been forced to pay thousands of dollars just to understand the project next door and to protect their property rights. It should not be this difficult to obtain a fair and impartial land use process.

When the Appellants were forced to go to the DCD Office in February 2019 (because no planner would agree to meet with them to discuss their issues), Mr. Hernandez spoke with them about their concerns. He stated that he had not viewed any applications or photos of the Project, but then mysteriously stated that he would need to recuse himself from this application for unstated reasons. He did not go into detail when asked why, but to the extent Mr. Hernandez is obligated to recuse himself from reviewing this Project, he has not done so. Mr. Hernandez has been copied on all emails related to this Project and presented on the Project at the Planning Commissioner's Hearing.

These Appellants only seek due process and equal protection under the law. They have been repeatedly shut out, ignored, and been forced to watch County staff bend over backwards to ensure the Project moves forward. Agency action based on this type of abuse of discretion must be overturned. We look to the Board of Supervisors to rectify these wrongs by impartially reviewing the Project and requiring simple design changes to ensure it complies with County Code.

iii. Falsehoods in the Record

As highlighted above and discussed in the attached PC Appeal Letter, the County has relied on several falsehoods in concluding that this Project will not cause significant impacts. (See **Exhibit O**, p. 4-8.) From misrepresentations by the applicant's architect, to discounting the south-facing views from Appellants' home, to miscalculating the actual dimensions of both the upper addition and the extent of enormous deck, all of which has led to a misunderstanding of the facts on the ground and a critical errors in concluding the Project would not cause significant impacts to long-range views and privacy. These falsehoods were carried into the staff reports for both the ZA and the Planning Commission and inappropriately relied on in approving this Project. Had County staff taken the time to visit Appellants' property and to require story poles, all of this could have been avoided. We are hopeful that the Board will accept our invitation to view Appellants' property to better understand the views, privacy, and property value issues at stake.

iv. PRA Violations

Appellants have been forced to file repeated PRA requests to track the Project and understand the ways in which their home might be impacted. While not the subject of this Board's review, the County has committed several PRA violations in responding to Appellants' requests that could be rectified by this body's impartial ruling on the issues.

Between March-April 2019, Appellants filed several PRA requests asking for all documents, including telephonic notes of discussions between the County and the applicant. We were provided mostly redundant records and were not provided any notes of meetings, phone calls, or other verbal communications between the applicant and the County which are regularly kept on file in municipal records and should have been provided pursuant to the PRA. The County did not provide any justification for withholding this information as required under the PRA.

On September 20, 2019, we submitted a PRA request requesting a copy of the updated application that had been filed on September 18, 2019. The PRA response did not include the new application or a justification for failing to provide this publicly available document. (See **Exhibit N**, Email to Lawrence Huang, October 1, 2019.) It was only after we filed a second PRA request in October that we received a copy of the revised September application, over a month later.

In January 2020, after the ZA failed to respond to our request to directly provide the written KMAC testimony referenced in her ruling, we filed a PRA request on January 16, 2020, to obtain the KMAC testimony. The County's PRA response did not include the KMAC testimony which the ZA identified as critical to her ruling, another clear PRA violation.

While we do not expect the Board to fix these PRA violations, these incidents showcase the history of silence Appellants have endured in being repeatedly shut out of the process and kept in the dark about the proposed Project. Public involvement is paramount in the land use process, and Appellants have had to work far too hard to simply stay informed. For these and the other reasons stated above, it is critical for the Board, an impartial body of elected officials, to take the first step in rectifying these wrongs by addressing Appellants very reasonable concerns regarding long-term view, privacy, and property value impacts.

One Planning Commissioner incredulously suggested that the inclusion of these due process claims was merely a ‘shot-gun approach’ strategy to attack the Project. Rather than address serious due process violations, this Commissioner laughed it off as some type of legal strategy. On the contrary, these violations highlight the serious issues associated with this approval. It is critical for higher adjudicatory bodies to understand these procedural and substantive mistakes that have tainted the land use approval, and would subject the County to legal liability in court if not rectified. These violations highlight the need to reverse the approval to ensure a fair process that complies with land use law.

II. Requested Resolution

There is a simple solution to this ongoing issue. First, County Counsel should research the legal implications of the variance interpretation and provide a legal conclusion to the Board of Supervisors justifying how the same level of a structure can be both two and three-stories and how a nonconforming third story can be expanded without a variance. Staff’s interpretation of County Code is legally unsupported, and frankly illogical, and should not be relied on to insulate the County from legal liability. To the extent that County Counsel is unable to identify precedent and legal support for staff’s interpretation, the design should be revised to meet variance requirements.

Second, we are hopeful that the Supervisors will accept our invitation to visit Appellants’ home to see the long-range views and privacy that would be impacted by the Project. With misrepresentations in various applications and false renderings, it is critical to view the subject property to see firsthand the long-range view and privacy impacts.

For all of the reasons stated above, we respectfully request that the Board of Supervisors uphold the appeal and require the applicant to: 1) reduce the size of the enormous deck and addition to minimize long-range view and privacy impacts as verbally offered by the applicant, and 2) reduce the size of the third-story addition to minimize view impacts of the Bay Bridge and San Francisco. The County should require story poles for any redesign to confirm actual impacts on the ground. Without these adjustments, the KCD Ordinance would be rendered meaningless, Appellants’ long-range views and privacy would be permanently impacted, and the County would be subject to legal liability for due process violations and a failure to comply with County Code.

Sincerely,



Jillian Blanchard
Rudder Law Group

EXHIBIT A

Department of Conservation and Development

30 Muir Road
Martinez, CA 94553

Phone: 1-855-323-2626

Contra Costa County



John Kopchik
Director

Aruna Bhat
Deputy Director

Jason Crapo
Deputy Director

Maureen Toms
Deputy Director

Kelli Zenn
Business Operations Manager

December 13, 2019

Jillian B. Blanchard
Rudder Law Group
1101 Marina Village Parkway, Suite 201
Alameda, CA 94501
jblanchard@rudderlawgroup.com

RE: 120 St. Albans Road, Kensington, CA

Ms. Blanchard:

This responds to your December 10, 2019 email to the Department of Conservation and Development. You request that the Department produce "any other case in which the County has not required a variance to expand an existing non-conforming use when constructed on the other side of the house." Your request would require the Department to conduct an extensive review of every development approved by the Department to identify records responsive to your request. The request is unduly burdensome. The PRA does not require a local agency to perform a "needle in the haystack" search to locate requested records. *Cal. First Amend. Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 166. If you wish to make a more specific request, the Department may be able to identify and provide responsive records.

Your email also asserts that the Department's December 10 response to your November 27, 2019 Public Records Act request was insufficient. The Department disagrees with your assertion. Your November 27 request asked for all County records "that provide legal precedent, findings, records, memorandum, or guidance that would support the Legal Conclusion." The "Legal Conclusion" referenced in your request is the Department's determination that the proposed development at 120 St. Albans Road, Kensington, CA does not require a variance.

On December 10, 2019, the Department responded by providing responsive records including development plans provided by the applicant's architect and a communication from the project planner to the applicant that development based on the submitted plans would not require a variance. The Department's response also directed you to the forthcoming, and now publicly available, Department staff report for the December 16, 2019 Zoning Administrator meeting.

The Department has not identified any other "legal precedent, findings, records, memorandum, or guidance that would support the Legal Conclusion." The Public Records Act does not require a local agency to conduct a legal analysis or produce new records in response to a request by the

public. *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1075. Accordingly, the Department considers its obligations under the Public Records Act with respect to your November 27, 2019 request met.

Your December 10, 2019 communication also requests that the Department “suspend the proceedings” and require a variance for the proposed development. No approval for the proposed development will be granted without a public hearing. As with any member of the public, you and your client may attend and comment at any public hearing where the proposed development is considered, including the scheduled December 16, 2019 public hearing before the Zoning Administrator.

Please contact Ruben Hernandez at (925) 647-7785 if you have any questions.

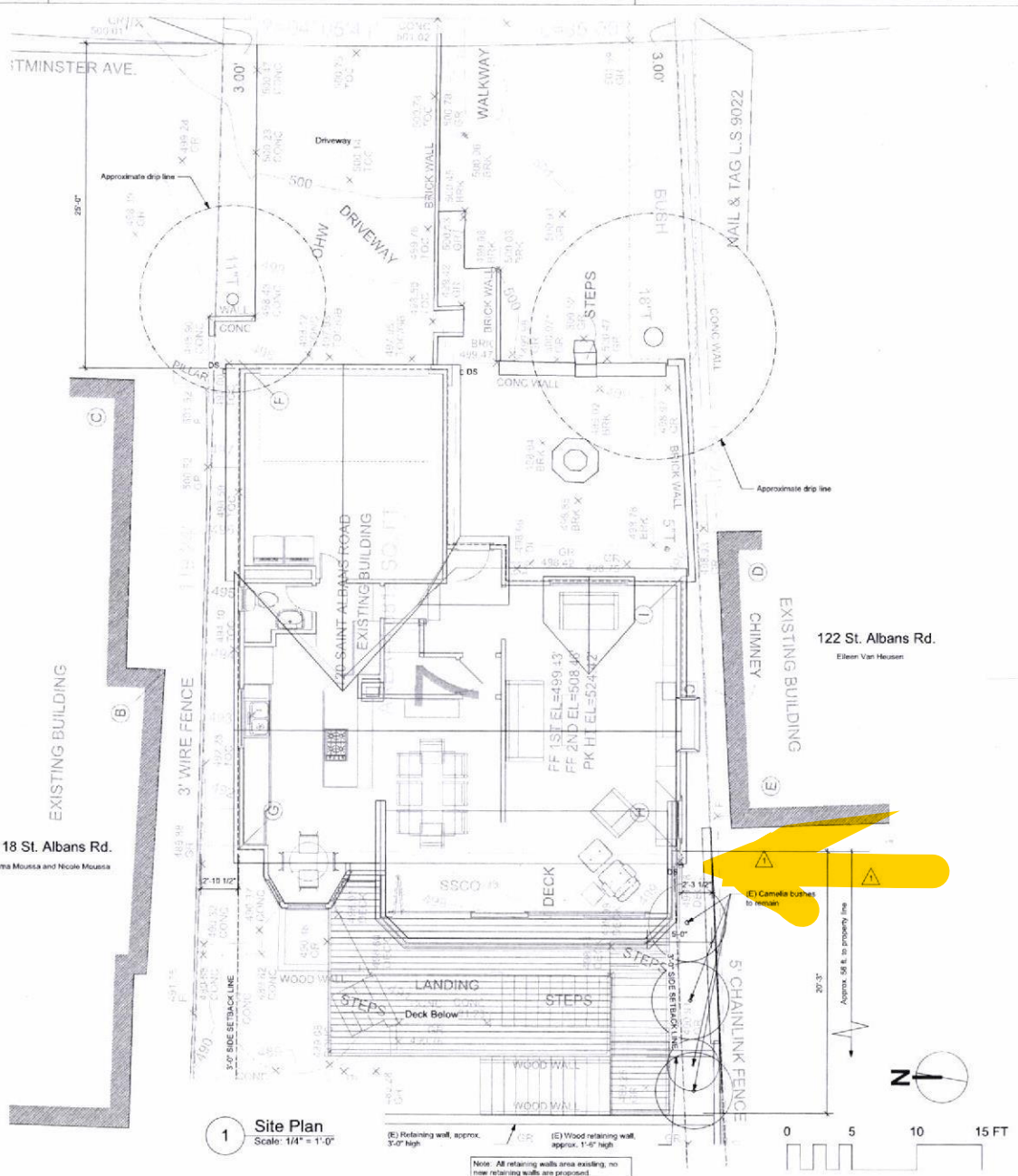
Sincerely,



John Kopchik
Director
Department of Conservation and Development

EXHIBIT B-1

Side setback shown as 2' 3 1/2" on July 15th application



Project:
Howard F. McNenny AIA

Address: 109 SANTA FE AVENUE
ALBANY, CA 94706

Phone: (510) 755-1471

Email: hmcnenny@comcast.net

Date:

All information on this drawing constitutes the original and unpublished work of the architect and may not be distributed, used or reprinted without the written consent of the architect.

Consultant:

Project No:
120 St. Albans Road
Kensington, CA

Architect:
contact(s): David Harberich
Tracy Harberich
address: 120 St. Albans Road
Kensington, CA
phone: (312) 533-0746
email: mcHarley@gmail.com

Scale:

Site Plan

Date:

07/19/2019

Drawn:

Checked:

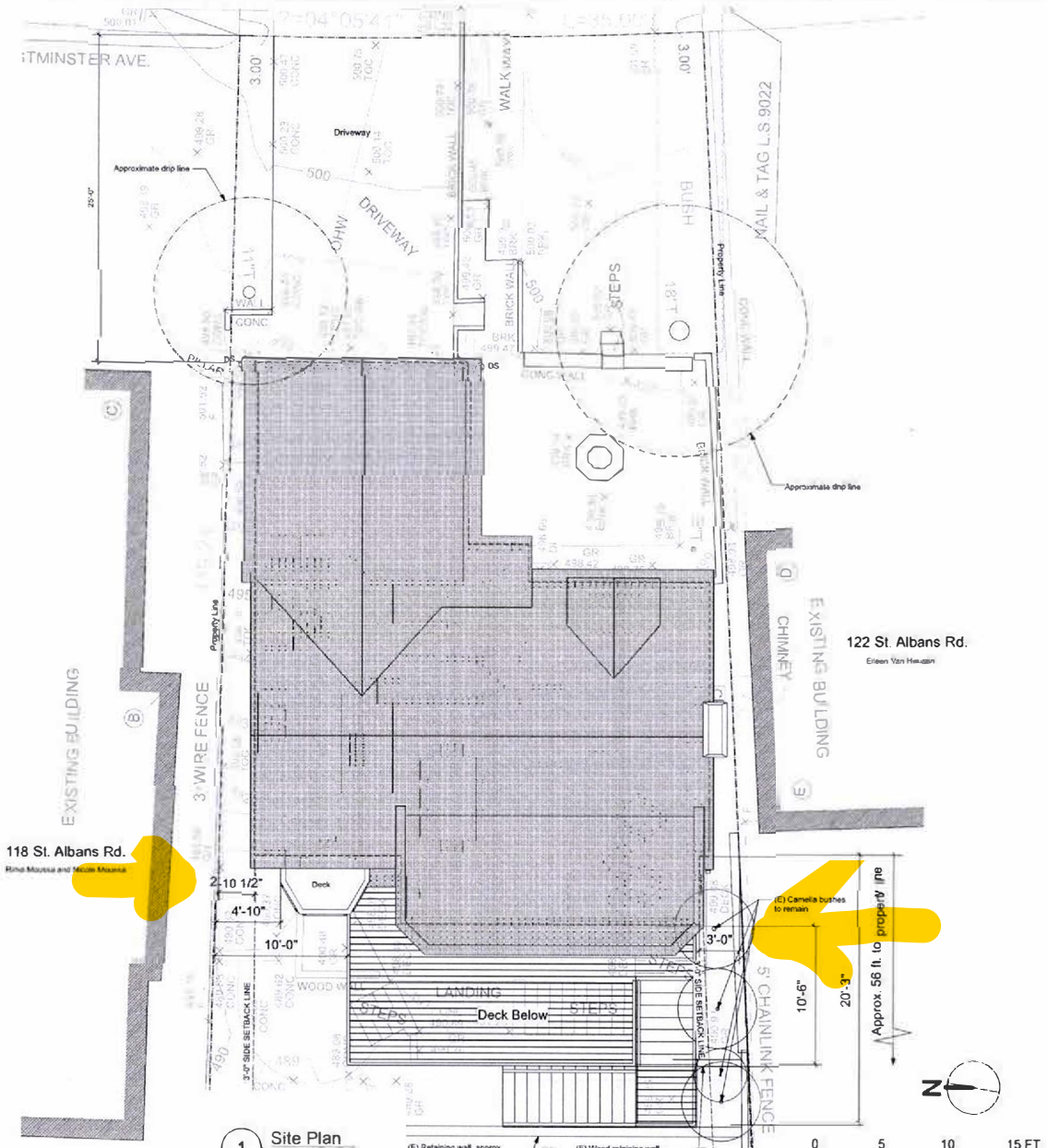
Scale:

Project Number:

C-2

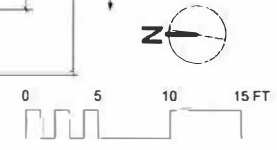
EXHIBIT B-2

Same location now shown as 3' in revised July 25th application



1 Site Plan
Scale: 1/4" = 1'-0"

(E) Retaining wall, approx. 3'-4" high
(E) Wood retaining wall, approx. 1'-8" high
Note: All retaining walls area existing; no new retaining walls are proposed.



Project:
Architect: Howard F. McNenny, AIA
1839 SANTA FE AVENUE
SAN ANTONIO, CA 78205
Phone: (512) 795-1271
Fax: (512) 795-1272
hfmcnenny@comcast.net

All information on this drawing constitutes the original and copyrighted work of the architect and may not be duplicated, used or faxed without the written consent of the architect.

Project Info:
120 St. Albans Road
Kensington CA
Client: David Horberich
Mary Hanley
Address: 120 St. Albans Road
Kensington CA
Phone: (512) 533-0316
Email: mc@hanley@gmail.com

Site Plan

1/8" = 1'-0"
Elevation Footing

C-2

EXHIBIT B-3

Margaret Mitchell

From: Margaret Mitchell
Sent: Tuesday, December 31, 2019 2:50 PM
To: Howard McNenny
Cc: Mary Hanley; David Herberich
Subject: RE: 120 St. Albans

Hi Howard,

I will get a copy of your attachment to Aruna for Monday.

Happy New Year!
Margaret

From: Howard McNenny <h.mcnenny@comcast.net>
Sent: Tuesday, December 31, 2019 11:31 AM
To: Margaret Mitchell <Margaret.Mitchell@dcd.cccounty.us>
Cc: Mary Hanley <mc4hanley@gmail.com>; David Herberich <dherberich@gmail.com>
Subject: 120 St. Albans

Dear Margaret:

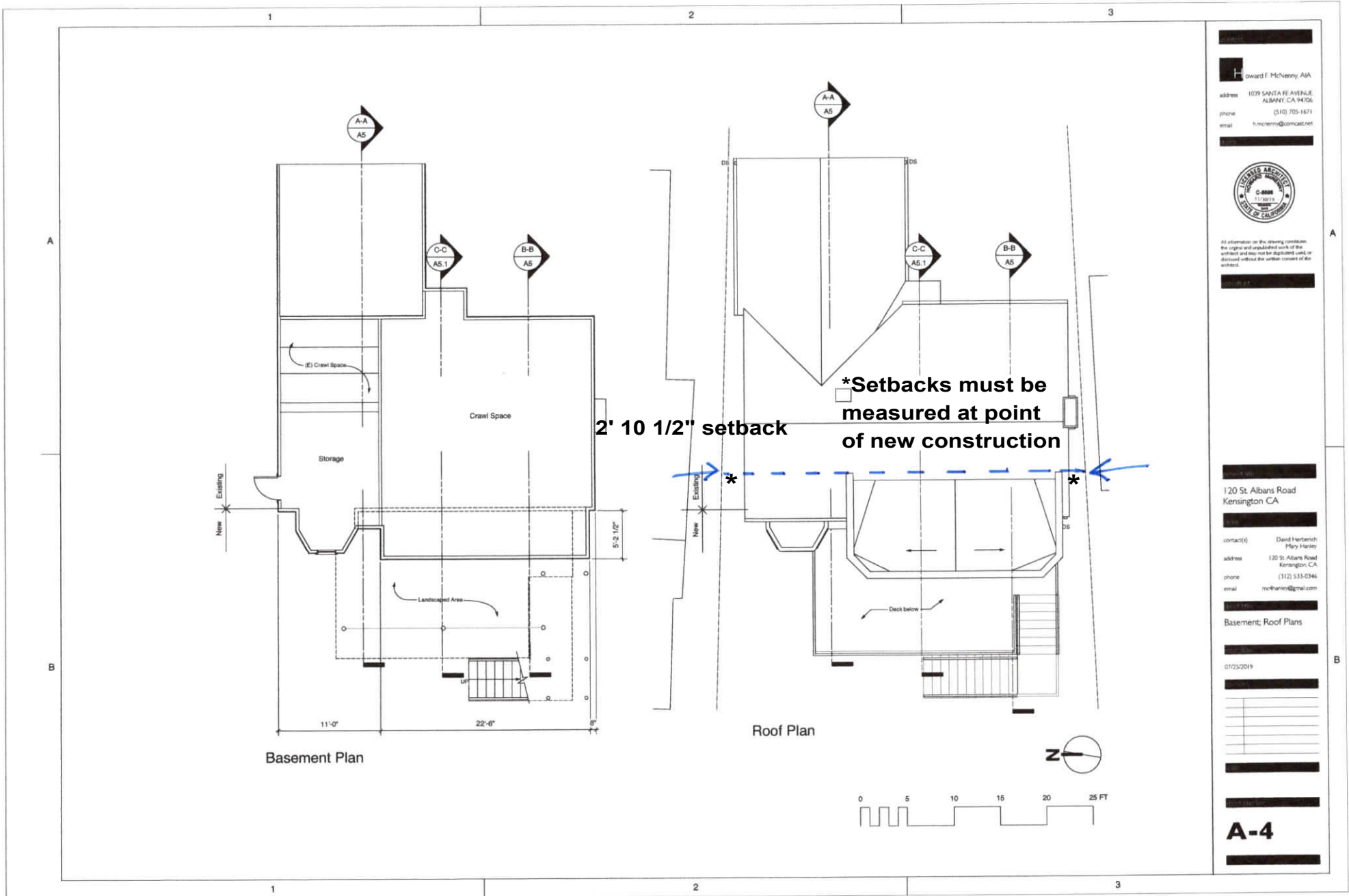
I hope you are back from jury duty by now, and will be available for the January 6 continuation of our hearing. At the initial hearing, there were some issue raised that I am sure you would be well able to answer. One concerned setbacks—something I did not expect to be in contention at all. Our proposal shows the addition on the south side to be set back 3'-0" from the property line, which is allowed as long as the setback on the other side is at least 5'-0". **In our case, the setback on the north sides is 10'-0", or twice what is required.** This dimension was left out of the floor plan, so I have added it, and attach below. Please verify that we are in compliance on this issue.

Thank you and best wishes for the new year.

Howard McNenny, AIA

1039 Santa Fe Ave, Albany CA
Tel: (510) 705-1671
Cell: (510) 207-7019
h.mcnenny@comcast.net

EXHIBIT B-4



Edward F. McNenny, AIA
 address 1079 SANTA FE AVENUE
 ALBANY, CA 94706
 phone (510) 705-1671
 email fmcnenny@comcast.net



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120 St. Albans Road
 Kensington CA
 contact(s) David Hertzsch
 Ptery Hertzsch
 address 120 St. Albans Road
 Kensington, CA
 phone (312) 533-0346
 email mh@hertzsch.com

Basement Roof Plans

07/25/2019

A-4

EXHIBIT C

Friday, October 4, 2019 at 10:39:14 AM Pacific Daylight Time

Subject: Re: 120 St. Albans - KMAC October Meeting - October 29, 2019
Date: Tuesday, September 24, 2019 at 5:06:15 PM Pacific Daylight Time
From: PATRICK TAHARA
To: Howard McNenny
CC: Mary Hanley, Kate Rauch

Howard:

In response to your question on story poles, I cannot make this request as KMAC has not met to discuss the revised design. At this time, erecting story poles is a decision between you and your client. While erecting story poles will allow the neighbor(s) to see the impacts, there are costs of erecting the story poles to your client that need to be considered as well.

Please let me know if you plan to erect the story poles as KMAC could conduct a site visit prior to the meeting pending availability and access to the neighbors' properties.

Patrick Tahara
415-307-4042

On September 24, 2019 at 4:34 PM Howard McNenny <h.mcnenny@comcast.net> wrote:

Patrick:

The meeting date is noted and I will be there.

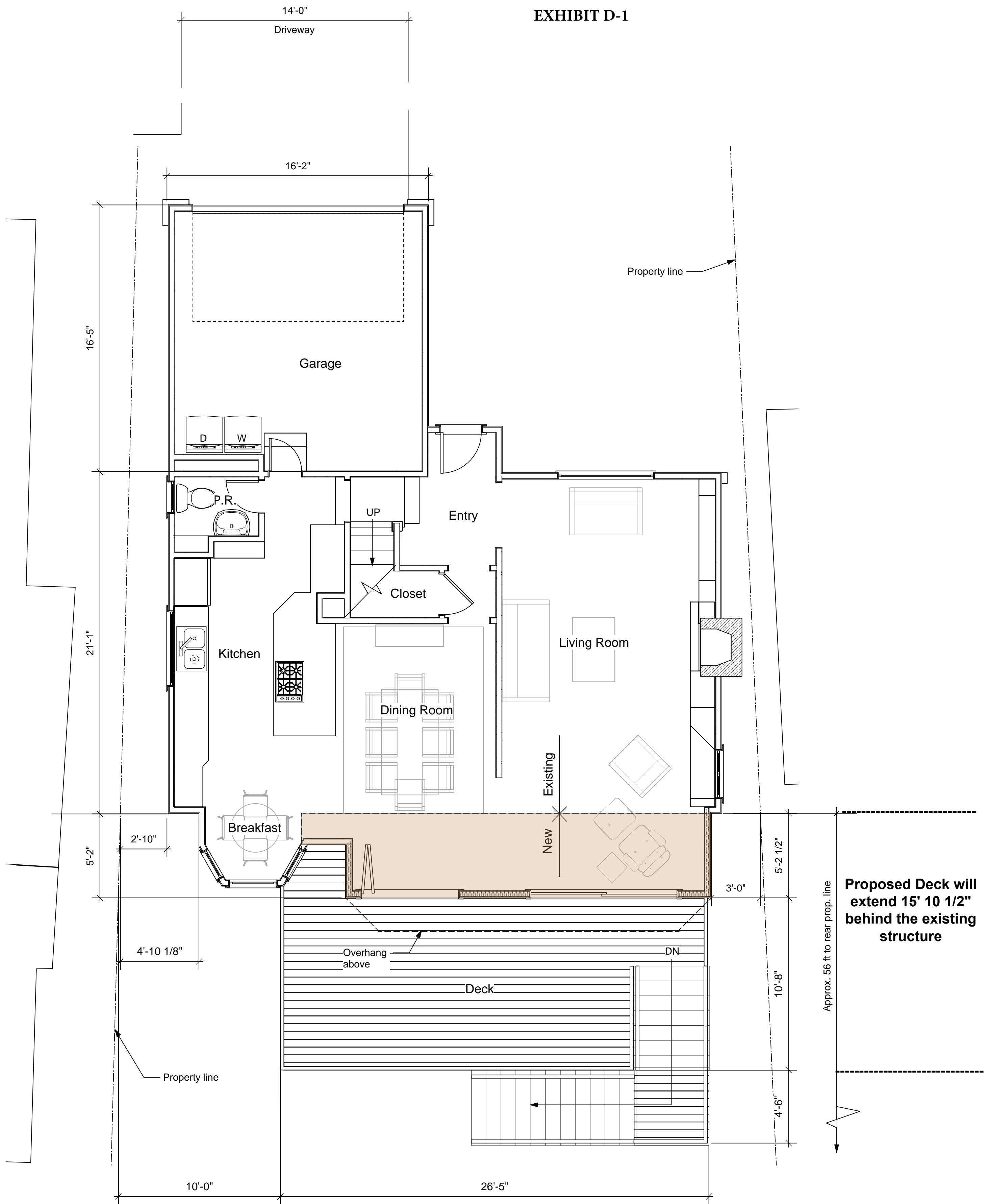
One quick question: Would it be helpful for us to go ahead and erect story poles?

Howard McNenny, AIA

1039 Santa Fe Ave, Albany CA
Tel: (510) 705-1671
Cell: (510) 207-7019

h.mcnenny@comcast.net





First Floor Plan

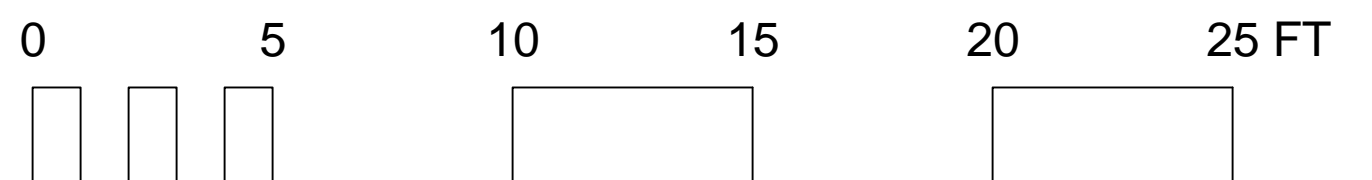
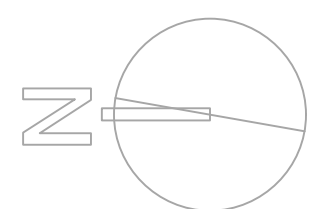


EXHIBIT D-2

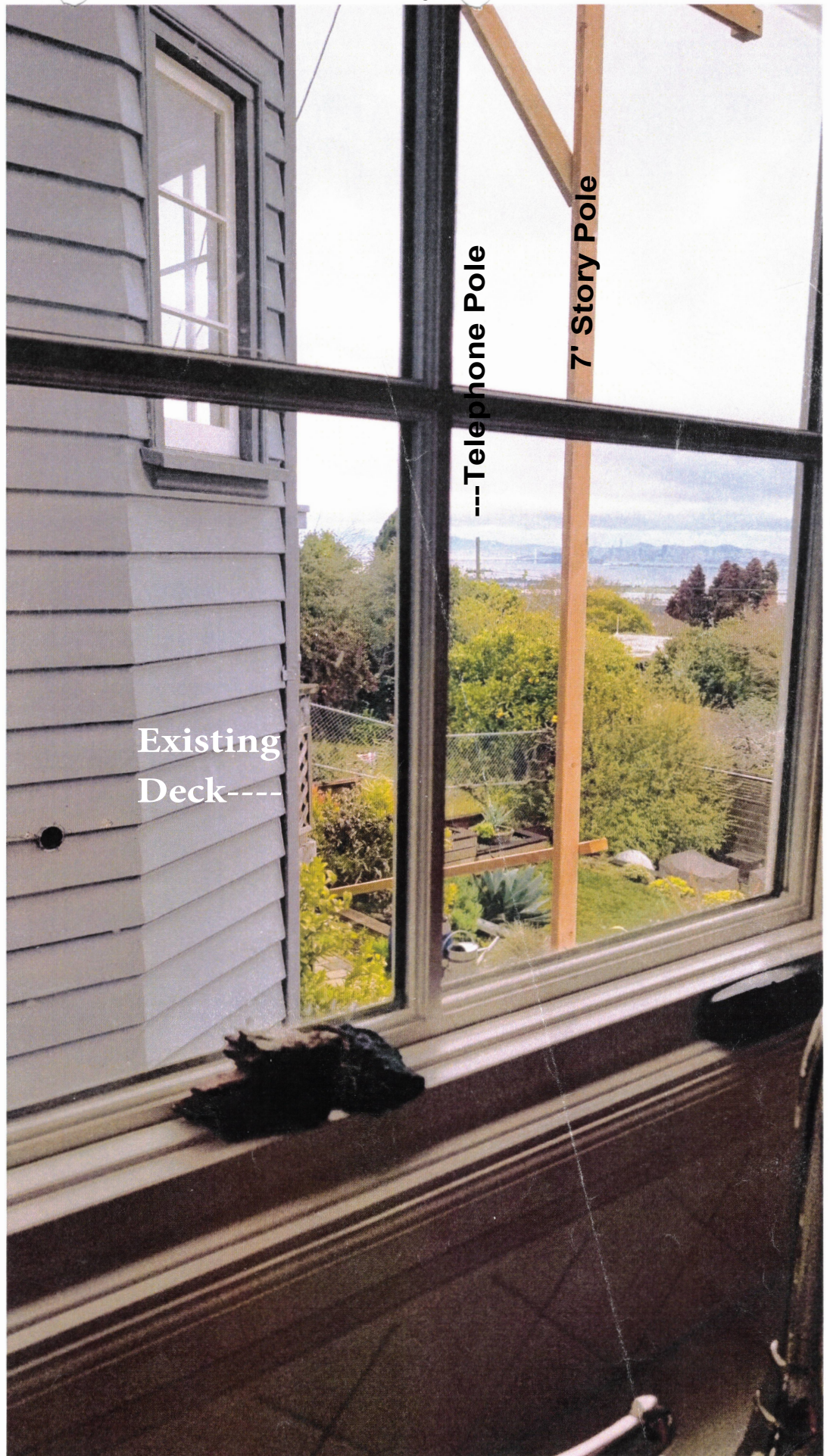
7' and 10' Story Poles From
Original Project Design -
Top Story

Existing Deck



RECEIVED
12/16/2019
ZONING ADMINISTRATOR HEARING
AGENDA ITEM # 3A

KMAC PHOTO:
7' Story Pole
installed with
previous design.
Shows the location
of 7' behind the
original structure
from second story
kitchen window.



South bay view from
kitchen window.

EXHIBIT D-4

Telephone Pole

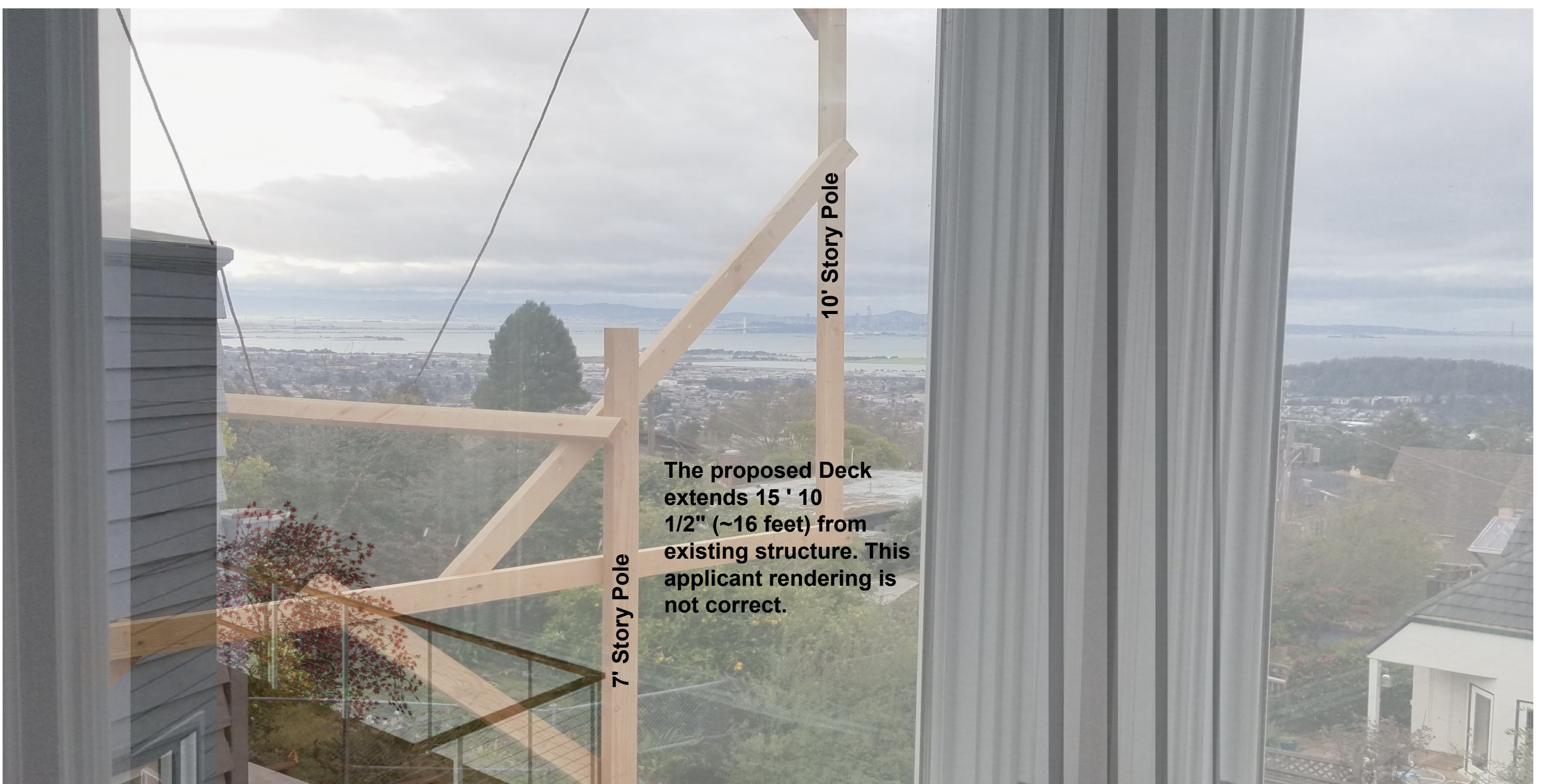
-----7' Story Pole from KMAC Photo-----

-----Proposed 15' 10 1/2" Deck will wipe out views of Bridge and SF-----





Photo from 118 St. Albans (KMAC Photo with story poles from previous proposal)



Rendered View from 118 St. Albans (Proposed)

EXHIBIT E
The GRUBB Co.
REALTORS

Nicole Ashar
118 St. Albans
Kensington, CA.

Re: proposed addition to the home adjacent to 118 St. Albans

Dear Nicole,

As discussed, I have looked at the potential obstruction of the views from your home's kitchen and master bath, and the diminished light for the family room if the proposed additions were to be constructed next door.

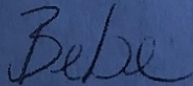
In our market, views in general represent great value, and in particular, the view from a kitchen sink and the master suite is extremely important.

Having represented the sellers when you purchased the property, I am aware of how the property has benefitted from the specific views that the property presently offers.

In areas such as Kensington, which are generally very densely built, there is also a decidedly value for privacy. The addition proposed for your neighbor's home appears to potentially diminish your privacy in important areas.

I look forward to hearing of a satisfactory resolution to this neighborhood concern.

Yours,



Bebe McRae

EXHIBIT F

On Thu, May 2, 2019 at 5:03 PM Jillian Blanchard <jblanchard@rudderlawgroup.com> wrote:

Thank you, Margaret.

On Thu, May 2, 2019 at 4:55 PM Margaret Mitchell <Margaret.Mitchell@dcd.cccounty.us> wrote:

Good afternoon, Jillian,

Yes, those statements from our conversation yesterday are correct. We will update you on any changes to the status of the application. Please contact Lawrence regarding the PRA requests.

Thank you,

Margaret

From: Jillian Blanchard <jblanchard@rudderlawgroup.com>

Sent: Thursday, May 02, 2019 3:36 PM

To: Margaret Mitchell <Margaret.Mitchell@dcd.cccounty.us>

Cc: Nicole Ashar <nicoleashar@ymail.com>

Subject: Re: 120 St Albans Road - Follow Up and Confirmation

Margaret:

I would appreciate your response to my email below as soon as possible.

Thank you,

Jillian

On Wed, May 1, 2019 at 3:43 PM Jillian Blanchard <jblanchard@rudderlawgroup.com> wrote:

Margaret:

Thanks for talking with me this morning.

As we discussed, it has been difficult to ensure the protection of my clients' property rights because the County insists on requiring us to file repeated Public Records Act ("PRA") requests to determine the status of the 120 St. Albans application. Requiring repeated PRA requests rather than simply sharing the information with my clients as real parties in interest places an unfair burden on both my clients and the County, and puts us at least 10-15 days behind the process as it unfolds. Given the direct way in which my clients could be affected (i.e. by a wall blocking their SF Bay views), and the potentially significant environmental impacts at stake, the County should be providing direct notice to my clients (copied here) and me as their legal representative with application updates. Please pass this request along to your supervisors. In the meantime, we will continue to make PRA requests to understand the status of the application.

Through the response to our fourth PRA request, we noticed an email that made it appear as if County staff was counseling the applicants on how to build the same devastating structure and avoid a variance, which would be extremely concerning and create obvious legal exposure for the County. Specifically, in your email to Howard McNenny dated April 9, 2019, you counseled: "If the lowest level of the addition is left unfinished, unconditioned, and at natural grade, regardless of height, it will not be considered a story" and accordingly, would not require a variance. You can imagine how the suggestion that the project could be constructed without a variance on the north side of the building at the same height (with the same significant environmental impacts, including impacts to my clients' long-range views of SF Bay, sunlight, use and enjoyment of their property, etc.), based on a tortured definition of a "crawl space" under the County Code would be extremely problematic.

However, during our conversation this morning, you clarified that this reference to construction without a variance was for construction on the south side of the home only. Please confirm that this is correct as there is no other email correspondence in the documents we have received to date to confirm this.

You also confirmed today that the current application for construction on the north side would require a variance, and that you have counseled the applicants that the County will recommend denial of the application if the applicants choose to continue with a proposed project on the north side of the building. You also stated that the application is currently complete, but that you are waiting to hear back from the applicants to determine whether they will withdraw the application before issuing the Notice of Intent to Render a Decision.

EXHIBIT G



EXHIBIT H

Applicant's Home

Appellants' Home

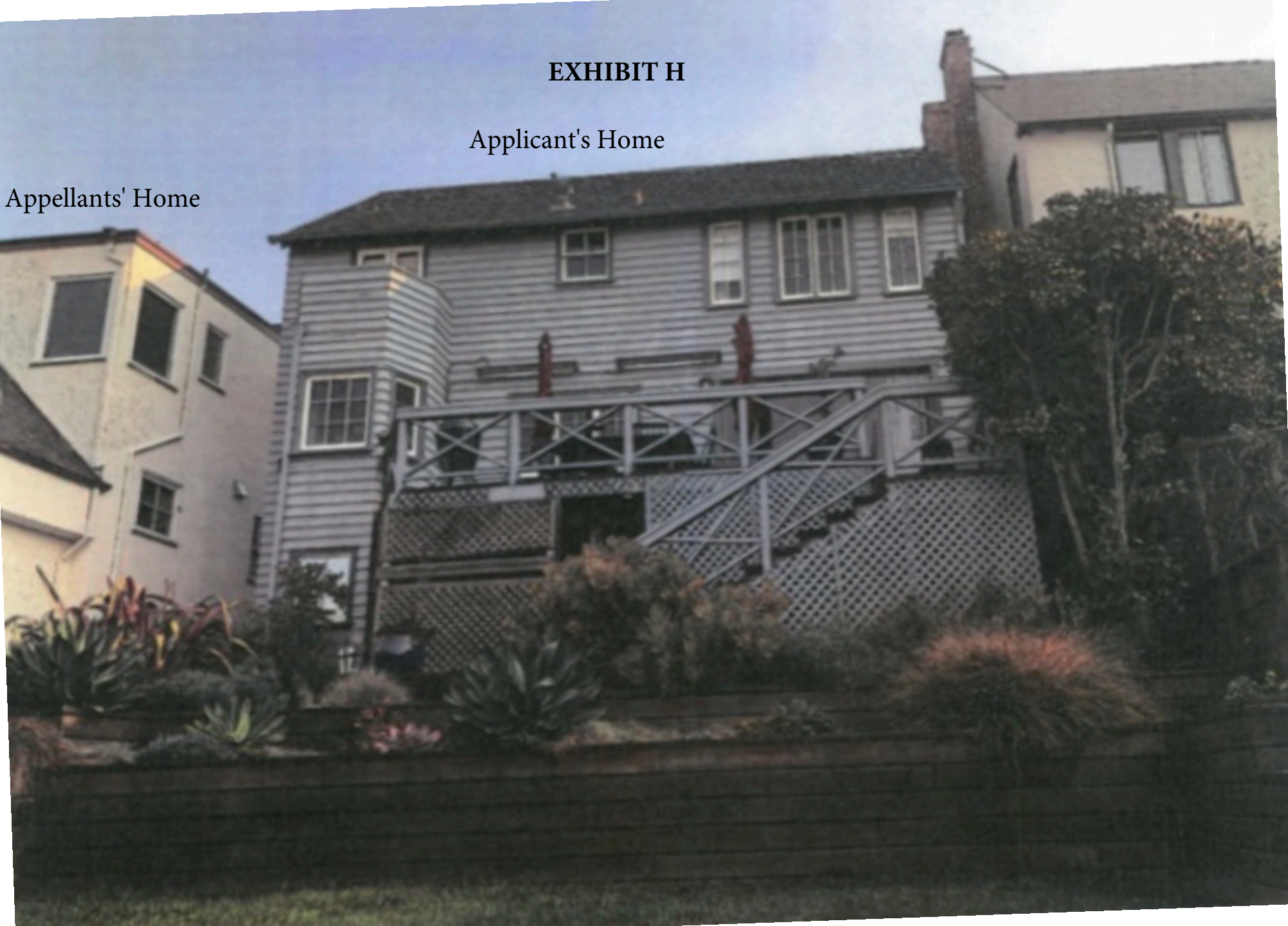


EXHIBIT I

Jillian Blanchard <jblanchard@rudderlawgroup.com>

Fwd: Site Visit

1 message

Nicole Ashar <nicoleashar@ymail.com>
To: Jillian Blanchard <jblanchard@rudderlawgroup.com>

Fri, Aug 7, 2020 at 11:03 AM

Hi Jillian,

Below is chain of emails asking Margaret to reach us for site visit but never called or emailed us back. We called and emailed her but she never returned my phone call or email.

Thank you

From: nicole Ashar <nicoleashar@ymail.com>**Date:** November 6, 2019 at 11:10 AM EDT**To:** Margaret Mitchel <Margaret.Mitchell@dcd.cccounty.us> **Cc:** Jillian Blanchard <jblanchard@rudderlawgroup.com>**Subject: Site Visit**

Hi Margaret,

I have left you voicemail to schedule a site visit but you have not returned our phone call. Please email or give us a call to schedule a date for Thursday November 7 or Friday November 8.

Nicole

Regards,

From: Margaret Mitchell <Margaret.Mitchell@dcd.cccounty.us>**Date:** November 5, 2019 at 9:19 AM EDT**To:** Jillian Blanchard <jblanchard@rudderlawgroup.com>, Nicole Ashar <nicoleashar@ymail.com>**Cc:** Ruben Hernandez <Ruben.Hernandez@dcd.cccounty.us>, Jennifer Cruz <Jennifer.Cruz@dcd.cccounty.us>**Subject: Review of County File #DP19-3019 - 120 St. Albans**

I will still need to conduct a site visit to better understand your clients' concerns. I am available this week on Wednesday at 11:15 or I have times available on Thursday and Friday. Would you and/or your clients be available this week?

Thank you,

Margaret

EXHIBIT J

Applicant's
Home



EXHIBIT K

-----Original Message-----

From: Howard McNenny <h.mcnenny@comcast.net>

Sent: Tuesday, April 16, 2019 4:22 PM

To: Margaret Mitchell <Margaret.Mitchell@dcd.cccounty.us>

Cc: Mary Hanley <mc4hanley@gmail.com>; David Herberich <dherberich@gmail.com>

Subject: Fwd: 120 St. Albans

Margaret:

At this point, we have received at least some of the information on comparable variance applications we requested. Unfortunately, we only got examples from the last 3 years, and some of the attachments we were unable to open. Also, some of the applications were apparently too recent to have been resolved. I have requested an estimate of what it would take to go back at least an additional 3-4 years, but have not to date received any response to that request.

Notwithstanding the sparsity of information received, I have discussed with my clients your offer to set up a meeting with Mr. Hernandez, and we agree it would be useful. The absolute best would be if he could agree to meet us on the site as you did initially, to see for himself the issues involved. It appears to us that we are being encouraged to only build on the south side of the house in order to avoid having to file for a variance. However, I do not see personally how it is possible to avoid the variance no matter where we build. As it is, we have configured our proposed addition to avoid as best we can any infringement on the views from the adjacent house. We do not think it would make much difference if we were to confine the addition to the south portion of the house, and in any event building there would not solve the circulation issues we are trying to address.

Absent a meeting with Mr. Hernandez, I do not see how we will ever get a resolution to our dilemma. You have told us to we should submit for a variance, but you have already told us you do not believe the required findings can be made. We would like to submit something that does not require a variance, but that seems impossible. We have to admit that we are unclear on the rules as currently being interpreted, and have very little information on how similar situations have been resolved. We also are afraid that the hearing before the zoning administrator will not result in clarity. That is why we are requesting your help.

Let me know if such a meeting with Mr. Hernandez will be possible. We are fairly open as to time and date.

Howard McNenny, AIA

1039 Santa Fe Ave, Albany CA

Tel: (510) 705-1671

Cell: (510) 207-7019

h.mcnenny@comcast.net

Margaret Mitchell

From: Margaret Mitchell
Sent: Tuesday, April 09, 2019 8:19 AM
To: 'Howard McNenny'
Cc: David Herberich; Mary Hanley; Ruben Hernandez; Jennifer Cruz
Subject: RE: 120 St. Albans

Hi Howard,

If the lowest level of the addition is left unfinished, unconditioned, and at natural grade, regardless of height, it will not be considered a story. If the area between the lowest floor and the ground below does not meet the definition of a crawl space per section 84-74.404(d), it would need to be included in the gross floor area calculation.

You will receive the information regarding other third story variance applications from Lawrence Huang.

Thank you,
Margaret

From: Howard McNenny <h.mcnenny@comcast.net>
Sent: Wednesday, April 03, 2019 1:45 PM
To: Margaret Mitchell <Margaret.Mitchell@dcd.cccounty.us>
Cc: David Herberich <dherberich@gmail.com>; Mary Hanley <mc4hanley@gmail.com>; Ruben Hernandez <Ruben.Hernandez@dcd.cccounty.us>; Jennifer Cruz <Jennifer.Cruz@dcd.cccounty.us>
Subject: Re: 120 St. Albans

Margaret:

Thank you for the response, however it is one thing to say that our application for a variance must be weighed against the rights of the neighbors (and possibly could be denied), but quite another thing to say that this project does not meet even the basic qualifications for a variance application. This makes it all the more critical that we understand under what circumstances variances have been granted in the past. We look forward to getting that information so that we can make a reasoned judgement on next steps.

Also, to be clear, my understanding is that any addition where the lowest full floor is more than 4 feet above existing grade, the level below that floor must be considered a floor also. Am I correct? Unless there are exceptions to your position on variances, I do not see how any addition could be built on the west side of this house that includes the bedroom level—even on the southern portion. Or, might you be saying that it would still be a variance, but one that might be more likely to be approved?

Howard McNenny, AIA

1039 Santa Fe Ave, Albany CA

Tel: (510) 705-1671

Cell: (510) 207-7019

h.mcnenny@comcast.net

EXHIBIT L

Jillian Blanchard <jblanchard@rudderlawgroup.com>

120 St. Albans Road - DP# 19-3019 - ZA Review

10 messages

Jillian Blanchard <jblanchard@rudderlawgroup.com>
To: aruna.bhat@dcd.cccounty.us
Cc: Nicole Ashar <nicoleashar@ymail.com>
Bcc: Jillian Blanchard <jblanchard@rudderlawgroup.com>

Wed, Jan 8, 2020 at 12:25 PM

Ms. Bhat:

Thank you for reconsidering DP # 19-3019 regarding the proposed development at 120 St. Albans Road. As a follow up to Monday's hearing, and before you make your determination, I wanted to reach out to you regarding a few items.

First, you mentioned receiving written testimony from KMAC representatives. As this testimony most likely addresses the claims we have raised on the record, I would appreciate the chance to respond to this testimony, or at the very least, to review it. It is highly unusual for an 'impartial decision-maker' to file testimony *in support* of a project and does not in anyway support KMAC representative claims that they have been impartial. I would appreciate it if you would forward the KMAC testimony at your earliest convenience, which will save my clients from having to file a 9th Public Records Act request with the County to receive information relevant to their property rights.

At Monday's hearing, the architect for the applicant suggested that the proposed expansion was a two-story addition on a two-story structure. That is simply not correct. Both the Staff Report and the Application make clear that the existing structure is three stories, which is prohibited by CCC §84-4.802. The applicant's architect made this clear when he stated *correctly* in the February KMAC meeting that "a variance is required due to the fact that the house as it already exists **is considered a 3-story structure.**" (Oral Testimony of Howard McNenny, applicant's architect, KMAC meeting February 2019.) This fact remains true whether the addition is on the north or south side of the structure. As described in extensive correspondence to the County, a proposed expansion of the top two floors of a three-story building requires a variance - pure and simple.

For purposes of determining the number of stories, a basement counts as a story if the finished floor level directly above the basement is more than six feet above grade **at any point** (CCC Code §82-4.266), which is absolutely the case here. A basement is further defined in the Kensington Combining District ("KCD") as "any area in a building or structure where the finished floor directly above the area is less than four feet above preconstruction grade or finished grade, whichever is lower." Again, this is the case with the house on 120 St. Albans Road. The analysis does not hinge in anyway on the definition of a 'crawl space' as suggested by County staff and repeated by the applicant's architect in Monday's hearing. Moreover, it is unclear why the County would rely on a novel - and unsupported - legal interpretation to avoid a variance in violation of its own Code, particularly in this situation, in which a neighbor has very real, legitimate concerns about significant impacts to long-range views, privacy, and property values. Approving the current design without a variance would not be legally supportable and would lead to a protracted legal battle to force the County to comply with its own laws.

The primary goals here are to avoid significant impacts to long-range views, privacy, and property values, and of course, to comply with planning and zoning laws. Some suggestion was made yesterday that the County is allowed to authorize *some* impacts to views and privacy. We would remind you of the Kensington Combining District Ordinance, which requires the County to: a) **minimize** impacts to surrounding neighbors; b) **protect** the value and enjoyment of the neighbor's property; and c) **maintain** property values. Authorizing obstructions to my client's *only* long range views of the Bay Bridge on the upper floor would not serve to minimize impacts or protect my client's value and enjoyment of their property. We have provided substantial evidence to suggest that there will be significant impacts to long range views from the upper level and out of the kitchen sink window on the lower level, which will also significantly impact my clients' privacy and property values. If the County believes the project will not cause such significant impacts, it is critical that they require the applicant to install story poles to establish this fact before allowing applicants to construct a permanent expansion. Without story poles to prove otherwise, the County will be making a finding contradictory to the substantial evidence on the record.

We also remind you that the variance standards require that the County (indeed the applicant) make a showing that there is no grant of special privilege here. Allowing one neighbor to essentially steal the view of another would clearly be a grant of special privilege without a proper showing of special need.

We also note that the County continues to reference the new deck as a replacement. As described at length at the first hearing on December 16, 2019, the new deck is proposed to start approximately 5 1/2 feet out from the existing structure, which would lead to an additional **6-7 feet** from the existing house, significantly impacting my clients' long range views, privacy, and property values. The Staff Report incorrectly states a critical dimension of the deck, claiming that it will only stick out 1.5 feet. Given the proposed house addition plus the new 10.5 foot deck, the new deck will be mostly outside of the existing deck footprint (which is only 9 feet from the existing structure). These critical miscalculations could cost my clients the loss of an astounding long-range view and privacy from their kitchen sink window, key selling points of their home. These inaccuracies also could be avoided by installing story poles to show the actual impacts associated with the proposed design.

There are simple solutions that the County must employ to avoid a protracted legal battle. Require the applicants to install story poles to establish the actual impacts from the project. If the project does not permanently damage my client's long range views, privacy, and property values, then perhaps a variance and DP can be approved. Another, more direct, solution, if the applicants are unwilling to install story poles, would be to have the applicants redesign the project to actually minimize impacts on my clients' views by: 1) reducing the size of the enormous deck footprint to 3.5 feet, (to stay within the existing footprint and be a true replacement deck); and 2) reducing the extent of the upper level to sit behind the existing structure (or 'nook') to preserve my client's long range views on the upper level. If the County fails to follow its own Code, acknowledge the substantial evidence on the record, and approves the project as designed without sufficient minimization measures, my clients will be left with no option but to appeal the decision.

Finally, any proposal to revise the design to address the setback issue, remove the window, or reduce the size of the deck/upper level should include resubmittal of project designs to ensure proper review and vetting before approval. This approval process has been fraught with due process violations and inattention to detail that has cost my clients (and the applicants) dearly. In addition to the extensive PRA requests we've been forced to file to simply understand the project, the County has failed to provide adequate notice or adequate meeting minutes of administrative decisions. Indeed, one cannot even hear the audio from Monday's hearing on this matter on the County's website. We strongly recommend that the County carefully work to address these laps in procedure and rectify our due process concerns by following the solutions suggested above.

Sincerely,
Jillian

--

Jillian B. Blanchard

Rudder Law Group, LLP

1101 Marina Village Pkwy, Suite 201

Alameda, CA 94501

Direct: 415.867.6769

www.RudderLawGroup.com

CONFIDENTIAL MESSAGE

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EXHIBIT M

Friday, October 4, 2019 at 2:13:23 PM Pacific Daylight Time

Subject: Re: 120 St. Albans Kensington
Date: Thursday, August 1, 2019 at 2:13:01 PM Pacific Daylight Time
From: patricktahara
To: Kate Rauch

interesting change in plan.

I am assuming that the neighbor , nicole, had seen this change? or she worked up even over this one.

Patrick Tahara
415-307-4042

----- Original message -----
From: Kate Rauch <Kate.Rauch@bos.cccounty.us>
Date: 8/1/19 10:11 AM (GMT-08:00)
To: Aruna Bhat <Aruna.Bhat@dcd.cccounty.us>
Cc: patricktahara@comcast.net
Subject: Re: 120 St. Albans Kensington

I assume this redesign needs to go back the the KMAC?
Kate

Sent from my iPhone

On Aug 1, 2019, at 9:58 AM, Aruna Bhat <Aruna.Bhat@dcd.cccounty.us<mailto:Aruna.Bhat@dcd.cccounty.us>> wrote:

Please see the attached Small Lot application KR19-00011 that is out for public review.

~~~~~  
Danielle Kelly  
Department of Conservation and Development  
30 Muir Road  
Martinez, CA 94553  
925-674-7789  
925-674-7205- Main Line  
danielle.kelly@dcd.cccounty.us<mailto:danielle.kelly@dcd.cccounty.us>

<image002.png>

From: Kate Rauch <Kate.Rauch@bos.cccounty.us<mailto:Kate.Rauch@bos.cccounty.us>>  
Sent: Wednesday, July 31, 2019 10:28 AM  
To: Aruna Bhat <Aruna.Bhat@dcd.cccounty.us<mailto:Aruna.Bhat@dcd.cccounty.us>>; Jennifer Cruz <Jennifer.Cruz@dcd.cccounty.us<mailto:Jennifer.Cruz@dcd.cccounty.us>>; patricktahara@comcast.net<mailto:patricktahara@comcast.net>  
Subject: 120 St. Albans Kensington

**EXHIBIT N**

Jillian Blanchard &lt;jblanchard@rudderlawgroup.com&gt;

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**Re: 120 St Albans Road - NEW PUBLIC RECORDS ACT REQUEST**

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Jillian Blanchard <jblanchard@rudderlawgroup.com>  
To: Nicole Ashar <nicoleashar@gmail.com>

Tue, Oct 1, 2019 at 11:16 AM

Hi Nicole- Please let me know if you have any comments on the email below. As discussed by phone, I plan to share this with Margaret, Lawrence, the Planning Director, Ruben Hernandez, and County Counsel.

Lawrence and Margaret:

The County's response to our Public Records Act ("PRA") request is substantially incomplete and does not comply with the PRA. The PRA request sent September 20, 2019 (below) clearly requested copies of "any plans, submittals, applications, or communications from or to the County relating to the Property (120 St. Albans Road), including any reference to land use application #KR19-0011 and/or any other applications for development. . . including any communications between the County and the applicants regarding any Land Use Applications." Instead of providing a comprehensive response as required under the PRA, the County provided a PRA package that consists primarily of Rudder Law Group's correspondence with the County. There is only one letter from the County to the applicants at 120 St Albans, and it does not even include the attachment referenced in the letter.

Egregiously, the County failed to include permit application documents and communications with the KMAC that we know exist. County staff Margaret Mitchell stated in an email to me, dated September 19, 2019, that "the applicant submitted a development plan application yesterday afternoon," and yet, the County FAILED to provide a copy of that application in the PRA response, which was the primary focus of the PRA request. Moreover, the County's PRA response below does not include any communications related to discussions with the KMAC, which communications were specifically requested in the PRA request.

Instead, my clients have been forced to make calls directly to KMAC members and go to the County's offices to try to determine the status of the proposed development next to their house. After essentially begging for information that they should have been provided as a matter of law, my clients learned that the KMAC has already scheduled a hearing on October 29, 2019. Obviously, if the KMAC has scheduled a hearing date, the County *must have* communicated with KMAC members about the project and shared the development application. And yet, the County's PRA response does not include any communications to or from the KMAC regarding this application, nor does it include any notice to my clients that a hearing affecting their property will take place on October 29th. It is only through my clients' sleuthing that they learned of the upcoming hearing date. Not only does the County's behavior violate standard land use laws and the PRA, but it violates my clients' due process rights to be notified of potential development that will affect their property rights.

It's unconscionable, and more importantly flouts land use law and the PRA, for the County to fail to sufficiently respond to the PRA request and continually fail to notify my clients of a hearing that will directly affect their property rights. Unfortunately, a similar breakdown in the land use approval process happened during the last KMAC hearing in which my clients learned of the KMAC hearing date only two days beforehand. The County's repeated failure to follow its own process has forced my clients to chase down County officials simply to understand the process affecting their property. This is particularly egregious when the County is required to provide all communications related to the approval process in the PRA response. Please respond immediately with the relevant documents requested in the PRA request, including in particular, the development plan application for 120 St. Albans and any and all communications between the County and the KMAC regarding the review process.

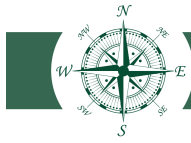
Thank you,  
Jillian

[Quoted text hidden]



**EXHIBIT O**  
**PC APPEAL LETTER**  
*(See Separate Attachment Due to File Size)*

# Exhibit O - Board of Supervisors Appeal



RUDDER LAW GROUP

## REQUEST FOR APPEAL REGARDING ZA RULING ON DP#19-3019

### Dear Planning Commissioners:

On behalf of the owners of 118 St. Albans Road (the “Neighbors”), we submit this request to Appeal the Zoning Administrator’s Approval of a Development Plan Application DP#19-3019 to construct an expansion to a three story residence in Kensington (the “Project”). The approval process has been fraught with land use inconsistencies, misrepresentations, due process violations, and bias. Most importantly, the Zoning Administrator (“ZA”) ignored the substantial evidence on the record establishing that the Project requires a variance and has the potential to cause significant impacts to neighboring long-range views, privacy, and property values. We are hopeful that the impartial review of the Planning Commissioners will correct the due process violations that have occurred to date and ensure that any project approved on this property complies with planning and zoning law and preserves the Neighbors’ long-range views, privacy, and property values.

### **I. INTRODUCTION**

The applicant proposes to build an expansion to the second and third stories on their three-story house - in violation of current zoning height restrictions- that would potentially cause significant aesthetic impacts to the neighboring property.

The approval process for this Project has been riddled with due process violations that the Planning Commission must address to avoid a protracted legal battle. The County has repeatedly failed to properly inform neighbors about the proposed Project, failed to provide adequate notice of meetings, failed to consider the substantial evidence on the record, failed to follow its own code requiring a variance, and failed to address the Neighbors’ very reasonable concerns regarding significant impacts to long-range views, privacy, and property values.

First, the County violated planning and zoning laws by approving the Project without issuing a variance. Second, the County repeatedly ignored the substantial evidence on the record that establishes the potential for the Project to cause significant aesthetic impacts. Finally, the County violated due process protections by failing to provide the Neighbors with adequate notice and information related to the Project, by misrepresenting key dimensions relevant to environmental impacts, and by biasedly advocating on behalf of the applicant in a wholly inappropriate manner. In doing so, the County failed to protect the Neighbors’ privacy, long-range views, and property values all of which are specifically protected under the unique Kensington Combining District (“KCD”) Ordinance that applies to this neighborhood. For these reasons, the Planning Commission must overturn the ZA decision, require a variance for this Project, and require the applicant to install story poles to determine the actual impacts that the Project, or any redesigned project, will cause before approving it.



We note that the applicant has made repeated personal attacks on the Neighbors, suggesting that their goal is to stop the Project. This is simply not the case. All the Neighbors want – all they have ever wanted- is fair play, impartial decision-making, compliance with County Code, and protection of their long-range views, privacy, and property values as required by the KCD Ordinance.

## II. VIOLATIONS OF PLANNING AND ZONING LAWS

Despite substantial evidence on the record to the contrary, the ZA approved the Project without issuing a variance and without confirming compliance with both the variance requirements and the KCD Ordinance standards.

### A. A VARIANCE IS REQUIRED FOR THIS PROJECT

#### i. A Variance Is Required to Expand an Existing Three Story Structure.

The Project proposes to expand the second and third story of a house in violation of CCC Code §84-4.802, which requires that all building heights be capped at 2 ½ stories. Any proposed expansion of the third story requires a variance – pure and simple. Many houses on the street currently have three stories, and are nonconforming structures, which does not in itself require a variance. But when an applicant proposes to expand that nonconforming element of their house, a variance is required. The applicant’s own architect acknowledged the need for a variance in his February 2019 testimony to the Kensington Municipal Advisory Committee (“KMAC”): “A variance is required due to the fact that the house as it already exists is considered a 3-story structure, due to the fact that is built on a down-slope lot that places the first floor in excess of 4-feet above grade at the rear of the structure. Current zoning places a limit of 2 ½ stories on houses in this zoning district.” (Testimony of Howard McNenny, applicant’s architect, KMAC meeting February 2019.)

For purposes of determining the number of stories of a structure, a basement counts as a story if the finished floor level directly above the basement is more than six feet above grade at any point (CCC Code §82-4.266). A basement is further defined in the KCD Ordinance as “*any area* in a building or structure where the finished floor directly above the area is less than four feet above preconstruction grade or finished grade, whichever is lower.” (CCC Code §82- 74.404). Based on these definitions, the ground floor of the existing structure at 120 St. Albans Road is a story, and the entire house is three stories. Even the Staff Report acknowledges that the house is three stories. (See Staff Report, p.2.) We have made clear in extensive documentation to County Staff (See Public Records Act request March 3, 2019 [[Exhibit A](#)]; Hearing Request to the County, dated August 30, 2019 [[Exhibit B](#)]; Second Hearing Request and Update to the County from KMAC Meeting, dated November 4, 2019 [[Exhibit C](#)]; and Corrections to the Staff Report, dated



December 13, 2019 [**Exhibit D** ]) that the CCC Code requires the applicant to obtain a variance for the proposed expansion of this three story structure. County staff has ignored the substantial evidence on the record and the law and issued a Project approval without a variance.

The Staff Report incredulously suggests that while a variance would be required for a proposed expansion of the third story on the north side of the house, a variance is no longer required for a similar sized expansion *on the same third story* - because it is now constructed on the south side of the building. This tortured definition defies logic and common sense. A building either is, or is not, three stories. It is not two stories on one side and three stories on another. An expansion of the top two floors of a three-story building, when proposed in Kensington – which establishes a 2 ½ story limit requirement - requires a variance.

Even the applicant’s own architect was confused by County staff’s novel efforts to avoid variance requirements. In an email from the architect to the County planner on April 16, 2020, he stated: “It appears to us that we are being encouraged to only build on the south side of the house in order to avoid having to file for a variance. However, I do not see personally how it is possible to avoid the variance no matter where we build.” (See **Exhibit B**, Attachment A.) He goes on to state: “my understanding is that any addition where the lowest full floor is more than 4 feet above existing grade, the level below that floor must be considered a floor also.” (See **Exhibit B**, Attachment B.) We note that this same architect conveniently reversed his conclusions two months later once he realized that County staff might offer this particular applicant a special loophole. Indeed, the subsequent application filed by the architect in July erroneously suggests that the Project is now a “2-story addition to existing 2-story house.” (See **Exhibit E**, Application dated July 25, 2019.) This is patently false and belies the Neighbors’ concern that the applicants repeatedly misrepresent key facts to the County. Moreover, the County’s efforts to guide the applicant in ways to avoid a variance is also troubling, particularly given the Neighbors’ reasonable concerns.

We asked County staff to provide any example, any legal precedent, in which it has ever relied on the novel – and legally unsupportable - interpretation that a variance only applies for the proposed expansion of a three-story structure on one side of the building, or any similar ruling, and the County has produced nothing. County staff sent us a letter on December 13, 2019, stating that “[t]he Department has not identified any other ‘legal precedent, findings, records, memorandum, or guidance that would support the Legal Conclusion’” that a variance is not required. (See **Exhibit F**.) The County’s failure to identify any legal precedent is not surprising as such an approach not only defies common sense, but would likely lead to chaos and legal disputes in processing land use applications throughout the County. Indeed, we can think of several instances in which this tortured interpretation would set terrible precedent for the County and its ability to consistently regulate development. More to the point, it is not appropriate for the



County to bend over backwards looking for loopholes to avoid variance standards, particularly when significant impacts to neighbors would result from allowing such exceptions.

The notion that a proposed expansion to the third story in violation of the County Code would be granted without a variance also suggests the potential for substantive due process violations as well. (*See Neighbors in Support of Appropriate Land Use v. County of Tuolumne*, 157 Cal. App. 4th 997, 998 (2007).) Development that causes environmental impacts and directly steals the long-range views of another house, and use and enjoyment of a neighbor's property, not to mention significantly reduces their property values, is exactly what the Kensington height restriction was created to protect against.

Unfortunately, County staff seems bound and determined to avoid a variance for the Project, which is particularly troublesome given the significant concerns of surrounding neighbors. It is well settled law in California that a County cannot pick and choose which portions of the code to apply. (*See Broadway, Laguna etc. Assn. v. Board of Permit Appeals*, (1967) 66 Cal.2d 767, 779-780; *See also Orinda Assn v Board of Supervisors*, 182 Cal.App.3d 1145 (1986).) County staff has made a finding that squarely conflicts with its own code. This decision must be overturned and a variance must be required for the proposed expansion of the third story of a three-story building that violates the zoning limit to protect not only the rights of the aggrieved neighbors, but also the County's precedent and integrity in consistently applying land use law.

#### ii. SETBACKS REQUIRE A VARIANCE OR A REDESIGN

Similarly, the Project as proposed does not comply with setback requirements and requires a variance for this reason as well.

The Staff Report correctly cites the CCC Code requirement that "a reduced side yard minimum of 3 feet and a [minimum] aggregate side yard of 8 feet is allowed for any new construction (CCC Section §82-14.004)." It then goes on to incorrectly conclude that the Project meets these setback requirements.

Sheet A-3 of the revised application (**Exhibit D, Attachment A.**) shows that the Project will result in 3 feet on one side, and 2'10" on the other, for an aggregate of 5'10" with the proposed new construction. While three feet may be allowed for a single side yard, the new addition falls well short of the aggregate requirement to have a minimum of 8' for both side yards. Accordingly, a variance is required to allow for this continued inconsistency with the County's Code.

What's worse, the applicant has repeatedly filed misrepresentations regarding the dimensions of the proposed Project regarding setbacks. The revised July Application filed by the architect initially identified the setback as 2' 3 ½" on one side and 2' 10 ½" on the left side for a total of 5' 2" aggregate – *well below* the setback requirements. (**Exhibit G-1.**) When the architect realized that the setbacks might become an issue, he filed a revised application to show that the same



area on the right side was now 3” (See Exhibit G-2.) These plans show two different measurements for the same side without any redesign or explanation as to why this measurement would have changed. The only explanation we can fathom is that the number on the page was changed in an effort to meet setbacks on paper, but not in reality. The architect went further in an email to the County on December 31, 2019, by filing another revised application sheet and stating that: “Our proposal shows . . .the setback on the north sides is 10'-0”, or twice what is required.” (See Exhibit G-3.) As the plan shows, the 10’ measurement does not address the measurements closer to the existing structure which do not comply with setback requirements. These factual misstatements and misrepresentations highlight the lengths to which this applicant appears willing to go to misrepresent the actual dimensions and facts surrounding the Project. Facts matter and so does protecting the residents of Kensington.

At the January 6, 2020, ZA hearing continuance, the applicant’s architect submitted the revised plan view in an effort to establish that the Project complies with setback requirements; however, the architect’s own diagram establishes the opposite. Even if viewed in a light most favorable to the applicant, one side of the proposed addition is 3 feet, while the other is 4’10”. (Exhibit G-2.) While it is close, this does not comply with the 8’ foot aggregate CCC Code requirements. Again, the County cannot ignore its own code requirements simply because the measurement is ‘close’.

Rather than confirm the dimensions by measuring them independently, and requiring the applicant to submit an application that complies with setback requirements or obtain a variance, the ZA made a vague finding on January 22, 2020, that it would approve the Project as long as the Project was redesigned to avoid setback issues. This abdication of duty is unacceptable. If the Project requires a redesign to meet setback requirements, then the applicant must submit an actual redesign, and the County should independently confirm these dimensions to avoid any misrepresentation by the applicant. The County cannot rely on a verbal commitment to meet setback requirements. Independent confirmation and revised designs are particularly important when the applicant has previously misrepresented the dimensions and components of the Project.

It is paramount that the County vigorously implement its variance regulations to adequately protect the community. Any court reviewing the County’s decision would “meaningfully review grants of variances [or failure to require a variance] in order to protect the interests of those who hold rights in property nearby the parcel for which a variance is sought.” (See *Orinda Assn v. Board of Supervisors*, 182 Cal.App.3d 1145, 1162 (1986). CA courts have clarified that if the interest of neighboring property owners in preventing unjustified variance awards [or exemptions] for neighboring land is not sufficiently protected, the consequences would be dire. See *Id.* On the contrary, the County’s primary responsibility is to ensure that such ordinances are fairly and consistently applied to protect the entire community it regulates.



### III. THE PROJECT HAS THE POTENTIAL TO CAUSE SIGNIFICANT IMPACTS

We implore the Planning Commission to correctly and consistently implement the CCC Code to protect neighboring long-range views, privacy, and property values.

#### **A. The Project May Cause Significant Impacts to Long-Range Views of the Bay Bridge and Downtown San Francisco.**

The Neighbors have a very unique view of downtown San Francisco and the Bay Bridge, which are key selling points of their home. The Staff Report both misstates facts and glosses over the significant long-range view impacts potentially caused by the Project. First, the Staff Report incorrectly suggests that the Neighbors' property only has west facing views and relies on this falsehood to claim that views will not be impacted. As is clear from the many photos we have provided to staff (See **Exhibit D**, Attachment B -1 & B-2 and C-1 & C-2), the Neighbors' property has views to the southwest of the South Bay, including the Bay Bridge, that may be affected by the Project on both the upper and lower levels.

The Staff Report also incorrectly states that "the existing house is located downhill of the neighbors . . . and the addition will be lower than the existing residence. So the addition will not impact views of the San Francisco Bay. . . ." (Staff Report, p. 15, Finding 4.) This is not correct. Any simple search on Google Maps will show that the existing house is actually slightly uphill from the Neighbors' property. Again, this faulty logic has led to unsubstantiated findings by the ZA.

Indeed, the expansion of the third story proposed in the Project will impact the Neighbors' views of the Bay and the Bay Bridge. (See **Exhibits B, C, & D**.) The Staff Report incorrectly suggests that the upper addition proposed will only extend 2 feet beyond the existing house. (Staff Report, p.7, Finding 3.) On the contrary, what is shown in the application is that the upper level addition will extend 7' 2 1/2" from the existing house, and at least 3 1/2 feet from the existing structure, directly into the Neighbors' current views. (**Exhibit H**.) We provided several pictures to County staff and to the KMAC to establish this, but rather than consider this substantial evidence, the County has ignored this evidence without providing any contrary evidence through the use of story poles to clarify the actual impacts of the Project.

To further highlight staff's lack of care, due diligence, and concern during this process, the Staff Report erroneously asserts that the new deck, which barely overlaps the existing deck, is a *replacement deck* that extends 1 1/2 feet more than the existing. (Staff Report, p.8). Once again, the County misstates the facts and relies on falsehoods to approve the Project. First, it is clear from the Application Sheet C-2 (**Exhibit G-2**), that the new deck proposed will not be located within the existing deck footprint, but rather will be constructed behind the new addition and will extend 5 2 1/2 feet into the Neighbors' long-range views. We explained this inaccuracy to the ZA and received absolutely no response, acknowledgement, or suggestion that the Staff Report should be revised. (**Exhibit D**.) As described in extensive correspondence to the County, the new



deck proposed will extend directly into the best part of the Neighbors' Bay Bridge view from their kitchen sink window, a key selling point of their home. (See Exhibits B-D.)

County staff has never once visited the Neighbors' property to address the situation. Staff was invited back in February 2019 and declined the request. The County planner for the project has never met directly with the Neighbors to discuss their concerns. Indeed, until late 2019, County staff repeatedly avoided the Neighbors' requests for meetings and site visits. Instead, the ZA relied on incorrect dimensions in the Staff Report to suggest that southern views, which very much exist, will not be impacted. Had the County visited the property or required the applicant to install story poles before recommending approval, staff would have realized their mistake, and one would hope, requested that the applicants reduce the size of their unnecessarily large new deck structure to minimize impacts to the Neighbors' long-range views of the Bay Bridge and downtown San Francisco.

**B. The Proposed Project Will Impact the Neighbors' Privacy.**

As repeatedly described to the County, if a deck this large is approved, not only will the Neighbors' unique view of the Bay Bridge and downtown San Francisco be gone from this side of the house, but their privacy will be significantly impacted as well. Every time the applicants have people out on their deck, the Neighbors will be forced to look at them from their kitchen sink window instead of their previous Bay Bridge and Bay views. The proposed new deck is so large that it could also impact privacy from the master bathroom upstairs as well, as indicated on the rendering recently submitted by the applicant to the County. (See Exhibit I.) Having a deck this size impacts both long-range views and privacy and does not comply with the KCD Ordinance requirement to "protect the value and enjoyment of the neighbor's property". (CCC Code §84-74.1206.)

**C. The Project Will Significantly Impact Property Values.**

The Staff Report erroneously concludes that the Neighbors' property values will not be impacted and does not provide any evidence to refute the substantial evidence on the record to the contrary. As stated in a letter we provided from the prominent real estate agent who sold the Neighbors' property, impacts to the Neighbors' privacy and views from the kitchen window and master bath, will be impacted by the proposed project, and are major selling points to this particular home. (See Exhibit D, Attachment D.) Rather than address this evidence, and ask the applicants to reduce the size of their structure to avoid these significant impacts, the County suggests in the Staff Report that "since the addition will be increasing the enjoyment and value of the [applicant's] property, it will in turn increase the value of the neighboring properties". (Staff Report, p.7). This sentence is nonsensical. Ironically, the applicant's property values would be increased by directly stealing the Neighbors' views. This is exactly the type of project the KCD Ordinance was created to protect against. The ZA ignored the substantial evidence from a





prominent realtor stating that property values would be significantly impacted and approved the Project anyway.

**D. The Project Does Not Comply with the Kensington Combining District Standards.**

The County has recognized Kensington as a particularly special place with exceptional long-range views of the Bay and downtown San Francisco. To protect these unique features, the County has established the KCD Ordinance specifically to “promote the community’s values of *preservation of views*, light and solar access, *privacy*, parking, residential noise levels, and compatibility with the neighborhood with regard to bulk and scale. (CCC §84-74.204(b).) The KCD Ordinance creates an additional layer of required review by the County to ensure that neighboring views, privacy, and property values are protected.

Even if the County was not required to issue a variance here – which it clearly is – the Project will violate KCD Ordinance standards and should not be approved as currently designed. The KCD Ordinance requires the ZA to evaluate siting, size, height, setbacks, window placement, etc. of even the smallest projects to determine a project’s actual “impact on the neighboring properties, with regard to view protection, obstructions, privacy in living areas, . . .” (KCD §84-74.1206.) Under the KCD Ordinance, the County MUST confirm that the project both “minimize[es] impacts upon surrounding neighbors; [and] protect[s] the value and enjoyment of the neighbors’ property” (Id.) The KCD Ordinance goes so far as to allow hearings for small building permits and requires sun shadow analysis for even the smallest structures to protect the neighbors. These protections explain why the County – in all other instances – has taken a very hard look at proposed additions in Kensington and regularly denies variances for height expansions.

As evidenced above and on the record, the Project – even on the south side of the house, has the potential to impact long-range views, privacy, and property values of the neighbors, which directly flouts KCD Ordinance requirements. While the County is allowed to balance interests, the ZA has focused her decision exclusively on the applicant’s interests. During her ruling on January 22, 2020, the ZA only read out loud Section 84-74.204(a) of the KCD Ordinance to benefit the applicant and neglected to read Sections 84-74.204 (b), 84-74.1206 (a) and 84-74.1206(b), all of which require the County to protect the surrounding neighbor’s long-range views, use, value, enjoyment, and privacy.

As previously proposed to County staff, a smaller addition could be constructed on the property that would avoid these significant impacts and would comply with the KCD Ordinance requirements. Rather than deny any development – as the applicant dramatically suggests–the Neighbors only wants to have their views and privacy protected. The applicants could easily accomplish this by limiting the upper level addition to the size of the existing house on the north side and reducing the deck to the previous footprint, to be an actual replacement deck. These changes would provide the applicant with a significant addition to their house while protecting the value of the Neighbors’ privacy, and property values and minimizing impacts to long-range



views as required by the KCD Ordinance. These reasonable requests were not even considered in the ZA hearing. Instead, the ZA relied on incorrect dimensions and falsehoods in rendering a decision.

When two sides posit such differing positions regarding precious views and privacy, the only reasonable approach is to require the installation of story poles to confirm that the Project will not cause aesthetic impacts. In the unlikely event that story poles establish that view and privacy impacts will in fact be protected, then the Neighbors would have no issue with the Project. As stated repeatedly, the Neighbors have no interest in stopping development, and have never before challenged a land use decision by the County. But given the County's current failure to follow its own code, the apparent bias in decision-making, and the very real impacts this Project could cause to their enjoyment of their home, the Neighbors have been left with no other choice but to challenge the ZA's decision.

**E. This Project May Cause Potentially Significant Impacts that Need to be Analyzed Under CEQA.**

Without story poles to confirm otherwise, it's very possible that the Project could cause significant aesthetic impacts that have not been properly reviewed under CEQA. "A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." (Public Resources Code §21084(d); CEQA Regulations §15300.2(c).) The record contains evidence to suggest potentially significant environmental impacts associated with this Project that could make use of a categorical exemption inappropriate here.

**IV. DUE PROCESS CONCERNS**

The land use approval process for this Project has been plagued with due process violations ranging from inadequate notice to potential bias from what should be impartial decision-makers.

**A. Failure to Inform Interested Parties.**

From the beginning, the County has stonewalled the Neighbors' attempts to learn about the proposed project, a development that will directly impact their home. The Neighbors were denied access to the file on multiple visits to the County starting back in late 2018. Even though the Neighbors repeatedly voiced their reasonable concerns to the Project planner, County staff failed to keep them informed. The Neighbors were ultimately forced to hire land use counsel, who have had to file not one, *but 12* Public Records Act ("PRA") requests with the County to learn about the Project. (See discussion of the issue in **Exhibit A**, PRA request to the County March 3, 2019.) California law requires the land use process to be open and transparent, and the planner's job is to inform the public. Unfortunately, County staff did not take the Neighbors seriously – or even respond to them- until they hired a land use firm to handle the matter.



## **B. Inadequate Notice.**

As discussed extensively with the County (See **Exhibits A, B, C, and D**), throughout the process, the County has failed to provide mandatory notice of the various land use proposals for a property located next door – even after the Neighbors specifically requested to be notified.

In February, County staff misrepresented the status of the revised application and told the Neighbors that the Project was on hold when in fact a meeting was scheduled to review a revised application in front of the KMAC two weeks later. The Neighbors were forced to scramble to attend the February 26, 2019, KMAC meeting to ensure their property rights would be protected.

As an advisory committee that represents the County charged with providing valuable input to the Board of Supervisors regarding land use decisions, the KMAC is required to hold meetings that follow Brown Act requirements and provide objective recommendations based on the legal standards established in California planning and zoning law. Unfortunately, the KMAC repeatedly failed to comply with these legal protections when reviewing the Project.

At the February 2019 KMAC meeting, KMAC members appeared to be coaching the applicant on ways to avoid a variance (discussion below). The Neighbors were naturally concerned after this meeting and emailed County staff requesting a meeting to discuss the likely impacts of the Project. County staff never responded to this request. The Neighbors then asked County staff to visit their property to better understand the issues, but County staff refused. The Neighbors were forced to go directly into the DCD office wherein they met with Mr. Ruben Hernandez, who listened to their plight, but did not indicate that such facts would be considered, and upon seeing the significant impacts the Project would cause to long-range views, mysteriously stated that he would need to recuse himself from reviewing this application. We learned later that Mr. Hernandez was the one who had verbally guaranteed approval to the applicants back in September (See **Exhibit J**, applicant email confirming his understanding from County supervisor that a variance would be approved.)

The October KMAC meeting was even more troubling. The KMAC members failed to comply with the Brown Act's requirement to provide adequate notice to the public. (CA Gov Code 54956.) Ms. Snyder, who volunteered to provide KMAC notice -and consequently was the same KMAC member who coached the applicant in February- provided notice of the meeting to all other neighbors surrounding the Project, except to the two opponents of the Project, the Neighbors and Ms. Donna Stanton, the owner of 134 Windsor Road in Kensington.

When the issue of adequate notice was raised at the October meeting by Ms. Stanton, the KMAC members did not apologize or suggest a new process to ensure adequate notice going forward, they instead suggested that Ms. Stanton's property must have fallen outside the noticing area. This assertion is patently false. Through PRA requests, we have learned that both Ms. Stanton's



and the Neighbors' properties fall within the notification area for this KMAC meeting (See **Exhibit K** which contains the KMAC's list of all properties within the KMAC noticing area for this Project—relevant properties highlighted.) Indeed, both of Ms. Stanton's neighbors on either side received notice of the KMAC meeting.

When individual rights are being deliberated in an administrative hearing or similar meeting, interested parties are required to be apprised of the application "so that [they] may have an opportunity to refute, test, and explain it, and the requirement of a hearing necessarily contemplates a decision in light of the evidence there introduced. (*Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152, 1172 (1996).) Without adequate notice, it "would be tantamount to requiring a hearing in form but not in substance, for the right of a hearing before an administrative tribunal would be meaningless if the tribunal were permitted to base its determination upon information received without the knowledge of the parties." (*Id.*) Without such required notice, the KMAC meeting should not have been held and should have been rescheduled. At the very least, the KMAC members could have suggested a more robust notice process going forward to avoid these due process issues.

### C. **Bias.**

Perhaps most troubling, is the evidence on the record of bias by KMAC members in what the law requires must be an impartial decision-making process. At the February 26, 2019, KMAC meeting a KMAC member provided the applicant with specific guidance on how they could "avoid a variance" in what could be viewed as a spurious effort to circumvent the variance requirements. Sadly, when the Neighbors raised the concern about this KMAC member with the Supervisor's Office back in March of 2019, the Supervisor's assistant dismissed the issue saying that rather than work with the Neighbors, they could always appeal it to the Board of Supervisors. (See **Exhibit L.**) Rather than address direct issues early on, the County has ignored the problem, probably hopeful that the Neighbors would simply give up. It should not be this difficult for a County resident to receive fairness and consideration in the land use process.

The same KMAC member who coached the applicant in February and failed to provide adequate notice to Project opponents in October, Ms. Snyder, appears to have a clear conflict of interest. The Neighbors have learned from various neighbors in the area that Ms. Snyder solicited support for the Project when notifying them about the October KMAC meeting. The Neighbors obtained signatures from 35 different neighbors confirming that Ms. Snyder asked them to attend the meeting in support of the Project, which would be clear evidence of campaigning in violation of California laws protecting impartial decision-making.

If there is evidence of an "unacceptable probability of actual bias on the part of a decision-maker", that decision-maker must be disqualified from reviewing the application. (See *Nasha LLC v. City of Los Angeles*, 125 Cal. App. 4th 470, in which a Planning Commission decision was vacated because one of the Commissioners showed clear bias by speaking out against a pending



project.) While it may not be objectionable for a KMAC member to have a personal preference regarding a project, California law prohibits public representatives from campaigning for any project that they are reviewing.

With these legal standards in mind, we sent an email to Ms. Snyder before the KMAC meeting respectfully asking her to either explain the situation or to recuse herself from deliberating on the Project. (**Exhibit C**, Attachment A). Ms. Snyder did not respond to our email request. When the KMAC Chair raised the issue with Ms. Snyder at the meeting, she said the accusation was false, but provided no evidence to counter the 35 signatures from neighbors establishing her efforts to campaign for the Project. The KMAC Chair accepted Ms. Snyder's statements without any further precautions and allowed her to vote on the Project. To avoid even the appearance of bias, Ms. Snyder should have recused herself from deliberating on this Project.

The KMAC Chair himself seemed to show bias against the Neighbors when he snidely discounted the Neighbors' concerns in an email to the Supervisor's office on August 1, 2019, asking "is [Nicole] worked up even over this [revised application]." (**Exhibit M.**) It appears that the KMAC members have been irritated with the Neighbors all along. Perhaps they are friends with the applicant, we do not know. But one of the potential flaws in having residents without government experience sit on advisory committees to the County, is that they are less familiar with the requirement to be impartial and can let personal issues cloud their rulings.

During the October KMAC Meeting, evidence of potentially significant impacts to the Neighbors' privacy and long-range views resulting from the proposed construction were ignored by the KMAC. Rather than request to have story poles installed to confirm actual impacts, the KMAC members found that while the Project may "block the view," it wouldn't be "that bad". They made this arbitrary finding without any evidence, just the word of the applicant. The KMAC members appeared to believe that because the applicants had moved their project to the other side of the house, they should now be entitled to build. Thankfully, California law prevents such arbitrary decisions.

The most egregious display of bias came at the ZA hearing in December 16, 2019, when the two relevant KMAC members, Ms. Snyder and Mr. Tahara, testified **on behalf** of the Project applicant. These 'impartial decision-makers' testified on behalf of the Project, directly violating their legal obligation to remain impartial. Rather than chastise the KMAC members for testifying on behalf of a project in violation of their duties as impartial decision-makers, the ZA considered the KMAC testimony and cited it during her ruling on January 22, 2020. When we followed up with the ZA on this point and requested to receive a copy of the written testimony provided by the KMAC members, the ZA did not respond. (**Exhibit N**, Email to ZA.) Indeed, the County has yet to provide us with a copy of the written testimony from the KMAC despite repeated requests, including a PRA request. (See **Exhibit O**, PRA Request dated January 16, 2020). It simply should not be this difficult to ensure fairness in a land use approval process.



All affected parties have the right to an impartial tribunal and unbiased decision makers such that “even the probability of unfairness is to be avoided.” (*Clark v. City*, 48 Cal. App. 4th at 1170. Due process “demands an appearance of fairness and the absence of even a probability of outside influence on the adjudication. In fact, the broad applicability of administrative hearings to the various rights and responsibilities of citizens and businesses, and the undeniable public interest in fair hearings in the administrative adjudication arena, militate in favor assuring that such hearings are fair.” (*Nightlife Partners, Ltd. v. City of Beverly Hills*, 108 Cal. App. 4th 81, 83 (2003)(emphasis added).) Any agency action that reflects an abuse of discretion must be disregarded to avoid further tainting the land use process.

The Planning Commission must overturn the previous decision to rectify these critical wrongs and prevent another protracted legal battle against the County for due process violations. (See *Fratus v. Contra Costa Cty. Dep't of Conservation & Dev.*, 2017 Cal. App. Unpub. LEXIS 5877 in which the court issued a writ against Contra Costa County DCD representatives for failing to follow CCC Code.) To protect the Neighbors’ civil rights, there must be due process to ensure fairness in the process. The Planning Commission can do this by overturning the ZA’s decision and requiring a variance, by the having County come to the property to see the impacts for themselves, and by requiring the applicant to install story polls. Without implementing such simple safeguards to protect property and civil rights, the system appears rigged.

**D. Additional Falsehoods in the Record.**

The Planning Commission must reverse this decision not only to rectify due process concerns, but to correct the various misstatements made by both County staff and the applicant throughout this process.

As described above, the Staff Report includes numerous falsehoods and inaccuracies, including the dimension of the proposed deck, the dimensions of the upper level, the elevation of the property, and stating that there are no views to the south from the Neighbors’ property.

The applicant’s architect has repeatedly misrepresented the Project. Early on in the process, he explained clearly why a variance would be required, but then flip flopped once he realized the County was willing to create a loophole for this Project. During his ZA testimony and in the application, he described the addition as a “two story addition on a two story house” in an effort to support the variance loophole, even though the Staff Report clearly states that the subject property is a three-story house. The architect then claimed setback requirements had been met while submitting an application that clearly shows that while close, the current design does not meet the aggregate 8’ setback requirement. The architect has gone so far as to accuse the Neighbors of ‘leaning out the window’ when taking the relevant photos, a ridiculous claim made to the ZA in private after the hearing. (See **Exhibit P.**) These misstatements and misrepresentations underscore the need for the Planning Commission – a neutral body- to review the facts and ensure that the CCC Code is correctly enforced, that dimensions are confirmed by



County staff through site visits, and story poles are installed to confirm actual impacts before approving a Project that could permanently destroy long-range views of the Bay Bridge and downtown San Francisco.

**V. CONCLUSION**

All of this could have been avoided. Had the applicants, or their architect, contacted the Neighbors to have an honest discussion about the type of expansion that would preserve the Neighbors' views and privacy, this could have been avoided. Rather than work with their neighbors, the applicants instead worked with County staff to identify nonexistent loopholes to variances.

By ignoring the substantial evidence in the record and avoiding CEQA review, the ZA approved a Project that is inconsistent with current zoning, and ignored potentially significant aesthetic impacts to long-range views, privacy, and property values. The residents of Kensington deserve a County review process that consistently applies the law and protects its citizens. They deserve a ZA who does not rubber stamp bad projects and waive CEQA review, but rather one that takes the necessary time to thoroughly review the project and ensure that the County addresses the substantial evidence on the required and confirms compliance with land use laws without bias or favoritism.

We understand that this County has been held legally liable for failing to consistently and fairly apply its regulations in the past. Fortunately, there is still time for the Planning Commission to comply with its code and require a variance for the Project and a revised application to address setback issues and to minimize aesthetic impacts.

Based on all of the above, we respectfully request that the Planning Commission reverse the ZA's decision, require a variance for the Project, and require story poles to confirm the actual extent of impacts. To the extent that the Project does not preserve long-range views, privacy, and property values, it must be rejected and redesigned.

Respectfully submitted,

Jillian Blanchard, Rudder Law Group, LLP

- cc: Supervisor John Gioia
- Contra Costa County Attorney
- DCD Planning Director
- Ms. Nicole Ashar
- Mr. Joseph Petrizello

EXHIBITS TO FOLLOW



**RUDDER LAW GROUP**

**EXHIBIT A**



# EXHIBIT A



**RUDDER LAW GROUP**  
NAVIGATING THROUGH ENVIRONMENTAL REGULATION

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Ms. Margaret Mitchell  
Department of Conservation and Development  
30 Muir Road  
Martinez, CA 94553

## **Public Records Request re 120 St. Albans Road, Kensington, CA**

Dear Ms. Mitchell:

We have been retained by parties interested in the development proposed for 120 St. Albans Road, Kensington, CA (the “**Property**” as defined below) in application #VR18-1032. Based on the approach the Kensington Municipal Advisory Committee (“**KMAC**”) and the County have followed to date, we have serious procedural due process concerns, substantive due process concerns, and land use and zoning consistency concerns related to the processing of this application and the proposed development of the Property. We are making this Public Records Act request to better understand the County’s and the KMAC’s respective processes in reviewing this application to ensure that the proper procedures and review standards are followed before any formal decision is rendered by the County.

The applicant proposes to build an addition to the structure on the Property that would violate current height restrictions and would cause significant aesthetic impacts and significantly damage the long-range views, incoming sunlight, use, enjoyment, and property values of the neighboring property. The applicants have presented the project to the KMAC (with two different proposals) on two occasions and both times, the KMAC has recommended denying a variance because the project cannot meet the statutory requirements for such an approval.

### *Due Process Concerns*

Throughout the process, the County has failed on several occasions to provide mandatory notice to our clients even though their property will be directly affected by the County’s decision. After repeatedly voicing their concerns and requesting status updates from the County, the County failed to inform our clients that the applicants had submitted revised plans on February 12<sup>th</sup> and failed to provide them notice that the KMAC would be reviewing these plans at the February 26, 2019 meeting. Indeed, when our clients spoke with you by phone on February 11<sup>th</sup> to learn the status of the application, you stated that since revised plans had not yet been filed, the project would be very unlikely to make it onto the February 26<sup>th</sup> KMAC agenda. Unfortunately, when the revised plans arrived the following day, you failed to notify our clients when they were undeniably an interested party to the proceedings. When individual rights are being deliberated in an administrative hearing, interested parties are required to be apprised of the application “so that [they] may

have an opportunity to refute, test, and explain it, and the requirement of a hearing necessarily contemplates a decision in light of the evidence there introduced. (*Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152, 1172 (1996).) Without adequate notice, it “would be tantamount to requiring a hearing in form but not in substance, for the right of a hearing before an administrative tribunal would be meaningless if the tribunal were permitted to base its determination upon information received without the knowledge of the parties.” (*Id.*) Our clients have a known, vested interest in the subject application, will be uniquely and directly impacted by the project proposed, and have indicated they have substantial evidence to submit into the record. Yet, the County failed to notify them of the revised plans ostensibly designed to address their concerns.

Our clients emailed you immediately after the February 26, 2019 KMAC meeting and requested a meeting to provide substantial evidence regarding the potential impacts the revised plans will cause, to which the County has yet to respond. Our clients were forced to go directly to the DCD office wherein they met with Mr. Rubin Hernandez, who listened to their plight, but did not indicate that such facts would be considered in the application and upon seeing the very real long-term views impacted by this project, mysteriously stated that he would need to recuse himself from reviewing this application. You can imagine our confusion at this kind of reaction and the need to better understand the history of communications between the parties related to this application.

The KMAC process has been equally fraught with due process concerns. While the revised designs were ostensibly created to address the impacts to our clients’ long-range and impressive views of San Francisco and the Bay Bridge, the applicants did not even bother to install new story poles to identify the location of the new design. Neither the KMAC nor the County have yet required the applicant to install these poles to better analyze the very real impacts this addition would cause.

At the February 26, 2019, meeting, one of the KMAC members appeared to be coaching the applicant through the process rather than offering an objective viewpoint based on the facts. Indeed, at one point, a KMAC member provided the applicant with specific guidance on how they could “avoid a variance” in what could be viewed as a spurious effort to circumvent the variance requirements, which this application clearly cannot meet. All affected parties have the right to an impartial tribunal and unbiased decision makers such that “even the probability of unfairness is to be avoided.” (*Id.* at 1170.) Due process “demands an appearance of fairness and the absence of even a probability of outside influence on the adjudication. In fact, the broad applicability of administrative hearings to the various rights and responsibilities of citizens and businesses, and the undeniable public interest in fair hearings in the administrative adjudication arena, militate in favor assuring that such hearings are fair.” (*Nightlife Partners, Ltd. v. City of Beverly Hills*, 108 Cal. App. 4th 81, 83 (2003).) And while the KMAC may only be an “advisory” committee, its recommendations are a significant factor in informing the County’s ultimate land use decision and is instrumental in supporting the County’s staff report regarding the application and the subsequent determination by the Zoning Administrator.

Unfortunately, it is impossible to confirm exactly how KMAC members handled the meeting, or the reasoning for any of their findings for that matter, because the meeting “minutes” are not minutes as that term is used by all other public agencies in California.

They do not include *any* details or findings, and simply list the members' votes on the project.

Having a transcript or detailed minutes of the February KMAC meeting is particularly important here to understand the support, reasoning, or findings related to the KMAC's critical, and dumbfounding, recommendation to "approve the revised plans, but deny the variance," which plans would cause significant, unmitigated environmental impacts.

The notion that a proposal to increase the height of a structure in violation of the Kensington Planning Ordinance and the Contra Costa County Code would be granted without a variance boggles the mind and suggests the potential for substantive due process violations as well. (*See Neighbors in Support of Appropriate Land Use v. County of Tuolumne*, 157 Cal. App. 4th 997, 998 (2007), in which the Court overturned a county's approval of a nightclub that was inconsistent with the zoning ordinance without a variance.) Development that causes environmental impacts and directly steals the long-range views of another house, sunlight, and use and enjoyment of a neighbor's property, not to mention significantly reduces their property values, is exactly what the height restriction was created to protect against. It is unclear how the KMAC believed it was authorized to "approve the revised plans" but "deny the variance." Unfortunately, the non-existent meeting minutes do not shed any light on the reasoning or basis for such a conclusion. We remain hopeful that the KMAC kept a transcript of the meeting, or at least detailed notes, to help us better understand the KMAC's reasoning on the matter.

#### *Land Use and Zoning Consistency Issues*

At base, our primary concern is that the applicants' revised proposal violates the standards stated in the Kensington Planning Ordinance (Section 84-74.1206) and the variance standards required in County Code Section 26-2.2006.

- The proposed project does not *minimize* impacts to its neighbors, it creates significant impacts on the long-term use and enjoyment of our clients' property.
- The revised design does not protect the value and enjoyment of our clients' property and we have substantial evidence to this effect;
- Creating this type of addition to one of the highest houses on the street to block other views is not consistent with a neighborhood dependent on long-range views for its property values;
- There is nothing unique about the Property that would justify a variance to the specific height requirements;
- Granting this application would constitute a special privilege to increase heights in a neighborhood in which the subject house is already one of the tallest;
- There are no special circumstances applicable to the Property that justify such a special privilege. Indeed, the applicants are able to construct the addition on the other side of the house while gaining the same benefits and avoiding *all* impacts to our clients' property. They simply don't want to.
- The proposed variance does not meet the intent and purpose of the Kensington Combining District, which unlike many other neighborhoods, has a specific planning ordinance to protect neighbor's use, view, privacy, and light and solar access, all of which will be significantly impacted under the revised plans.

Variances should only be granted when the applicant has made a clear showing of undue hardship. “The essential requirement of a variance is a showing that a strict enforcement of the zoning limitation would cause unnecessary hardship.” (*Neighbors in Support of Appropriate Land Use v. County of Tuolumne*, 157 Cal. App. 4th 997, 998 (2007).) The applicants have made no showing that allowing for a third-floor addition to their house is in anyway necessary to avoid an undue hardship on their property. Indeed, the applicants could construct this addition on the other side of their house and not in any way affect the neighbor’s property. It is clearly the applicant’s burden of demonstrating that a variance is necessary to avoid an undue hardship. (*See Orinda Ass’n v. Bd. of Supervisors*, 182 Cal. App. 3d 1145, 1150 (1986) (judgment vacating approval of a height variance because the applicant failed to make the affirmative showing that a variance was warranted where less impacting alternatives were available.)

Our clients are reasonable people, but they have very serious and reasonable concerns regarding the environmental impacts of the proposed project, including specific impacts to their use, enjoyment, sunlight, long-range views, and property values. The applicants are proposing a project that violates the Kensington Planning Ordinance and does not meet the high standards necessary to justify a height variance under the County Code. Indeed, there is a clear alternative to the proposed design that would avail applicants of a larger house with a third story and avoid all of these impacts. We will contact you soon to schedule a meeting to discuss these alternatives in greater detail to facilitate the County’s decision-making process.

To better understand the development proposed on the Property and to address the serious concerns we have regarding this application process, we submit this request for public records pursuant to the California Constitution (as amended by Proposition 59) and the Public Records Act (Government Code §§ 6250 *et seq.*).

For purposes of this request, we provide the following clarifying definitions for the following terms:

“**All**” and “**any**” each mean “any and all.”

“**Communications**” mean all verbal and written communications of every kind between and among the parties specified, including but not limited to telephone calls, conferences, conversations, meetings, notes, correspondence, emails, and memoranda.

“**County**” means Contra Costa County, including its officers, staff, managers, appointees, employees, contractors, agents, representatives, attorneys, and consultants, including in particular, employees of the Department of Conservation and Development.

“**KMAC**” means the Kensington Municipal Advisory Committee, including its officers, staff, managers, employees, contractors, agents, representatives, attorneys, and consultants.

“**Property**” mean that certain real property commonly referred to as 120 St. Albans Road in Kensington, California.

**“Records”** include, without limitation, all writings and documents of every type in your possession, control, or custody, including but not limited to the following items, whether printed or reproduced by any process, including documents sent and received by electronic mail, or written or produced by hand: computer data files, information stored in electronic media, including on computer tapes, disks, or diskettes, tapes, inputs, outputs, and printouts; notes; letters; correspondence; communications; telegrams; memoranda; summaries and records of telephonic and telegraphic communications; summaries and records of personal conversations; diaries; appointment books; reports (including any and all draft, preliminary, intermediate, and final reports); surveys; studies; comparisons; tabulations; budgets; workpapers; charts; plans; maps; drawings; engineering and other diagrams; photographs; film; microfilm; microfiche; tape and other mechanical and electrical audio and video recordings; data compilations; log sheets; ledgers; vouchers; accounting statements; books; pamphlets; bulletins; minutes and records of meetings; transcripts; stenographic records; testimony and exhibits, including workpapers; copies, reports, and summaries of interviews and speeches; reports and summaries of investigations; opinions and reports of consultants; reports and summaries of negotiations; press releases; newspaper clippings; drafts and revisions of draft of documents; and any and all other records, written, electrical, mechanical, and otherwise.

**“Relating To”** means concerning, pertaining to, referring to, describing, mentioning, containing, evidencing, constituting, dealing with, discussing, considering, analyzing, studying, reporting on, commenting on, setting forth, supporting, recommending or otherwise concerning in any manner whatsoever the subject matter of the request.

**“Writing”** means any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by email or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.

We hereby request the following categories of Records:

1. All Records and Writings Relating To the Property within the last four years.
2. All Records and Writings Relating To improvements proposed for or conducted upon the Property within the last four years.
3. All Records and Writings Relating To Communications by and between the County and the owners of the Property (including David Herberich and Mary Hanley) within the last four years.
4. All Records and Writings Relating To Communications by and between the KMAC and the owners of the Property (including David Herberich and Mary Hanley) within the last four years.

5. All Records and Writings Relating To Communications by and between the County and individuals known to the County to be working for the owners of the Property within the last four years (including architect Howard McNenny).
6. All Records and Writings Relating To Communications by and between the KMAC and individuals known to the KMAC to be working for the owners of the Property within the last four years (including architect Howard McNenny).
7. All Records and Writings Relating To Communications by and between the County and the KMAC Relating To the Property within the last four years.
8. All Records or Writings Relating To plans, submittals, applications, or requests submitted to the County Relating To the Property within the last four years.
9. All Records and Writings Relating To the KMAC meetings on November 27, 2018, January 8, 2019, and February 26, 2019.

Pursuant to Government Code § 6253.1, if you have any difficulty identifying responsive Records, we request that you provide assistance and suggestions for identifying responsive Records and for overcoming any practical basis for denying access.

We believe that no express provisions of law exist that exempt the Records from disclosure. As you determine whether this request seeks copies of disclosable public records, be mindful that Article I, Section 3 (b)(2) of the California Constitution requires the County to broadly construe a statute, court rule, or other authority if it furthers the right of access to the information we have requested and to narrowly construe a statute, court rule, or other authority if it limits the public's right of access.

To the extent that there are any responsive Records, or portions thereof, which the County or the KMAC determines to be exempt from disclosure and seeks to withhold, please provide us with prompt notification of the County's or the KMAC's intent to withhold such Records, together with an index and general description of such Records, the names and titles or positions of each person responsible for the denial of our request, and the reason(s) for the denial. If a portion of the information we have requested is exempt from disclosure by express provisions of law, Government Code Section 6253(a) additionally requires segregation and deletion of that material in order that the remainder of the information may be released.

We agree to appropriately reimburse you for your copying, scanning, and reproduction costs. Where feasible, we strongly prefer electronic copies of all responsive Records. It is our understanding that, by submitting this single request to your office, you will notify all appropriate divisions and departments within the County to produce any and all responsive Records.

Pursuant to Government Code Section 6253(b), we ask that you make the Records "promptly available," for inspection and copying, based on our payment of "fees covering direct costs of duplication, or statutory fee, if applicable." Given that the County's 30-day review period for the revised application is coming to a close, time is of the essence, and we therefore request a reply with responsive Records within 10 days. To expedite the process, we agree to receive responsive Records on a rolling basis, as they are identified.

Thank you for your cooperation in this matter, and please do not hesitate to contact me with any questions.

Sincerely,



Jillian Blanchard  
Rudder Law Group, LLP

Cc (by electronic mail):

Supervisor District 1, John M. Gioia  
Sharon L. Anderson, County Counsel  
John Kopchik, DCD Director  
Aruna Bhat, DCD  
w/attention to KMAC Members: Patrick Tahara, Lloyd Cowell,  
Larry Nucci, Christopher Brydon, and Melissa Holmes Snyder  
Ms. Nicole Ashar and Mr. Joseph Petroziello



**RUDDER LAW GROUP**

**EXHIBIT B**



# EXHIBIT B



**RUDDER LAW GROUP**  
NAVIGATING THROUGH ENVIRONMENTAL REGULATION

JILLIAN B. BLANCHARD  
415.867.6769  
JBLANCHARD@RUDDERLAWGROUP.COM

Application and Permit Center  
Community Development Counter  
30 Muir Road  
Martinez, CA 94553  
Attn: File #CD KR19-0011 and Margaret Mitchell

August 30, 2019

## **Hearing Request re 120 St. Albans Road, Kensington, CA**

Dear Ms. Mitchell and County Staff:

We have been retained by parties interested in the development proposed for 120 St. Albans Road, Kensington, CA (the “Property” as defined below) in application #KR19-00111 (the “Application”). As described further below, there are several issues with the current Application that need to be resolved before a permit can issue for the proposed construction, but the primary issues are: 1) a land use permit and a variance is required for this type of construction, not just a Building Permit and Design Review; and 2) a hearing is required to confirm that the proposed construction will comply with the strict variance standards and the Kensington Combining District requirements to minimize impacts to a neighboring property’s privacy, sunlight, and views. Unfortunately, the County has once again failed to follow its own land use process, but there is still time to rectify the situation and potentially approve construction that does not impact the sunlight, privacy, and views of neighboring properties, and complies with the County’s land use code.

### **I. The Proposed Project Requires a Variance**

#### **a. Variance Required to Expand Existing Nonconforming Use**

The existing property currently contains a nonconforming use, which automatically requires a variance to approve any expansion or extension of such use. The existing residential structure appears to violate both the 2 ½ story and setback requirements, and potentially other existing land use requirements. The Contra Costa County (“CCC”) Code requires that: 1) building heights must be capped at 2 ½ stories and 35-feet from grade. (CCC Code §84-4.802); and 2) side yards must be setback to a minimum of five feet (CCC Code §84-4.1002).

For purposes of determining the number of stories, a basement counts as a story if the finished floor level directly above the basement is more than six feet above grade at any point (CCC Code §82-4.266). A basement is defined in the Kensington Combining District as “any area in a building or structure where the finished floor directly above the area is less than four feet above preconstruction grade or finished grade, whichever is lower.”

(CCC Code §82- 74.404). The existing lower level on the property clearly falls within this definition, thereby establishing three stories on the existing structure, in violation of County Code.

Moreover, the existing residential structure at 120 St. Albans Rd. does not currently meet minimum side yard setback requirements. The existing side yards are well below the five foot requirement.

Accordingly, the existing structure is currently, *without any proposed expansion*, already a nonconforming use. We note that the County's Code regards any structure maintained contrary to its Zoning Ordinance to be unlawful and a public nuisance. (CCC §82-2.006).

Courts have a strict policy against the extension or enlargement of nonconforming uses (*See County of San Diego v McClurken*, 37 Cal.2d 683, 686-87 (1951)). Indeed, California courts regularly allow municipalities to require the termination of a nonconforming use without compensation if it provides a reasonable amortization period commensurate with the investment involved. (*See Metromedia, Inc. v. City of San Diego*, 26 Cal. 3d 848 (1980)). In this instance, our clients are not proposing a termination of the existing use, but merely a careful examination and strict scrutiny against any proposed expansion of that nonconforming use, particularly, when such expansion could cause negative environmental impacts and impact a neighboring property's use, enjoyment, privacy, and views.

Any proposal to increase a nonconforming use clearly requires a land use permit under the County's Code. (CCC §82-8.006.) The work proposed in Application# KR 19-00111 involves a substantial increase to the existing nonconforming use. Accordingly, it is unclear why County staff would ever suggest to the applicant that a simple Building Permit and Design Review would be sufficient. The County must follow its required land use process, including public hearings and KMAC review, and land use permit and variance review and approval, before allowing any construction of the proposed project.

#### **b. Proposed New Construction Requires a Land Use Permit & Variance**

Even if the existing structure were in compliance with the County Code, the work proposed in the Application clearly requires a variance pursuant to the County Code. The architect in charge of designing the project did not understand staff's suggestion that an expansion could be constructed on either the north or the south side of the property without a variance (See Exhibit A, Email from Howard McNenny to Margaret Mitchell, p. 1.) County staff based its faulty reasoning on a tortured definition of a 'crawl space,' which has no relevance to the issue. (See Exhibit B, Email from Margaret Mitchell, p. 1.) Not only is this reasoning incorrect, but it smacks of bias to coach an applicant on ways to avoid certain permitting requirements, particularly, when those permitting requirements help protect the rights of neighboring properties.

The proposed substantial upgrade requires a land use permit because the existing structure is already nonconforming (as described above) and a variance to address proposed construction on a three story building, the proposed height increase, the proposed roof overhang, and perhaps most importantly, the exceedance of the Kensington Combining District's threshold standards (CCC §84-74.802).

Based on the Application, the proposed work would expand the existing three-story structure. The Application erroneously claims that it's a "two-story addition to a two-story structure." It's clear from every depiction in the Application, that the existing structure is more than two and one-half stories. It's precisely these types of misstatements that the County needs to identify and correct through a more rigorous land use review and approval process, including the required hearings.

It also appears that the while the pitched roof may not increase in height, the proposed addition to the third story would involve a slight increase in height, which clearly triggers the variance requirement for height increases. The notion that a proposal to increase the height of a structure in violation of the Kensington Planning Ordinance and the Contra Costa County Code would be granted without a variance boggles the mind and suggests the potential for substantive due process violations as well. (*See Neighbors in Support of Appropriate Land Use v. County of Tuolumne*, 157 Cal. App. 4th 997, 998 (2007), in which the Court overturned a county's approval of a nightclub that was inconsistent with the zoning ordinance without a variance.) Moreover, the increased roof overhang itself may require a variance.

Development that causes environmental impacts and directly steals the long-range views of another house, sunlight, privacy, and use and enjoyment of a neighbor's property, not to mention significantly reduces their property values, is exactly what the variance standards were created to protect against.

Moreover, the proposed project exceeds the threshold standards established in the County Code. The threshold standard based on the existing parcel area is 2320.5 square feet, and the applicant proposes to increase the total gross floor area ("GFA") to 2,332 square feet. The County Code unequivocally requires a hearing when the GFA thresholds will be exceeded. (CCC 84-74.802).

While we appreciate the applicant's willingness to re-design their project on the south side of the property, the proposed project, in its current design, still likely will impact our clients' privacy and potentially their long-range views of San Francisco Bay. In addition to completing all necessary reviews associated with a land use permit, it is paramount that the County hold a public hearing to: 1) confirm that a land use permit and variance is required; 2) address existing nonconforming uses; 3) address the threshold standard exceedance; and 4) confirm whether the proposed construction meets both the strict standards for a variance and the Kensington Combining District Standards, which were created to "minimize[e] impacts upon surrounding neighbors and not substantially impair the value and enjoyment of their neighbors' property; maintain the community's property values; and promote[] the general welfare, public health and safety." (CCC §84-74.204). Based on the current Application, is it likely that some design changes may be required to avoid negative impacts to the neighboring property's privacy, views, and sunlight.

## **II. Project May Not Comply with Variance Standards or the Kensington Combining District Standards**

At base, our primary concern is that we need further investigation to confirm that the applicants' revised proposal complies with both the Kensington Planning Ordinance

(Section 84-74.1206) and the variance standards required in County Code Section 26-2.2006.

- While moving the project to the south side does minimize impacts to its neighbors somewhat, the currently proposed design, with attendant windows on the north side, may create new impacts to the long-term use, privacy, and enjoyment of our clients' property.
- A hearing and story poles are required to confirm that the revised design protects the value and enjoyment of our clients' property;
- To the extent the proposed addition to one of the highest houses on the street continues to block our clients' views, it would be inconsistent with a neighborhood dependent on long-range views for its property values;
- There is nothing unique about the Property that would justify a variance to the specific height requirements;
- Granting the Application without modification to protect neighboring properties could constitute a special privilege to increase heights in a neighborhood in which the subject house is already one of the tallest;
- There are no special circumstances applicable to the Property that justify such a special privilege; and
- The proposed variance may not meet the intent and purpose of the Kensington Combining District, which unlike many other neighborhoods, has a specific planning ordinance to protect neighbor's use, view, privacy, and light and solar access, all of which could be impacted under the revised plans.

Variations should only be granted when the applicant has made a clear showing of undue hardship. "The essential requirement of a variance is a showing that a strict enforcement of the zoning limitation would cause unnecessary hardship." (*Neighbors in Support of Appropriate Land Use v. County of Tuolumne*, 157 Cal. App. 4th 997, 998 (2007).)

We need a hearing to determine whether applicants have made the prerequisite showing that extending a three story addition to their house is appropriate and necessary to avoid an undue hardship on their Property. It is clearly the applicant's burden of demonstrating that a variance is necessary to avoid an undue hardship. (*See Orinda Ass'n v. Bd. of Supervisors*, 182 Cal. App. 3d 1145, 1150 (1986) (judgment vacating approval of a height variance because the applicant failed to make the affirmative showing that a variance was warranted where less impacting alternatives were available.)) We also need confirmation through the use of story poles and other methods, that the project as proposed will not impact our clients' long range views, sunlight, and privacy. The project, as currently designed, still extends far enough to impact long range views and includes a window that would look directly into our clients' house, significantly impacting their privacy.

Not only is a hearing required as part of the land use process, it is absolutely essential here to establish that the proposed construction complies with both the Kensington Combining District and variance standards.

### **III. Hearing Is Required to Ensure Land Use Laws Are Being Followed and Neighboring Rights are Protected**

All affected parties have the right to an impartial tribunal and unbiased decision makers such that “even the probability of unfairness is to be avoided.” (*Id* at 1170.) Due process “demands an appearance of fairness and the absence of even a probability of outside influence on the adjudication. In fact, the broad applicability of administrative hearings to the various rights and responsibilities of citizens and businesses, and the undeniable public interest in fair hearings in the administrative adjudication arena, militate in favor assuring that such hearings are fair.” (*Nightlife Partners, Ltd. v. City of Beverly Hills*, 108 Cal. App. 4th 81, 83 (2003).)

As indicated above, a hearing is required here for several reasons, including: 1) to ensure the project meets land use permit, variance, and Kensington Combining District requirements; 2) because threshold standards will be exceeded under County Code; and 3) because a hearing is required whenever an interested party submits a written request.

Our clients are reasonable people, but they have very serious and reasonable concerns regarding the environmental impacts of the proposed project, including specific impacts to their use, enjoyment, sunlight, long-range views, and property values. The applicants are proposing a project for an existing nonconforming structure that requires a land use permit, a variance, potentially violates the Kensington Planning Ordinance, and may not meet the high standards necessary to justify a variance under the County Code. We believe that a hearing will help address these land use concerns and help the applicants design a project that does not impact the sunlight, privacy, and long-range views of their neighbors. Please schedule a hearing at your earliest convenience.

### **IV. Adequate Notice**

We also note that the County continues to falter on providing adequate notice to our clients. Even though County staff committed to providing direct notice to our clients as real parties in interest (see Exhibit C, Email from Margaret Mitchell to Jillian Blanchard, May 2, 2019, p. 1), the County failed once again to notify our clients of this new application. When individual rights are being deliberated, interested parties are required to be apprised of the application “so that [they] may have an opportunity to refute, test, and explain it, and the requirement of a hearing necessarily contemplates a decision in light of the evidence there introduced. (*Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152, 1172 (1996).) Our clients have a known, vested interest in the Application, will be uniquely and directly impacted by the project proposed, and have indicated they have substantial evidence to submit into the record. Yet, the County failed to notify them of the revised plans ostensibly designed to address their concerns. Accordingly, please provide any future notices or information related to this Application directly to our clients, Nicole Ashar and Joseph Petroziello (118 St. Albans Rd), and to me, as their representative, on all matters related to this Application.

Thank you for your cooperation in this matter, and please do not hesitate to contact me with any questions. We look forward to receiving notice of the hearing date as soon as it set.

Sincerely,



Jillian Blanchard  
Rudder Law Group, LLP

Cc (by electronic mail):

John Kopchik, DCD Director  
Ms. Nicole Ashar and Mr. Joseph Petroziello

Attachment A

-----Original Message-----

From: Howard McNenny <[h.mcnenny@comcast.net](mailto:h.mcnenny@comcast.net)>

Sent: Tuesday, April 16, 2019 4:22 PM

To: Margaret Mitchell <[Margaret.Mitchell@dcd.cccounty.us](mailto:Margaret.Mitchell@dcd.cccounty.us)>

Cc: Mary Hanley <[mc4hanley@gmail.com](mailto:mc4hanley@gmail.com)>; David Herberich <[dherberich@gmail.com](mailto:dherberich@gmail.com)>

Subject: Fwd: 120 St. Albans

Margaret:

At this point, we have received at least some of the information on comparable variance applications we requested. Unfortunately, we only got examples from the last 3 years, and some of the attachments we were unable to open. Also, some of the applications were apparently too recent to have been resolved. I have requested an estimate of what it would take to go back at least an additional 3-4 years, but have not to date received any response to that request.

Notwithstanding the sparsity of information received, I have discussed with my clients your offer to set up a meeting with Mr. Hernandez, and we agree it would be useful. The absolute best would be if he could agree to meet us on the site as you did initially, to see for himself the issues involved. It appears to us that we are being encouraged to only build on the south side of the house in order to avoid having to file for a variance. However, I do not see personally how it is possible to avoid the variance no matter where we build. As it is, we have configured our proposed addition to avoid as best we can any infringement on the views from the adjacent house. We do not think it would make much difference if we were to confine the addition to the south portion of the house, and in any event building there would not solve the circulation issues we are trying to address.

Absent a meeting with Mr. Hernandez, I do not see how we will ever get a resolution to our dilemma. You have told us to we should submit for a variance, but you have already told us you do not believe the required findings can be made. We would like to submit something that does not require a variance, but that seems impossible. We have to admit that we are unclear on the rules as currently being interpreted, and have very little information on how similar situations have been resolved. We also are afraid that the hearing before the zoning administrator will not result in clarity. That is why we are requesting your help.

Let me know if such a meeting with Mr. Hernandez will be possible. We are fairly open as to time and date.

Howard McNenny, AIA

1039 Santa Fe Ave, Albany CA

Tel: (510) 705-1671

Cell: (510) 207-7019

[h.mcnenny@comcast.net](mailto:h.mcnenny@comcast.net)

## Attachment B

**Margaret Mitchell**

---

**From:** Margaret Mitchell  
**Sent:** Tuesday, April 09, 2019 8:19 AM  
**To:** 'Howard McNenny'  
**Cc:** David Herberich; Mary Hanley; Ruben Hernandez; Jennifer Cruz  
**Subject:** RE: 120 St. Albans

Hi Howard,

If the lowest level of the addition is left unfinished, unconditioned, and at natural grade, regardless of height, it will not be considered a story. If the area between the lowest floor and the ground below does not meet the definition of a crawl space per section 84-74.404(d), it would need to be included in the gross floor area calculation.

You will receive the information regarding other third story variance applications from Lawrence Huang.

Thank you,  
Margaret

---

**From:** Howard McNenny <h.mcnenny@comcast.net>  
**Sent:** Wednesday, April 03, 2019 1:45 PM  
**To:** Margaret Mitchell <Margaret.Mitchell@dcd.cccounty.us>  
**Cc:** David Herberich <dherberich@gmail.com>; Mary Hanley <mc4hanley@gmail.com>; Ruben Hernandez <Ruben.Hernandez@dcd.cccounty.us>; Jennifer Cruz <Jennifer.Cruz@dcd.cccounty.us>  
**Subject:** Re: 120 St. Albans

Margaret:

Thank you for the response, however it is one thing to say that our application for a variance must be weighed against the rights of the neighbors (and possibly could be denied), but quite another thing to say that this project does not meet even the basic qualifications for a variance application. This makes it all the more critical that we understand under what circumstances variances have been granted in the past. We look forward to getting that information so that we can make a reasoned judgement on next steps.

Also, to be clear, my understanding is that any addition where the lowest full floor is more than 4 feet above existing grade, the level below that floor must be considered a floor also. Am I correct? Unless there are exceptions to your position on variances, I do not see how any addition could be built on the west side of this house that includes the bedroom level—even on the southern portion. Or, might you be saying that it would still be a variance, but one that might be more likely to be approved?

**Howard McNenny, AIA**

1039 Santa Fe Ave, Albany CA

Tel: (510) 705-1671

Cell: (510) 207-7019

[h.mcnenny@comcast.net](mailto:h.mcnenny@comcast.net)



## Attachment C

On Thu, May 2, 2019 at 5:03 PM Jillian Blanchard <[jblanchard@rudderlawgroup.com](mailto:jblanchard@rudderlawgroup.com)> wrote:

Thank you, Margaret.

On Thu, May 2, 2019 at 4:55 PM Margaret Mitchell <[Margaret.Mitchell@dcd.cccounty.us](mailto:Margaret.Mitchell@dcd.cccounty.us)> wrote:

Good afternoon, Jillian,

Yes, those statements from our conversation yesterday are correct. We will update you on any changes to the status of the application. Please contact Lawrence regarding the PRA requests.

Thank you,

Margaret

**From:** Jillian Blanchard <[jblanchard@rudderlawgroup.com](mailto:jblanchard@rudderlawgroup.com)>  
**Sent:** Thursday, May 02, 2019 3:36 PM  
**To:** Margaret Mitchell <[Margaret.Mitchell@dcd.cccounty.us](mailto:Margaret.Mitchell@dcd.cccounty.us)>  
**Cc:** Nicole Ashar <[nicoleashar@ymail.com](mailto:nicoleashar@ymail.com)>  
**Subject:** Re: 120 St Albans Road - Follow Up and Confirmation

Margaret:

I would appreciate your response to my email below as soon as possible.

Thank you,

Jillian

On Wed, May 1, 2019 at 3:43 PM Jillian Blanchard <[jblanchard@rudderlawgroup.com](mailto:jblanchard@rudderlawgroup.com)> wrote:

Margaret:

Thanks for talking with me this morning.

As we discussed, it has been difficult to ensure the protection of my clients' property rights because the County insists on requiring us to file repeated Public Records Act ("PRA") requests to determine the status of the 120 St. Albans application. Requiring repeated PRA requests rather than simply sharing the information with my clients as real parties in interest places an unfair burden on both my clients and the County, and puts us at least 10-15 days behind the process as it unfolds. Given the direct way in which my clients could be affected (i.e. by a wall blocking their SF Bay views), and the potentially significant environmental impacts at stake, the County should be providing direct notice to my clients (copied here) and me as their legal representative with application updates. Please pass this request along to your supervisors. In the meantime, we will continue to make PRA requests to understand the status of the application.

Through the response to our fourth PRA request, we noticed an email that made it appear as if County staff was counseling the applicants on how to build the same devastating structure and avoid a variance, which would be extremely concerning and create obvious legal exposure for the County. Specifically, in your email to Howard McNenny dated April 9, 2019, you counseled: "If the lowest level of the addition is left unfinished, unconditioned, and at natural grade, regardless of height, it will not be considered a story" and accordingly, would not require a variance. You can imagine how the suggestion that the project could be constructed without a variance on the north side of the building at the same height (with the same significant environmental impacts, including impacts to my clients' long-range views of SF Bay, sunlight, use and enjoyment of their property, etc.), based on a tortured definition of a "crawl space" under the County Code would be extremely problematic.

However, during our conversation this morning, you clarified that this reference to construction without a variance was for construction on the south side of the home only. Please confirm that this is correct as there is no other email correspondence in the documents we have received to date to confirm this.

You also confirmed today that the current application for construction on the north side would require a variance, and that you have counseled the applicants that the County will recommend denial of the application if the applicants choose to continue with a proposed project on the north side of the building. You also stated that the application is currently complete, but that you are waiting to hear back from the applicants to determine whether they will withdraw the application before issuing the Notice of Intent to Render a Decision.

**Given some of the misinformation offered to my clients by the County in the past, I would appreciate your specific confirmation by response email that the underlined statements above are correct.** Thanks very much.

Again, I urge the County to let us know immediately once you have heard back from the applicants, given the potential issues at stake here and potential legal exposure to the County for hindering my clients' due process rights.

With respect to the Notice of Intent to Render a Decision, if one is issued, please be sure to send both a hard copy by mail and email it to both me and my clients (copied here). Unfortunately, the KMAC failed to provide sufficient notice to my clients in previous proceedings which limited their ability to defend themselves at the hearing. Providing email notice directly to both me and my clients will help avoid having the same procedural issues here.

Finally, I would note that construction proposed on the southern side of the property would of course need to be designed to avoid impacting the neighbor's long range views, sunlight, etc. and likely would require a variance if it involves three stories, has certain overhangs, or has the potential to cause significantly environmental impacts.

Thanks again for talking with me this morning. Please respond as soon as you're able with email confirmation regarding the information stated above.

Jillian

--

**Jillian B. Blanchard**

**Rudder Law Group, LLP**  
1101 Marina Village Pkwy, Suite 201

Alameda, CA 94501  
Direct: 415.867.6769



**RUDDER LAW GROUP**

**EXHIBIT C**

# EXHIBIT C



RUDDER LAW GROUP  
NAVIGATING THROUGH ENVIRONMENTAL REGULATION

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415.867.6769  
JBLANCHARD@RUDDERLAWGROUP.COM

Application and Permit Center  
Community Development Counter  
30 Muir Road  
Martinez, CA 94553  
Attn: File #CD KR19-0011 and Margaret Mitchell

November 4, 2019

**120 St. Albans Road, Kensington, CA Application –**  
**2<sup>nd</sup> Hearing Request and KMAC Update**

Dear Ms. Mitchell and County Staff:

On behalf of my clients, the owners of 118 St. Albans Road, I am writing this update as an addendum to the Hearing Request letter sent to you on August 30 2019, to inform you of the unlawful hearing that occurred before the KMAC on October 29, 2019, and more importantly, to articulate my clients outstanding concerns regarding the development proposed for 120 St. Albans Road, Kensington, CA (the “Project ” as defined below) in application #DP- 19-3019.

**I. KMAC Meeting Did Not Comply with Legal Requirements; KMAC Recommendation Is Not Based on an Objective Review of the Facts**

The Kensington Municipal Advisory Committee (“KMAC”) Meeting held on October 29, 2019 (“KMAC Meeting”) to discuss the Project violated planning and zoning laws, the Brown Act, and the KMAC’s own by-laws. The KMAC is an advisory committee that represents the County and is charged with providing valuable input to the Board of Supervisors regarding land use decisions. As such, they are required to hold meetings that follow Brown Act requirements and provide objective recommendations based on the legal standards established in California planning and zoning law. Unfortunately, the KMAC failed to comply with these legal requirements when reviewing the Project.

First, the KMAC Meeting failed to comply with the Brown Act’s requirement to provide adequate notice to the public. (CA Gov Code 54956.) Ms. Snyder, who volunteered to provide KMAC notice, managed to provide notice of the KMAC Meeting to all other neighbors surrounding the Project, but failed to provide it to the two interested parties who are on the record in opposition to the Project, my clients and Ms. Donna Stanton, the owner of 134 Windsor Avenue in Kensington.

When this issue was raised at the KMAC Meeting by Ms. Stanton, the KMAC members did not concede the error or suggest a new process to ensure adequate notice going forward, they instead suggested that Ms. Stanton’s property must have fallen outside the noticing area. The fact that both of Ms. Stanton’s immediate neighbors on either side did receive notice shows the fallacy of this claim. Strangely, the KMAC members did not appear to have any concern that neither Ms. Stanton, nor my clients, the owners most likely to be impacted by the Project, failed to receive notice of the meeting. The Brown Act absolutely requires adequate notice to all interested parties. Without it, the meeting should not have been held and should have been rescheduled. At the very least, the KMAC members could have suggested a more robust notice process going forward to avoid these due process issues.

The same KMAC member, Ms. Snyder, who failed to provide adequate notice to Project opponents also had a clear conflict of interest. We learned from various neighbors in the area that Ms. Snyder affirmatively solicited support for the Project when notifying them about the KMAC meeting. My clients obtained signatures from 35 different neighbors who stated that Ms. Snyder asked them to attend the meeting in support of the Project, which is clear evidence of campaigning in violation of California laws protecting impartial decision-making.

Under California law, all interested parties have the right to a hearing in front of "a fair and unbiased decision-maker under the due process clause." (*See Noble v. City of Palo Alto* (1928) 89 Cal.App.47, 51.) If there is evidence of an "unacceptable probability of actual bias on the part of a decision-maker", that decision-maker must be disqualified from reviewing the application. (*See Nasha LLC v. City of Los Angeles*, 125 Cal. App. 4th 470, in which a Planning Commission decision was vacated because one of the Commissioners showed clear bias by speaking out against a pending project.) While it may not be objectionable for a KMAC member to have a personal preference regarding a project, California law clearly prohibits public representatives from campaigning for or against any project that they are reviewing. Asking neighbors to attend a meeting to vocally support the Project while failing to provide Project opponents with adequate notice would be clear examples of unacceptable bias and due process violations.

With these legal standards in mind, we sent the attached email to Ms. Snyder before the KMAC Meeting respectfully asking her to recuse herself from deliberating on the Project based on the facts available (**Attachment A**). Ms. Snyder did not respond to our email request. The KMAC Chair, Mr. Tahara, raised the issue at the KMAC Meeting, wherein Ms. Snyder claimed to not have seen the email request. She then reviewed the email and dismissed it without any concern whatsoever for the appearance of bias. She said the accusation was false, but provided no evidence to counter the 35 signatures from neighbors establishing her efforts to campaign for the Project. Mr. Tahara accepted Ms. Snyder's statements without any further precautions and allowed her to vote on the Project.

To avoid even the appearance of bias, Ms. Snyder should have recused herself from deliberating on this Project. She failed to provide adequate notice to the Project opponents, and was presented with 35 signatures of neighbors stating their belief that she attempted to coerce them into supporting the Project. There were five KMAC members in attendance at the meeting. Ms. Snyder could have recused herself to protect the process and allowed the remaining four members to make an objective determination. Instead, she insisted on participating, speaking forcefully in favor of the Project during deliberations. The experience left all of us with the impression that the KMAC had decided well before the meeting that they would approve the Project and that my clients,' and other residents' reasonable concerns simply did not matter.

The substance of the deliberations provided further evidence of the KMAC's pre-ordained conclusions. During the meeting, we presented evidence of potentially significant impacts to my clients' privacy and long-range views resulting from the revised application. Rather than acknowledge these points, and at the very least request that story poles be put in, the KMAC members found that while the Project may "block the view" it wouldn't be "that bad". They made this extremely arbitrary finding without any evidence. We provided clear evidence that anything beyond the existing nook (described further below) and the expansive deck would block my clients' view of the Bay and the Bay Bridge, but the KMAC ignored these concerns. Apparently, KMAC members believed that because the applicants had moved their project to the other side of the house, they should be entitled to build. Thankfully, California law prevents such arbitrary decisions.

KMAC members stated that it was acceptable for views to be blocked, which would be a violation of the Kensington Combining District Ordinance. As the only attorney in the room, I offered to read for the KMAC members the standards from the actual code to help them apply the law to their deliberation, but they refused my offer, apparently unconcerned with the legal standards or the applicable law.

Land use decisions must be conducted impartially, based on the facts of the Project at hand with real evidence to determine whether the Project will comply with the applicable legal standards to avoid the abuse of discretion. Unfortunately, none of that happened at the KMAC Meeting. As a result, the KMAC abused its discretion by ignoring evidence of potential bias and significant impacts to long range views and privacy.

The KMAC also disregarded the variance requirement. When we referenced the County Code provisions that require a variance to approve an expansion to an existing non-conforming use, which understanding is shared by the applicant's own architect, the KMAC deemed this law irrelevant to their findings.

For these reasons, we respectfully ask the County to disregard the KMAC recommendation in making its determination regarding the Project. It is clear that the KMAC has little regard for the law it is required to follow in administering its duties. Any agency action that reflects an abuse of discretion must be disregarded to avoid further tainting the land use process.

## **II. The Project Requires a Variance for an Existing Non-Conforming Use.**

As described in detail in our August 30, 2019, letter (attached as **Attachment B** for convenience), the Project, as proposed, requires a variance to approve the existing non-conforming use both for setback and story requirements under the Contra Costa Code. When we raised this issue with the KMAC, they stated that they were not required to consider the law here, and accordingly, did not make any findings related to the variance.

Any proposal to increase a nonconforming use clearly requires a land use permit under the County's Code. (CCC §82-8.006.) For an existing non-conforming use, the land use permit required here is a variance. (CCC §82-28.516.)

The Project application incorrectly describes the proposed development as a "2-story expansion on a 2-story structure". The existing structure is, and has always been, three stories. As correctly described by the applicant's architect at the February KMAC: "A variance is required due to the fact that the house as it already exists is considered a 3-story structure, due to the fact that is built on a down-slope lot that places the first floor in excess of 4-feet above grade at the rear of the structure. Current zoning places a limit of 2 ½ stories on houses in this zoning district." (Howard McNenny, February 2019, KMAC Meeting.) Mr. McNenny's interpretation is correct. The structure does not magically become two stories when the project is constructed on the other side of the house. The existing structure is three stories, as defined under Contra Costa County's Code, and accordingly, requires a variance for any expansion of the existing non-conforming use, whether on the north or south side.

Accordingly, we request that you ask the applicant to demonstrate how the necessary variance findings may be colorably made, including a clear showing of an undue burden on the property justifying the Project, before issuance of a staff report on this Project. As described further below, we believe these findings cannot be made based on the current design of the Project, but it may be possible to meet the high variance standards if the applicant eliminates or significantly reduces the size of the deck, removes the north-facing window, and does not expand beyond the existing upper level nook.

### **III. The Project, As Currently Proposed, Will Cause Significant Impacts to My Clients Long-Range Views, Privacy, and Property Values.**

As confirmed in your May 2, 2019, email to us, the Project, even when constructed on the south side of the property must be designed “to avoid impacting the neighbor’s long range views, privacy” and property values. Unfortunately, the Project on the south side still causes significant impacts to my clients’ long range views, privacy, and property values.

As described in detail at the KMAC meeting (which facts were sadly ignored), the proposed Project will cause impacts to my clients’ long-range views on both the first and second floors because: 1) the proposed expansion will go beyond the existing nook; and 2) the expansive deck will block Bay views. Both the upper expansion beyond the existing house and the enormous deck will impact my clients side view of the Bay Bridge and the Bay. While the full extent of the impact cannot be determined because the application lacks specific dimensions for either component, it is clear from a conservative review that any expansion beyond the nook will impact Bay views (see **Picture #1, Attachment C-2**) and that the expansive deck will impact my clients’ view of the Bay and the Bay Bridge (see **Picture #2, Attachment D**). My clients only desire is to have their views of the Bay and the Bay Bridge and privacy preserved. That is what the Kensington Combining District and the variance standards require.

We also note that at the KMAC Meeting, the applicants showed a figure that misplaced the location of the bathtub in the master bath where views will be impeded. The correct angle is shown in Attachment C, in which it is undeniable that any expansion beyond the nook will cause long-range view impacts.

Also, as indicated at the KMAC Meeting, the proposed window on the top floor will look directly into my clients’ master bathroom. My clients bought their house in part because of the master bathroom, which allows you to view the Bay Bridge from the tub and the shower. Having a window on the north side of the proposed Project will kill that privacy.

In addition, the proposed expansive deck would cause significant impacts to my clients’ privacy, use, and enjoyment of their home. If a deck this large is approved, not only will my clients’ unique view of the Bay Bridge be gone from this side of the house, but their privacy will be significantly impacted as well. Every time the applicants have people out on the new deck, my clients will be forced to look at them instead of their previous spectacular Bay Bridge view. Having a deck this size impacts both long-range views and privacy and does not comply with either the Kensington Combining District or the County Code regarding variances.

We have included a letter from the realtor (**Attachment E**) who sold the house previously, Ms. Bebe McRae, that identifies the importance of both privacy and long-range views as a selling point of this particular house. It is clear that any impacts to these two factors will cause a significant decrease in my clients’ property value.

If the applicants are willing to remove the north facing window, eliminate or significantly reduce the deck, and avoid expansion beyond the existing nook, it would significantly improve the Project.

### **IV. Hearing Is Required to Ensure Land Use Laws Are Being Followed and Neighboring Rights are Protected**

While we appreciate the applicant’s willingness to re-design their project on the south side of the property, the Project, in its current design, will still impact our clients’ privacy and long-range views of San Francisco Bay. In addition to completing all necessary reviews associated



with a land use permit, it is paramount that the County hold a public hearing to: 1) confirm that a land use permit and variance is required; 2) address existing nonconforming uses; and 3) confirm whether the proposed construction meets both the strict standards for a variance and the Kensington Combining District Standards, which were created to “minimize[e] impacts upon surrounding neighbors and not substantially impair the value and enjoyment of their neighbors' property; maintain the community's property values; and promote[] the general welfare, public health and safety.” (CCC §84-74.204).

Our clients are reasonable people, but they have very serious concerns regarding the environmental impacts of the Project, including specific impacts to their use, enjoyment, privacy, long-range views, and property values. The applicants are proposing a project for an existing nonconforming structure that requires a variance, violates the Kensington Planning Ordinance, and does not currently meet the high standards necessary to justify a variance under the County Code. We believe that a hearing will help address these land use concerns and help the applicants design a project that complies with the existing code.

Thank you for your cooperation in this matter, and please do not hesitate to contact me with any questions. We look forward to receiving notice of the hearing date as soon as it set.

Sincerely,



Jillian Blanchard  
Rudder Law Group, LLP

Cc (by electronic mail):

Ruben Hernandez, CDCD  
Jennifer Cruz, CDCD  
Sharon Anderson, County Counsel  
Ms. Nicole Ashar and Mr. Joseph Petroziello



Jillian Blanchard <jblanchard@rudderlawgroup.com>

## KMAC Meeting October 29, 2019

7 messages

Jillian Blanchard <jblanchard@rudderlawgroup.com>

Mon, Oct 28, 2019 at 8:14 PM

To: melissaanneholmes@gmail.com

Cc: patricktahara@comcast.net, jgioi@bos.cccounty.us, sande@cc.cccounty.us, sarena.burke@cc.cccounty.us, Nicole Ashar <nicoleashar@ymail.com>

Bcc: Jillian Blanchard <jblanchard@rudderlawgroup.com>

Dear Ms. Snyder:

We represent the owners of the 118 St. Albans property in connection with Land Use Application #DP19-3019 to expand the 120 St. Albans Rd Property (the "Project").

On the basis of our discussions with neighbors of the Project, we understand that you approached several neighbors to solicit their specific support for the Project. We have signatures from 35 different neighbors who stated that you asked them to come to the KMAC meeting to support the Project, which, if true, is very troubling for my clients, who are concerned about receiving a fair and objective review of the Project.

We also understand from a public records act ("PRA") response that you personally volunteered to provide to the neighborhood the necessary notice of the KMAC meeting tomorrow night. Unfortunately, my clients and one other neighbor, Donna Stanton at 134 Windsor Ave in Kensington, who are both known to have raised concerns about the Project, did not receive notice from you regarding the October 29, 2019 KMAC meeting. My clients instead learned about the KMAC meeting by calling County staff and through PRA responses. Ms. Stanton received notice about the meeting from my clients. This lack of required notice to Project opponents is particularly troubling given the statements from neighbors regarding your alleged efforts to campaign in favor of the Project.

Under California law, all interested parties have the right to a hearing in front of "a fair and unbiased decision-maker under the due process clause." (See Noble v. City of Palo Alto (1928) 89 Cal.App.47, 51.) If there is evidence of an "unacceptable probability of actual bias on the part of a decision-maker", that decision-maker must be disqualified from reviewing the application. (See Nasha LLC v. City of Los Angeles, 125 Cal. App. 4th 470, in which a Planning Commission decision was vacated because one of the Commissioners showed clear bias by speaking out against a pending project.) While it may not be objectionable for a KMAC member to have a personal preference regarding a project, California law clearly prohibits public representatives from campaigning for or against any project that they are reviewing. Asking neighbors to attend a meeting to vocally support the Project while failing to provide these Project opponents with adequate notice, if true, would be clear examples of unacceptable bias and due process violations. It is particularly important for decision-makers to remain impartial when they live in the same area or have ties to a project applicant, in order to ensure a fair hearing and non-biased decision making in connection with land use decisions.

Assuming the information we have received from such neighbors (stating that you campaigned in favor of the Project) is true, and we have no reason to believe that it is not, and given the fact that my clients still have not received notice from you about the KMAC meeting, we respectfully ask that you recuse yourself from discussing the Project at the October 29, 2019, KMAC meeting to ensure that KMAC holds a fair and impartial review of this Project.

Thank you in advance for your consideration.

Jillian

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**Jillian B. Blanchard**  
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**CONFIDENTIAL MESSAGE**



**RUDDER LAW GROUP**

**EXHIBIT D**

# EXHIBIT D



**RUDDER LAW GROUP**  
NAVIGATING THROUGH ENVIRONMENTAL REGULATION

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Application and Permit Center  
Community Development Counter  
30 Muir Road  
Martinez, CA 94553  
Attn: File #DP 19-3019, Aruna Bhat, and Telma Moreira

December 13, 2019

**120 St. Albans Road, Kensington, CA Application**  
**Corrections to Staff Report**

Dear Ms. Bhat and Ms. Moreira:

On behalf of our clients, the owners of 118 St. Albans Road, I am writing to clarify certain facts on the record and correct misstatements in the Staff Report issued by the County on December 10, 2019 (“Staff Report”), in advance of the public hearing set for December 16, 2019. We want to ensure that as the potential Zoning Administrators (“ZA”) for this hearing, you have all of the facts regarding the development proposed for 120 St. Albans Road, Kensington, CA (the “Project”) in application #DP- 19-3019 before issuing a decision.

**1. Variance Required for an Expansion of the Three Story Structure and Setbacks**

**a. The House is Three Stories**

The Staff Report suggests that while a variance was required for the expansion of the three-story house on the north side, a variance is no-longer required for a similar sized expansion *on the same nonconforming structure* – because it is now constructed on the south side of the building.

This tortured definition defies logic and common sense. A building either is, or is not, three stories. It is not two stories on one side and three stories on another. An expansion of the top two floors of a three-story building requires a variance whether it is on the north or south side. The applicant’s own architect made this clear when he stated correctly in the February KMAC meeting that “A variance is required due to the fact that the house as it already exists is considered a 3-story structure, due to the fact that is built on a down-slope lot that places the first floor in excess of 4-feet above grade at the rear of the structure. Current zoning places a limit of 2 ½ stories on houses in this zoning district.” (Oral Testimony of Howard McNenny, applicant’s architect, KMAC meeting February 2019.)

As repeatedly described in previous correspondence to County staff, for purposes of determining the number of stories, a basement counts as a story if the finished floor level directly above the basement is more than six feet above grade at any point (CCC Code §82-4.266). A basement is further defined in the Kensington Combining District (“KCD”) as “*any area* in a building or structure where the finished floor directly above the area is less than four feet above preconstruction grade or finished grade, whichever is lower.” Based on these definitions, the ground floor is considered a story, and the entire house is three stories.

We asked the County to provide any example, any legal precedent, in which the County relied on the novel interpretation that a variance only applies for expansion to a three story structure on one

side of the building, and the County has produced nothing. County staff has not provided any other example in which the County has used this twisted and inconsistent interpretation to avoid variance requirements. In determining whether a variance applies, the question is whether the proposed project expands a nonconforming use. Here, the proposed development expands the top two floors of a three-story structure, and clearly requires a variance.

The practical implications of implementing the inconsistent approach suggested in the Staff Report would lead to chaos and legal disputes. Indeed, we can think of several instances in which this particularly tortured interpretation would set terrible precedent for the County and its ability to regulate development, leading applicants to design contorted additions to avoid variance requirements. Moreover, it is not appropriate for the County to bend over backwards looking for loopholes to avoid applying variance standards, particularly in this situation where million dollar views are at stake and significant impacts to neighbors would result from allowing such nonexistent loopholes.

## **b. Setbacks**

Similarly, as stated several times previously, the proposed project does not comply with setback requirements, and accordingly, requires a variance.

The Staff Report correctly cites the Contra Costa Code (“CCC”) Code requirement that “a reduced side yard minimum of 3 feet and a [minimum] aggregate side yard of 8 feet is allowed for any new construction (CCC Section 82-14.004).” It then goes on to incorrectly conclude that the addition and deck meet these setback requirements.

Sheet A-3 of the application (attached for convenience as “**Exhibit A**”) shows that the new construction will allow for 3 feet on one side, and 2’10” existing on the other, for an aggregate of 5’10” with the proposed new construction. While three feet may be allowed for a single side yard, the new addition will fall well short of the aggregate requirement to have a minimum of 8’ for both side yards. Accordingly, a variance is required to allow for this continued inconsistency with the County’s Code.

Unfortunately, County staff seems bound and determined to avoid a variance for this project, which seems particularly odd and troublesome given the significant concerns of surrounding neighbors and the need to avoid significant impacts to long-range views. It is well settled law in California that a County cannot pick and choose which portions of the code to apply. (*See Broadway, Laguna etc. Assn. v. Board of Permit Appeals*, (1967) 66 Cal.2d 767, 779-780; *See also Orinda Assn v Board of Supervisors*, 182 Cal.App.3d 1145 (1986).) We respectfully request that the County correctly apply its land use regulations and require a variance for the proposed construction.

## **2. Land Use Permit is Required**

The Staff Report also suggests that a land use permit is not required to authorize the existing non-conforming 3-stories and setbacks. The Staff Report states: “The applicant proposes to expand the existing residential building, as allowed under the R-6 Zoning District. Contra Costa County (CCC) Section 82-8.006 requires a land use permit for expansion of non-conforming uses. The use in this case is residential, permitted by right in the R-6 Zoning District, and therefore, does not require a land use permit.”

The CCC Code clearly defines “nonconforming use” to include a “building or structure on land that does not conform to Divisions 82 and 84 for the district in which it is situated” in addition to inconsistent uses (CCC 82-4.280.) This definition does not only include zoning ‘uses’ but also includes buildings and structures that do not conform with zoning requirements. In this case, as described in painstaking detail in previous correspondence to the County, the existing structure at 120 St. Albans Road does not comply either with the 2 ½ story requirement or the minimum setback

requirements. Accordingly, as acknowledged by staff, a land use permit is required to expand the existing nonconforming use. The Staff Report should be revised and the land use process amended for this reason alone. At the very least, a variance for the proposed continued inconsistency should be required, per the discussion above.

### **3. Views Will Be Affected– Upper and Lower Level**

#### **a. Upper Level – Master Bathroom Views Significantly Impacted**

The Staff Report glosses over the most important issue to our clients – the significant view impacts caused by the proposed project. The Staff Report incorrectly suggests that the property only has west facing views. As is clear from the photos we have provided to staff, our clients’ property has expansive views of the South Bay, including the Bay Bridge and downtown San Francisco, that will be affected by the proposed project, on both the upper and lower level.

Rather than visit the subject property, staff provides an incorrect description in the Staff Report based on inaccurate dimensions to suggest that southern views, which very much exist, will not be impacted by the proposed project.

The Staff Report incorrectly states that the upper floor of the addition to the rear (west side) of the subject residence will only extend two and a half feet beyond the existing residence. It is unclear how staff determined this measurement because these specific dimensions are never identified in the application, which we note is a glaring omission. To the contrary, what is shown in the application, as indicated in the attached sheet A-3 (Exhibit A), is that the upper level addition will extend 7’ 2 ½” from the existing house. As shown, there is an existing nook that extends approximately 4 feet from the house on the upper level on the north side, leaving the proposed addition to extend approximately 3’ 2 ½” into our client’s expansive master bath views. It is hard to know the exact size of the existing nook because this critical dimension has been left out of the application, but *any extension* beyond the existing nook will block our clients’ expansive views from the master bath. (See attached **Exhibit B.**)

At the very least, the application needs to be revised, and story poles installed, to confirm the extent of impacts to our clients’ master bath views. Unfortunately, the KMAC ignored our requests to have story poles installed.

#### **b. Lower Level – Kitchen Window Views Significantly Impacted**

To further highlight staff’s lack of care, due diligence, and concern in this process, the Staff Report erroneously asserts that “[t]he new deck is to replace the existing deck and extends 10.5 feet to the west from the new addition, which is only one and a half feet more than the existing deck.” (p.8).

This statement is wrong for a number reasons. First, it is clear from the Application Sheet A-3 (Exhibit A), that the new deck proposed will not be located within the existing deck footprint, but rather will be constructed behind the new addition, which will be 5’ 2 ½” beyond the existing structure. The Staff Report states that the new deck is 10.5 feet (or 10’ 5”). The application notably fails to include this *critical* dimension of the deck, but assuming the Staff Report is correct, the project would result in a deck that extends at least 15’ 7 ½” out from the existing structure (5’ 2 ½” of the additional house plus 10’ 5” feet of the proposed new deck). The existing deck currently extends only 9 feet from the existing house. Accordingly, the new deck will extend nearly 6 feet (5’ 7½”) directly into the best part of our clients’ Bay Bridge and downtown San Francisco views from their kitchen sink window. (See attached **Exhibit C** for a rendering of likely impacts.) Staff’s suggestion that there will only be 1 ½ feet of new deck is not only wrong, but reflects a complete lack of concern for the very significant view impacts that this project will cause. Had the County required the applicant to install story poles before recommending approval, staff would have realized their mistake, and one would hope, required the applicants to reduce the size of their

unnecessarily large new deck structure. Unfortunately, the County has ignored our request to have story poles installed and has recommended approval based on incorrect calculations.

The fact that the Staff Report describes a proposed deck that is almost entirely outside of the original deck footprint as a ‘replacement deck’ further illustrates staff’s misunderstanding of the size and extent of the proposed project.

These facts may seem like trivial numbers on a page to County staff, but as shown in the various photos that have been repeatedly provided to the County –attached here as Exhibits B and C for convenience – the proposed deck will significantly impact our clients’ current view from their kitchen sink window, a key selling point of their home.

If a deck this large is approved, not only will our clients’ view of the Bay Bridge and downtown San Francisco be gone from this side of the house, but their privacy will be significantly impacted as well. Every time the applicants have people out on their deck, our clients will be forced to look at them instead of their previous Bay Bridge and San Francisco views. Having a deck this size impacts both long-range views and privacy and does not comply with either the KCD or the County Code requirements regarding variances.

As confirmed in Ms. Margaret Mitchell’s May 2, 2019, email to us, the Project, even when constructed on the south side of the property must be designed “to avoid impacting the neighbor’s long range views, privacy” and property values. Unfortunately, the Project as designed still causes significant impacts to our clients’ long range views, privacy, and property values.

As described in detail at the KMAC meeting on October 29, 2019, (which substantial evidence was sadly ignored), the proposed Project will cause impacts to our clients’ long-range views on both the first and second floors because: 1) the proposed expansion will go beyond the existing nook; and 2) the expansive deck will block Bay, Bay Bridge, and San Francisco views. While the full extent of the impacts cannot be determined because the application lacks specific dimensions for either component, and there are no story poles, it is clear that any expansion beyond the nook will impact long-range, million dollar views (see Picture #1, Exhibit B) and that the expansive deck (15’ 2 ½”) will impact our clients’ view of the Bay, downtown San Francisco, and the Bay Bridge (see Picture #2, Exhibit C). Our clients only desire is to have their views of the Bay, downtown San Francisco, and the Bay Bridge and privacy preserved. That is what the KCD and the variance standards require.

We note that for other projects in the KCD, the County has taken a very hard look to preserve these kinds of views on other properties and always required a variance. It is unclear why the County is working so hard in this instance against our clients and recommending approval of such significant impacts in violation of its own regulations.

#### **4. Property Values Will Be Affected**

The Staff Report erroneously suggests that our clients’ property values will not be impacted. Significant impacts to the kitchen window and master bath views will unquestionably impact our clients’ property values. Our clients currently have significant and long range views facing south, contrary to what the Staff Report suggests. Rather than address this issue and ask the applicants to reduce the size of their project to avoid these significant impacts, County staff glosses over the issue by laughably suggesting that “since the addition will be increasing the enjoyment and value of the [applicant’s] property, it will in turn increase the value of the neighboring properties. Therefore, the Petroziello property values will not decrease from the addition to the subject property. (p.7). This analysis is not only wrong, but it’s insulting.

We have included a letter from the prominent real estate agent who sold our clients’ property who confirms that the property’s privacy and views from the kitchen window and master bath, which

views will be significantly impacted by the proposed project, are major selling points to this particular home. (See **Exhibit D.**) We provided this letter to County staff and to the KMAC, and they both chose to ignore this substantial evidence on the record regarding specific impacts to our clients' views and property values. It is disingenuous for staff to suggest our clients' property values will not be impacted because the neighboring property will increase in value. Ironically, the applicant's property values would be increased by stealing our clients' views. This is exactly the type of project the KCD Ordinance was created to prohibit.

Even if the County was not required to issue a variance – which it clearly is – the project will violate KCD standards and should not be approved as currently designed. We have repeatedly explained to staff that a smaller addition could be constructed that would avoid these significant impacts simply by limiting the upper level addition to the size of the existing nook, removing the proposed window facing our clients' master bath, and reducing the deck to the previous footprint size or very close thereto.

While we appreciate County staff's addition of Condition #3 regarding the upper level window, the vague language in this condition should be revised to clarify that this window needs to be removed to preserve our clients' privacy, not simply frosted.

## **5. Notice and Due Process**

As indicated in previous correspondence to the County, the County's review of this project, including the KMAC review, has been fraught with due process violations now exacerbated by the Staff Report. Rather than go into painstaking detail of each violation, we have included the relevant correspondence outlining the various due process violations that have occurred from the beginning, starting with a verbal commitment from a County planner to approve a variance before even reviewing the application, followed by countless failures by the KMAC to follow its own regulations to provide adequate notice, followed by coaching from an interested KMAC representative to avoid a variance, (See **Exhibit E**, letter to the County March 8, 2019), followed by active advocating on behalf of the project by a KMAC representative (See **Exhibit F**, Update to County re: KMAC Hearing, dated November 4, 2019), followed by a failure by County staff to ever meet with our clients, update our clients, or visit our clients' property to adequately assess the situation.

Perhaps most egregious was the latest KMAC meeting on October 29, 2019, which led to staff's most recent approval. When presented with evidence that one of the KMAC members actively advocated on behalf of the project and failed to provide required notice to the two project opponents, the biased KMAC member not only refused to recuse herself to preserve fair and impartial decision-making, but then proceeded to vigorously advocate in favor of the project. For these reasons, we respectfully ask the County to disregard the KMAC recommendation in making its determination regarding the Project. Any agency action that reflects an abuse of discretion must be disregarded to avoid further tainting the land use process.

In addition, the County has repeatedly failed to provide timely and adequate Public Records Act ("PRA") responses to our clients to help us understand the proposed project and the very real ways in which their property will be significantly impacted. The County has forced our clients to hire land use counsel simply to understand the proposed development next door. Sadly, County staff has made it very difficult for our clients to protect their property rights, rights that are specifically protected by the KCD and land use law. We are hopeful that with this additional information, you can help rectify the situation and directly address our clients' very real legal and property concerns.

## **6. Conclusion**

As indicated above and in the attached, this process has been fraught with due process issues and violations of planning and zoning law. The County has repeatedly failed to comply with its own



regulations to avoid significant impacts to our clients' long range views, privacy, and property values. We are confident that a reviewing court would find serious land use violations and abuse of discretion by the County throughout this process, and possibly even violations of CEQA.

However, there is a way forward that would start to address the County's past failures, address our clients' very real concerns, and potentially avoid a protracted legal battle. We have stated repeatedly that if the applicants are willing to remove the north facing window, eliminate or significantly reduce the deck to its original footprint (to make it an actual replacement deck), and avoid an upper level expansion beyond the existing nook, it would significantly improve the project. These changes may even make the project eligible to meet the strict variance standards. While we appreciate the changes that the applicant has made to move the addition to the south side of the structure, additional changes are absolutely necessary to avoid significantly impacting our clients' long range views, privacy, and property values. At the absolute minimum, we request that you require the applicants install story poles before approving the project to help clarify the actual view and privacy impacts this project will cause.

Thank you for your consideration. We look forward to discussing this further during Monday's hearing.

Sincerely,

Jillian Blanchard  
Rudder Law Group, LLP

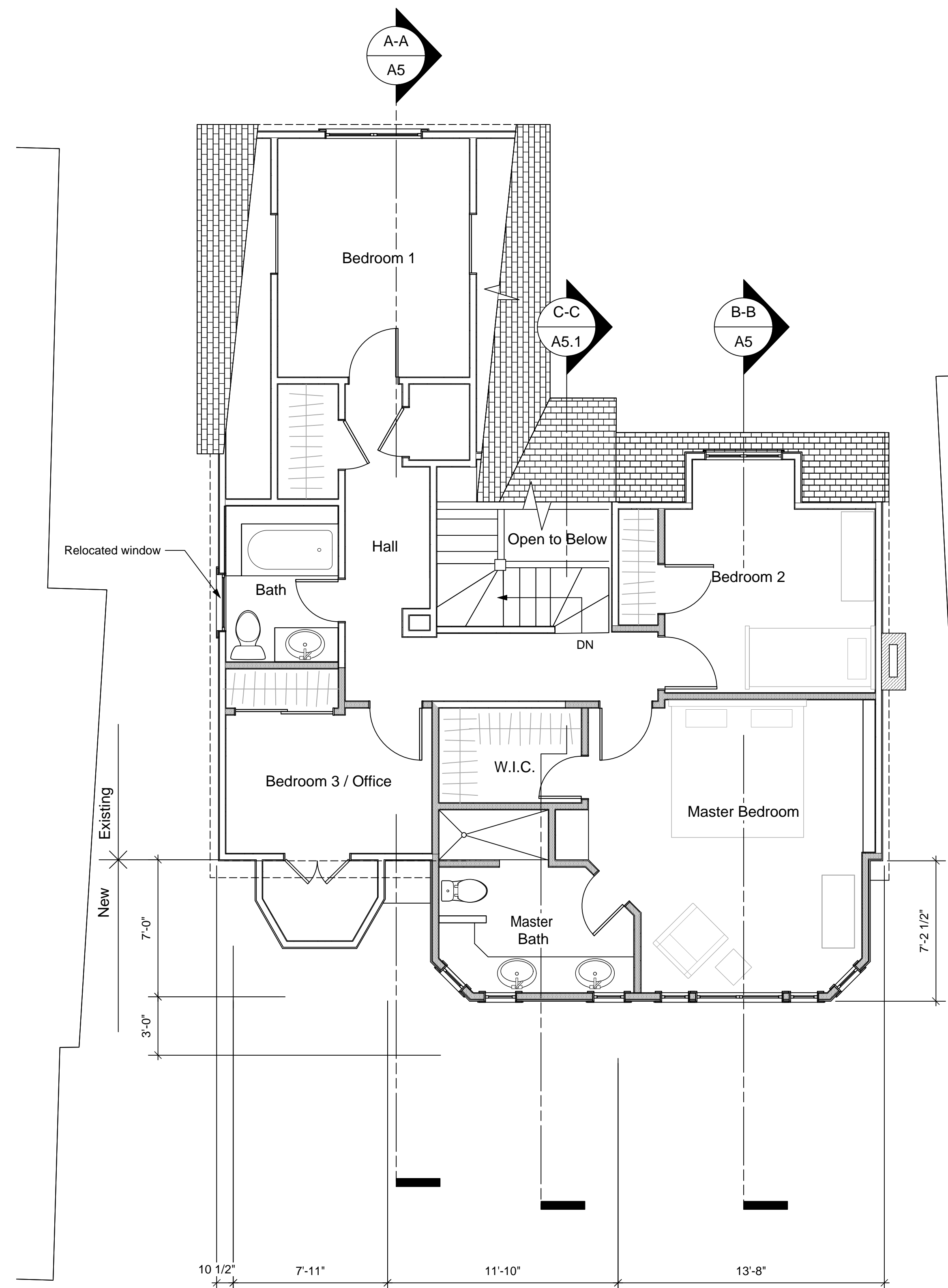


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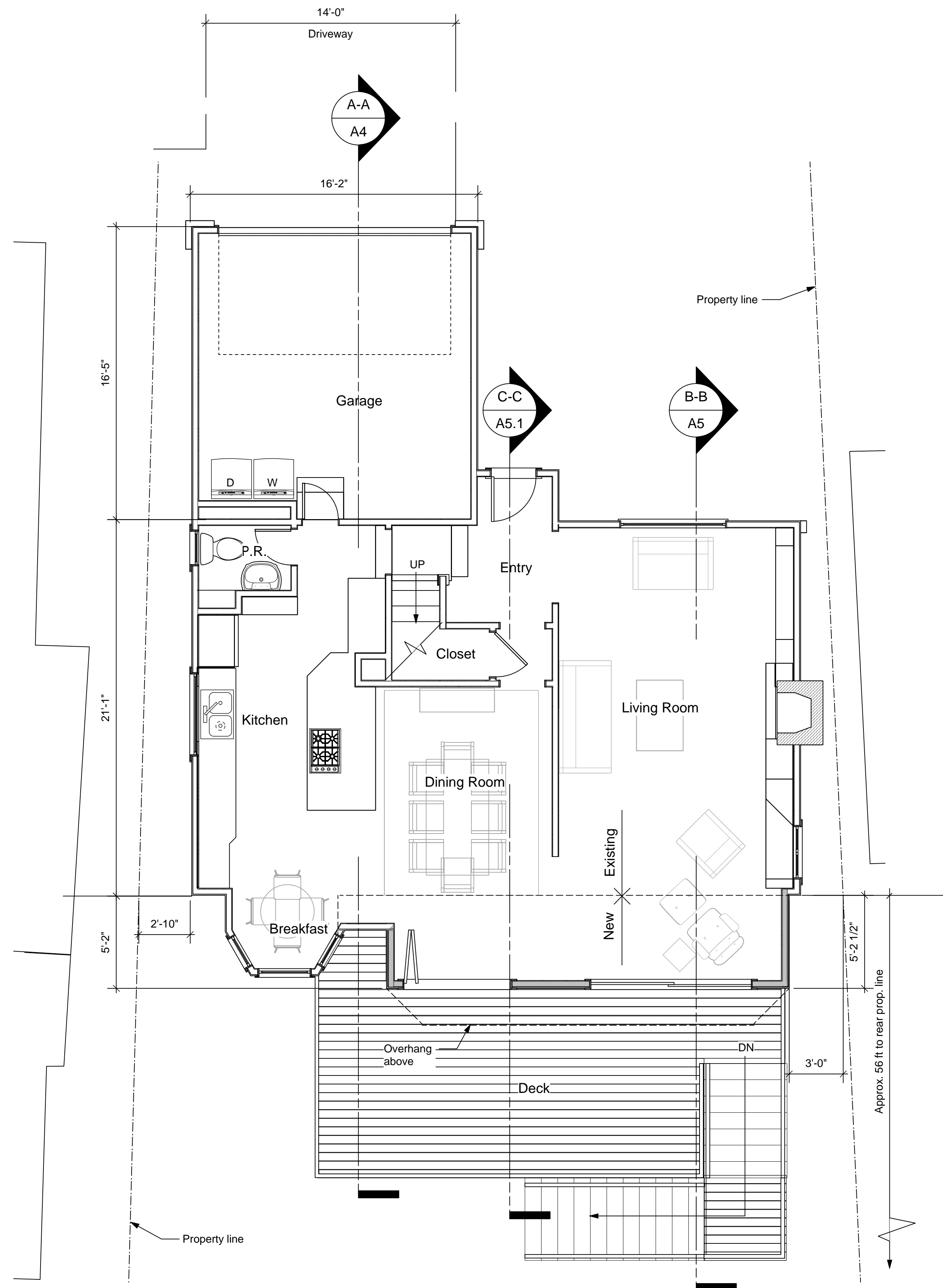
Supervisor District 1, John M. Gioia  
Sharon L. Anderson, County Counsel  
John Kopchik, DCD Director  
Margaret Mitchell, DCD  
Ms. Nicole Ashar and Mr. Joseph Petroziello

Exhibits Enclosed

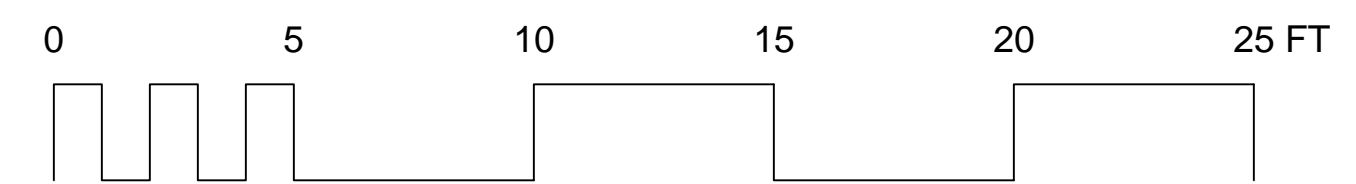
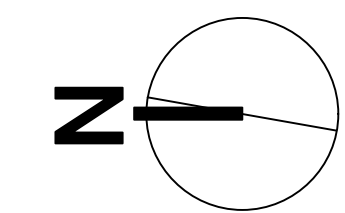
Attachment A



Second Floor Plan



First Floor Plan



architect  
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 email hmcnenny@comcast.net  
 stamp



All information on this drawing constitutes the original and unpublished work of the architect and may not be duplicated, used or disclosed without the written consent of the architect.  
 consultant

project title  
 120 St. Albans Road  
 Kensington CA  
 client  
 contact(s) David Herberich  
 Mary Hanley  
 address 120 St. Albans Road  
 Kensington, CA  
 phone (312) 533-0346  
 email mc4hanley@gmail.com

sheet title  
 Floor Plans (Proposed)

issue date  
 07/25/2019

revisions

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scale

sheet number

**A-3**

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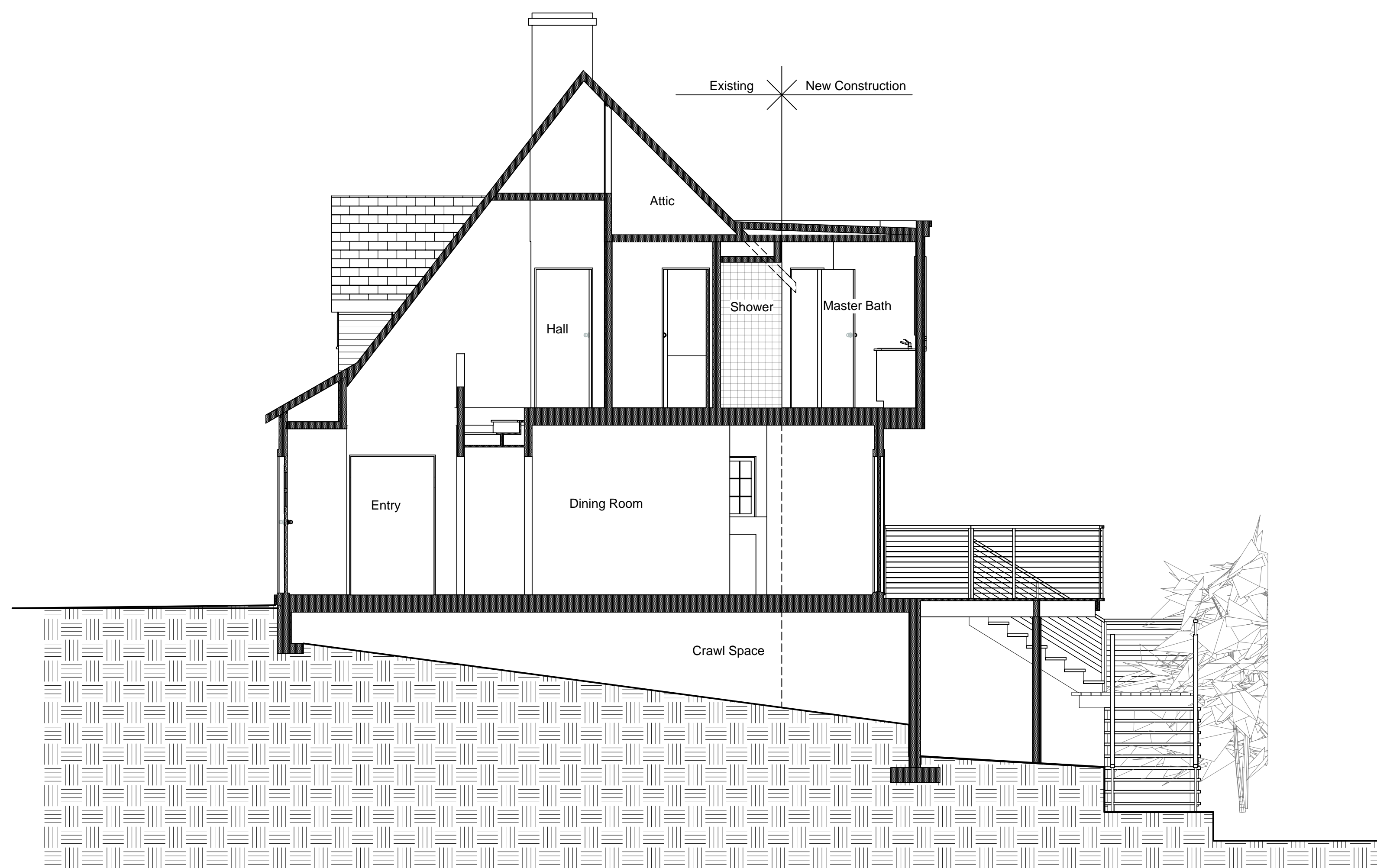
3

A

A

B

B



1 Section C-C  
Scale: 1/4" = 1'-0"

architect

Howard F. McNenny, AIA

address 1039 SANTA FE AVENUE  
ALBANY, CA 94706

phone (510) 705-1671

email h.mcnenny@comcast.net

stamp

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consultant

project title

120 St. Albans Road  
Kensington CA

client

contact(s) David Herberich  
Mary Hanley

address 120 St. Albans Road  
Kensington, CA

phone (312) 533-0346

email mc4hanley@gmail.com

sheet title

Cross Section C-C

issue date

07/25/2019

revisions

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scale

sheet number

**A-5.1**

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3

**Attachment B - 1 - EXISTING VIEW**



**Attachment B - 2 -  
POTENTIAL IMPACTS**



**Attachment C-1 -  
EXISTING VIEW - LOWER LEVEL**



**Attachment C-2 -  
POTENTIAL IMPACTS LOWER LEVEL**



Attachment D



Nicole Ashar  
118 St. Albans  
Kensington, CA.

Re: proposed addition to the home adjacent to 118 St. Albans

Dear Nicole,

As discussed, I have looked at the potential obstruction of the views from your home's kitchen and master bath, and the diminished light for the family room if the proposed additions were to be constructed next door.

In our market, views in general represent great value, and in particular, the view from a kitchen sink and the master suite is extremely important.

Having represented the sellers when you purchased the property, I am aware of how the property has benefitted from the specific views that the property presently offers.

In areas such as Kensington, which are generally very densely built, there is also a decidedly value for privacy. The addition proposed for your neighbor's home appears to potentially diminish your privacy in important areas.

I look forward to hearing of a satisfactory resolution to this neighborhood concern.

Yours,

A handwritten signature in cursive script that reads "Bebe".

Bebe McRae





**RUDDER LAW GROUP**

**EXHIBIT E**



# Design Review Application

Department of Conservation and Development  
Community Development Division  
30 Muir Road  
Martinez, CA 94553  
(925) 674-7200  
[www.cccounty.us](http://www.cccounty.us)

EXHIBIT E-1



CONTRA COSTA COUNTY  
2019 JUL 26 AM 11:56

APPLICANT: PLEASE PRINT CLEARLY AND FILL IN ALL APPLICABLE SECTIONS

TYPE OF APPLICATION (Mark the one that applies):  SMALL LOT DESIGN  KENSINGTON DESIGN REVIEW

### PROPERTY OWNER OR AGENT AUTHORIZATION

NAME: DAVID HERBERICH / MARY HANLEY  
ADDRESS: 120 ST. ALBANS  
CITY, STATE: KENSINGTON ZIP: 94708  
PHONE #: (312) 533-0346

EMAIL: mc4hanley@gmail.com  
 I am the property owner and hereby authorize the filing of this application.

SIGNATURE: [Signature]

### APPLICANT CONTACT INFORMATION

NAME: HOWARD McHENNY  
ADDRESS: 1039 SANTA FE AVE  
CITY, STATE: ALBANY CA ZIP: 94706  
PHONE #: (510) 705-1671

EMAIL: h.mchenney@comcast.net  
 Check here if billings are to be sent to applicant rather than owner.

SIGNATURE: [Signature]

Request description (attach supplemental statement if necessary): 2-STORY ADDITION TO EXISTING 2-STORY HOUSE w/ UNFINISHED CRAWL SPACE BELOW

**Materials required for submittal:** All drawings must be of sufficient clarity to effectively communicate the proposed design, including exterior materials, and proposed heights of structure to the public.  
**Small Lot Design Review (Hand deliver do not mail):** A legible plot plan, floor plan(s), and elevations (from all relevant/alterd sides) no larger than 11 x 17. \*Additional information will be required on sloped lots or where the structure is within 5 feet of maximum height. A drawing prepared by a licensed civil engineer may be required in some circumstances.  
**Kensington:** For projects in Kensington, provide one full size set of plans 24" x 36" and one reduced set 11 x 17.  
**A REQUEST FOR ANY CHANGES TO THE APPROVED DESIGN SHALL REQUIRE THE FILING OF ANOTHER APPLICATION AND RENOTICING. THE SETBACKS SHOWN WILL BE THE MINIMUM, AND THE HEIGHT SHOWN ON THE PLANS WILL BE THE MAXIMUM HEIGHT REQUIRED FOR THE PROJECT.** Applicant/Owner Initials: \_\_\_\_\_

\*\*\*\*\* FOR OFFICE USE ONLY \*\*\*\*\*

#### Project Description:

THE APPLICANT REQUESTS A KENSINGTON DESIGN REVIEW TO ALLOW AN APPROXIMATELY 335 FT<sup>2</sup> 2-STORY LIVING SPACE ADDITION AND REMODEL/EXPANSION OF AN EXISTING UNCOVERED REAR DECK.

#### Property Description:

LOT-5, BLOCK-5, OF BERKELEY HIGHLANDS TERRACE

| AREA                          | FILING FEES                                       | FEE             | CODE                      | ASSESSOR'S #                    |
|-------------------------------|---------------------------------------------------|-----------------|---------------------------|---------------------------------|
| <u>KENSINGTON</u>             |                                                   |                 |                           | <u>572-124-006</u>              |
| Ord. Small Lot 82-10.002(c)   | Small Lot Design Review                           | \$150.00        | S-036A                    | Site Address:                   |
| Ord: Kensington 84-74.10      | Kensington Design Review (if under FAR threshold) | <u>\$500.00</u> | S-036B                    | <u>120 ST. ALBANS ROAD</u>      |
| X-Ref Files: <u>VR18-1032</u> | Late Filing Penalty (+50% of above if applicable) |                 | S-066                     | Supervisor District: <u>ONE</u> |
|                               | Notification Fee                                  | <u>\$30.00</u>  | S-052B                    | Date Filed: <u>7/26/19</u>      |
| Concurrent Files:             |                                                   |                 |                           | Received by: <u>[Signature]</u> |
|                               | TOTAL                                             | <u>\$ 530-</u>  | File #: <u>14R19-0011</u> |                                 |

CHECKING YOUR PLANNING PERMIT STATUS IS EASY, JUST GO TO: <https://epermits.cccounty.us/CitizenAccess/>. (No Registration required, just scroll to the bottom of the page and click on Planning, Search Application For Status.)

Plan review and parcel information

2

To be completed by Community Development Staff

| PARCEL INFORMATION |                                                                                                                                                                                                                                                                                     | NO | YES | COMMENTS or CONDITIONS                                                                                        |
|--------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|-----|---------------------------------------------------------------------------------------------------------------|
| 1                  | Zoning: <u>R-6, T-02, L</u>                                                                                                                                                                                                                                                         |    |     |                                                                                                               |
| 2                  | General Plan: <u>SH</u>                                                                                                                                                                                                                                                             |    |     |                                                                                                               |
| 3                  | Flood Zone <u>X</u><br>(If flood plain is required, refer applicants to Public Works prior to moving on to building.)                                                                                                                                                               |    |     | Refer to Public Works? Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>                    |
| 4                  | Does the lot comply with Subdivision Map Act? (example: Parcel number for minor subs. and lot number for major subs.)                                                                                                                                                               |    | X   |                                                                                                               |
| 5                  | Review previous & concurrent files. Check for restrictions to proposed project, and special conditions that may apply. <u>MAKE SURE ALL FEES ARE PAID IN FULL ON PREVIOUS APPLICATIONS PRIOR TO APPROVAL FOR BI PERMIT.</u>                                                         |    |     |                                                                                                               |
| 6                  | Sliding scale allowed? (82-14.004 for any lot or parcel of land which was established by record in the Office of the Recorder before 1947)                                                                                                                                          |    | X   |                                                                                                               |
| 8                  | Child Care is required if a lot was established or development plan approved after November 14, 1992.                                                                                                                                                                               | X  |     |                                                                                                               |
| 9                  | Park Dedication or Impact fee required?                                                                                                                                                                                                                                             | X  |     |                                                                                                               |
| 10                 | Trees must show on site plan (816-6):<br>• Are there any trees that are possibly effected by development? (within 50 feet)<br>• Are any of the effected trees protected?                                                                                                            | X  |     | PROPOSED ADDITION WILL BE ABOVE AN EXISTING REAR DECK, AND THE WESTWARD DECK EXPANSION WILL NOT IMPACT TREES. |
| 11                 | Do structure setbacks apply to the edge of a private road easement? (Ord. 82-4.244)                                                                                                                                                                                                 | X  |     |                                                                                                               |
| 12                 | Is MWLO (500 sq. ft. for new and 2,500 for rehabbed landscape) Required?                                                                                                                                                                                                            | X  |     |                                                                                                               |
| 13                 | C3 Storm water Control (2500 - 10,000 sq. ft. of impervious space) required?                                                                                                                                                                                                        | X  |     |                                                                                                               |
| 14                 | Retaining Walls proposed?                                                                                                                                                                                                                                                           | X  |     |                                                                                                               |
| 15                 | Grading proposed? (If so, how much?)                                                                                                                                                                                                                                                | X  |     | MINOR GRADING MAY BE NEEDED                                                                                   |
| 16                 | HOA required?                                                                                                                                                                                                                                                                       | X  |     |                                                                                                               |
| 17                 | Historical District?                                                                                                                                                                                                                                                                | X  |     |                                                                                                               |
| 18                 | Sphere of Influence?                                                                                                                                                                                                                                                                |    |     | EL CERRITO                                                                                                    |
| 19                 | Fire District?                                                                                                                                                                                                                                                                      |    |     | KENSINGTON FIRE                                                                                               |
| 20                 | Supervisor District?                                                                                                                                                                                                                                                                |    |     | ONE                                                                                                           |
| 7                  | <b><u>KENSINGTON DESIGN REVIEW ONLY</u></b><br>Total Parcel Size: <u>4641 FT<sup>2</sup></u><br>Existing Gross Floor Area: <u>1,997</u><br>Proposed New Gross Floor Area: <u>335</u><br>Proposed Total Gross Floor Area: <u>2,332</u><br>(Gross floor area definition-84-74.404(h)) |    |     |                                                                                                               |

Conditions/comments:



**RUDDER LAW GROUP**

**EXHIBIT F**

# EXHIBIT F

## Department of Conservation and Development

30 Muir Road  
Martinez, CA 94553

Phone: 1-855-323-2626

## Contra Costa County



**John Kopchik**  
Director

**Aruna Bhat**  
Deputy Director

**Jason Crapo**  
Deputy Director

**Maureen Toms**  
Deputy Director

**Kelli Zenn**  
Business Operations Manager

December 13, 2019

Jillian B. Blanchard  
Rudder Law Group  
1101 Marina Village Parkway, Suite 201  
Alameda, CA 94501  
jblanchard@rudderlawgroup.com

RE: 120 St. Albans Road, Kensington, CA

Ms. Blanchard:

This responds to your December 10, 2019 email to the Department of Conservation and Development. You request that the Department produce “any other case in which the County has not required a variance to expand an existing non-conforming use when constructed on the other side of the house.” Your request would require the Department to conduct an extensive review of every development approved by the Department to identify records responsive to your request. The request is unduly burdensome. The PRA does not require a local agency to perform a “needle in the haystack” search to locate requested records. *Cal. First Amend. Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 166. If you wish to make a more specific request, the Department may be able to identify and provide responsive records.

Your email also asserts that the Department’s December 10 response to your November 27, 2019 Public Records Act request was insufficient. The Department disagrees with your assertion. Your November 27 request asked for all County records “that provide legal precedent, findings, records, memorandum, or guidance that would support the Legal Conclusion.” The “Legal Conclusion” referenced in your request is the Department’s determination that the proposed development at 120 St. Albans Road, Kensington, CA does not require a variance.

On December 10, 2019, the Department responded by providing responsive records including development plans provided by the applicant’s architect and a communication from the project planner to the applicant that development based on the submitted plans would not require a variance. The Department’s response also directed you to the forthcoming, and now publicly available, Department staff report for the December 16, 2019 Zoning Administrator meeting.

The Department has not identified any other “legal precedent, findings, records, memorandum, or guidance that would support the Legal Conclusion.” The Public Records Act does not require a local agency to conduct a legal analysis or produce new records in response to a request by the

public. *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1075. Accordingly, the Department considers its obligations under the Public Records Act with respect to your November 27, 2019 request met.

Your December 10, 2019 communication also requests that the Department “suspend the proceedings” and require a variance for the proposed development. No approval for the proposed development will be granted without a public hearing. As with any member of the public, you and your client may attend and comment at any public hearing where the proposed development is considered, including the scheduled December 16, 2019 public hearing before the Zoning Administrator.

Please contact Ruben Hernandez at (925) 647-7785 if you have any questions.

Sincerely,



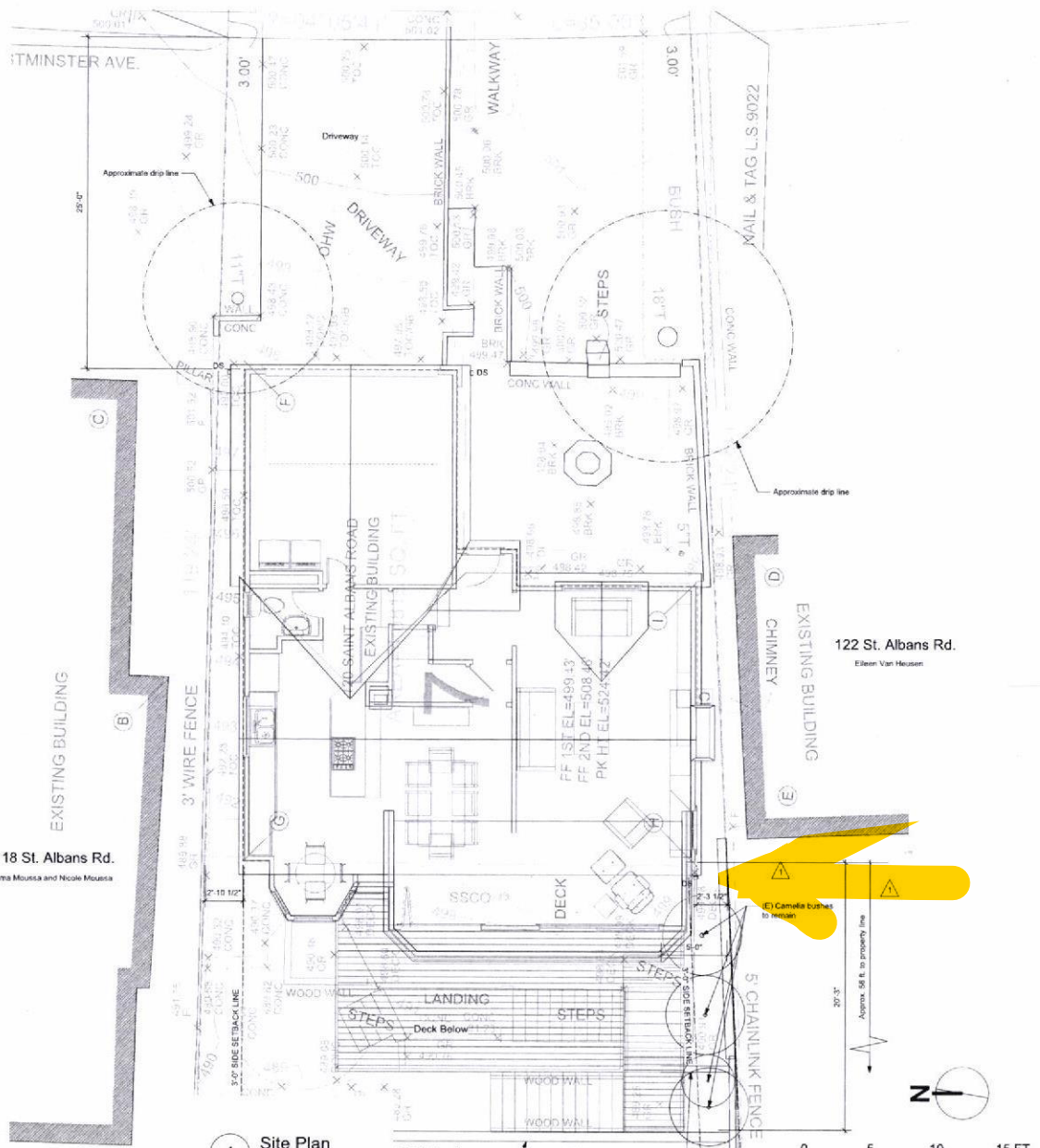
John Kopchik  
Director  
Department of Conservation and Development



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**EXHIBIT G**

**EXHIBIT G-1**



**1 Site Plan**  
Scale: 1/4" = 1'-0"

(E) Retaining wall, approx. 3'-0" high  
(E) Wood retaining wall, approx. 1'-6" high

Note: All retaining walls area existing, no new retaining walls are proposed.

**Architect**  
Howard F. McNenny AIA  
address 109 SANTA FE AVENUE  
ALBANY, CA 94706  
phone (510) 755-1471  
email hmcnenny@comcast.net



All information on this drawing constitutes the original and unpublished work of the architect and may not be distributed, used or published without the written consent of the architect.

**Consultant**

**Project Info**  
120 St. Albans Road  
Kensington, CA  
**Client**  
contact(s) David Harberich  
Tracy Harberich  
address 120 St. Albans Road  
Kensington, CA  
phone (312) 533-0746  
email mcHarley@gmail.com

**Site Plan**

**Project Date**  
07/19/2019  
**Project No.**

| DATE | DESCRIPTION |
|------|-------------|
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**C-2**





## EXHIBIT G-3

**Margaret Mitchell**

---

**From:** Margaret Mitchell  
**Sent:** Tuesday, December 31, 2019 2:50 PM  
**To:** Howard McNenny  
**Cc:** Mary Hanley; David Herberich  
**Subject:** RE: 120 St. Albans

Hi Howard,

I will get a copy of your attachment to Aruna for Monday.

Happy New Year!  
Margaret

---

**From:** Howard McNenny <h.mcnenny@comcast.net>  
**Sent:** Tuesday, December 31, 2019 11:31 AM  
**To:** Margaret Mitchell <Margaret.Mitchell@dcd.cccounty.us>  
**Cc:** Mary Hanley <mc4hanley@gmail.com>; David Herberich <dherberich@gmail.com>  
**Subject:** 120 St. Albans

Dear Margaret:

I hope you are back from jury duty by now, and will be available for the January 6 continuation of our hearing. At the initial hearing, there were some issue raised that I am sure you would be well able to answer. One concerned setbacks—something I did not expect to be in contention at all. Our proposal shows the addition on the south side to be set back 3'-0" from the property line, which is allowed as long as the setback on the other side is at least 5'-0". In our case, the setback on the north sides is 10'-0", or twice what is required. This dimension was left out of the floor plan, so I have added it, and attach below. Please verify that we are in compliance on this issue.

Thank you and best wishes for the new year.

Howard McNenny, AIA

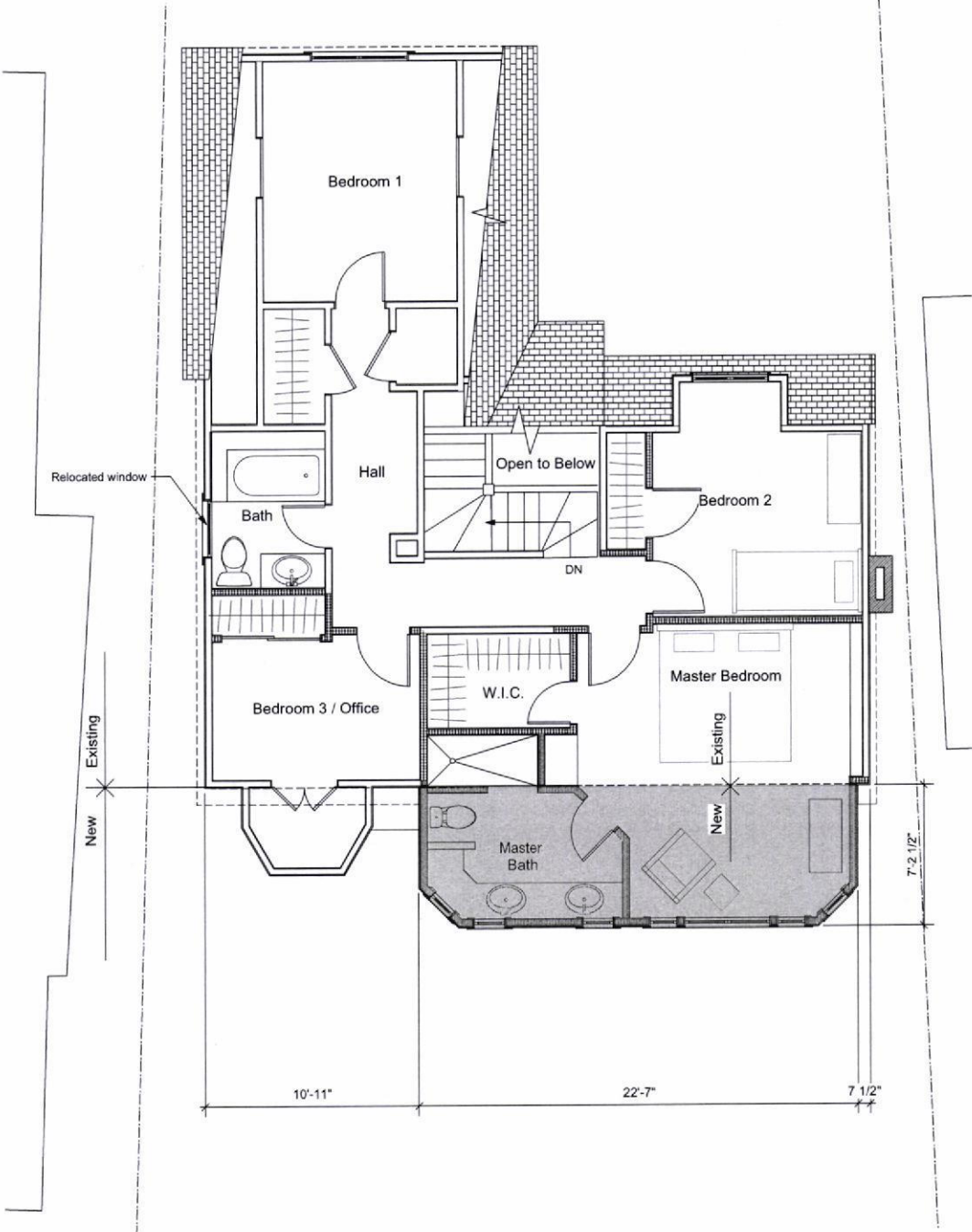
1039 Santa Fe Ave, Albany CA  
Tel: (510) 705-1671  
Cell: (510) 207-7019  
[h.mcnenny@comcast.net](mailto:h.mcnenny@comcast.net)



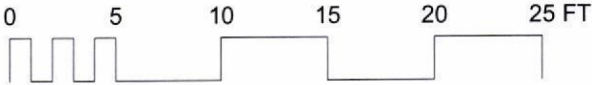
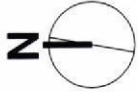
**RUDDER LAW GROUP**

**EXHIBIT H**

# EXHIBIT H



Second Floor Plan

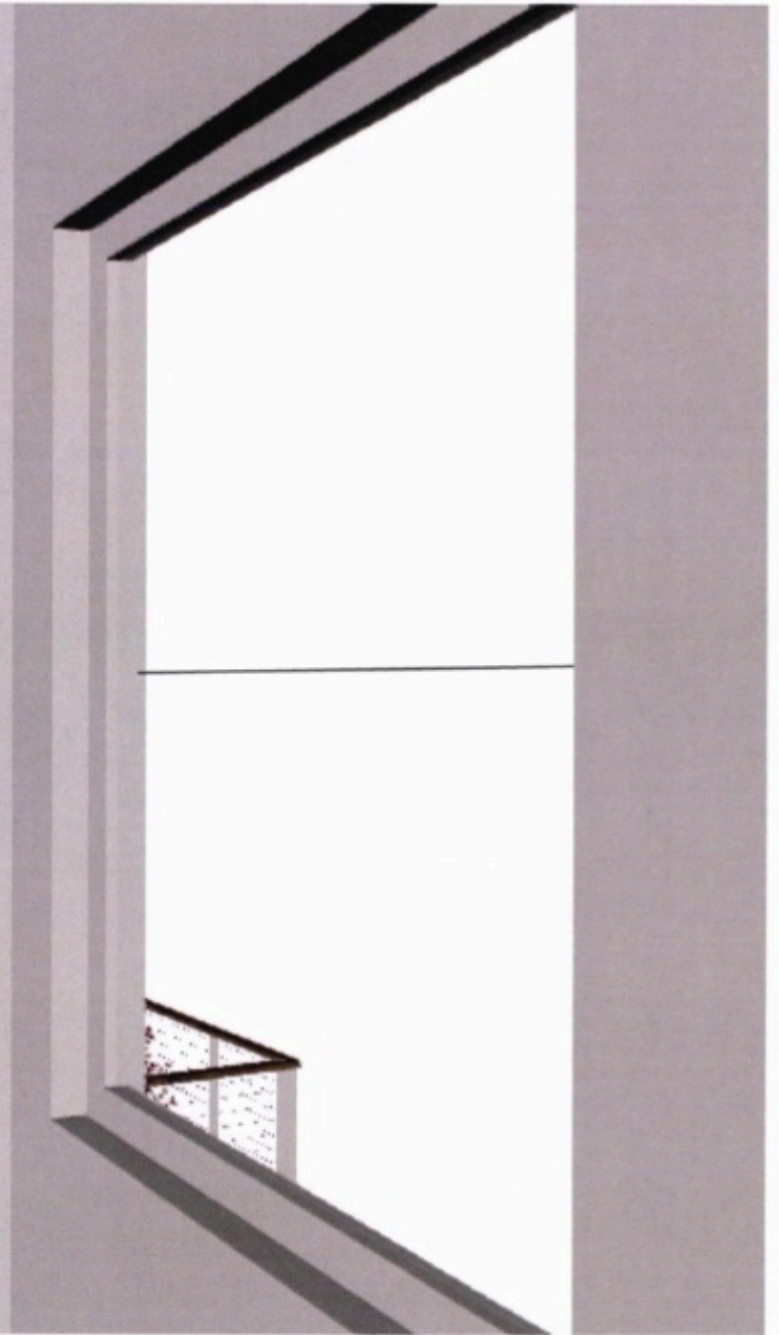




**RUDDER LAW GROUP**

**EXHIBIT I**

**EXHIBIT I**



View from Bath @ 118 St. Albans



**RUDDER LAW GROUP**

**EXHIBIT J**

EXHIBIT J

From: Howard McNenny <[h.mcnenny@comcast.net](mailto:h.mcnenny@comcast.net)>  
Sent: Friday, March 15, 2019 11:32 AM  
To: Margaret Mitchell <[Margaret.Mitchell@dcd.cccounty.us](mailto:Margaret.Mitchell@dcd.cccounty.us)>  
Cc: Mary Hanley <[mc4hanley@gmail.com](mailto:mc4hanley@gmail.com)>; David Herberich <[dherberich@gmail.com](mailto:dherberich@gmail.com)>  
Subject: Re: 120 St. Albans

Margaret:

The obvious question we have is on what basis does staff "not believe that the required variance findings can be made".

As I stated previously, when I first came to the permit center on August 31 of last year, I met with Joseph Lawlor, who reviewed the plans with me, left to review the plans with his supervisor, and returned to let me know that he saw no problems with the variance. He indicated that it was in fact the type of variance that the county routinely grants. Based on that information, my clients have gone to considerable effort and expense to get to the point where we are now. This includes a complete re-design to preserve the view of the neighbor to the north.

As you know, KMAC has recommended design approval. Their reluctance to recommend approval of the concurrent variance request made no sense to me and they did not give an explanation, other than they did not





**RUDDER LAW GROUP**

**EXHIBIT K**

| ParcelID | ParcelID  | Owner Full Name                | Owner Mailing Address 1 | Owner Mailing City | Owner | Owner Mailing | Site St | Site Street Name | Site St | Site City  | Site St | Site Zip   |
|----------|-----------|--------------------------------|-------------------------|--------------------|-------|---------------|---------|------------------|---------|------------|---------|------------|
| 1        | 572140018 | ABRAHAM MICHAEL D & MARY C     | 125 YORK AVE            | KENSINGTON         | CA    | 94708-1044    | 125     | YORK             | AVE     | KENSINGTON | CA      | 94708-1044 |
| 2        | 572140025 | BRASFIELD WENDY TRE            | PO BOX 981              | SAN MARTIN         | CA    | 95046-0981    | 10      | WESTMINSTER      | AVE     | KENSINGTON | CA      | 94708-1056 |
| 3        | 572140013 | BYCEL LEE TRE                  | 143 YORK AVE            | KENSINGTON         | CA    | 94708-1044    | 143     | YORK             | AVE     | KENSINGTON | CA      | 94708-1044 |
| 4        | 570020002 | CAPONE RICHARD & CYNTHIA       | 705 WELLESLEY AVE       | KENSINGTON         | CA    | 94708-1011    | 705     | WELLESLEY        | AVE     | KENSINGTON | CA      | 94708-1011 |
| 5        | 572140001 | CARUTHERS WILLIAM PHILIP       | 100 WINDSOR AVE         | KENSINGTON         | CA    | 94708-1043    | 100     | WINDSOR          | AVE     | KENSINGTON | CA      | 94708-1043 |
| 6        | 572122010 | CHAN DEREK & LYDIA TRE         | 2516 TULARE AVE         | EL CERRITO         | CA    | 94530-1465    | 119     | ST ALBANS        | RD      | KENSINGTON | CA      | 94708-1034 |
| 7        | 570020003 | CHAN ROSALYN SHY-TONG TRE      | 104 ARLINGTON AVE       | KENSINGTON         | CA    | 94707-1102    | 709     | WELLESLEY        | AVE     | KENSINGTON | CA      | 94708-1011 |
| 8        | 572100010 | CHANG CHENG-FONG               | 203 WILLAMETTE AVE      | KENSINGTON         | CA    | 94708-1038    | 203     | WILLAMETTE       | AVE     | KENSINGTON | CA      | 94708-1038 |
| 9        | 572124009 | CHARPENTIER ROBERT L           | 136 ST ALBANS RD        | KENSINGTON         | CA    | 94708-1035    | 136     | ST ALBANS        | RD      | KENSINGTON | CA      | 94708-1035 |
| 10       | 572124003 | CHRISTBAUM RYAN J TRE          | 110 ST ALBANS RD        | KENSINGTON         | CA    | 94708-1035    | 110     | ST ALBANS        | RD      | KENSINGTON | CA      | 94708-1035 |
| 11       | 572140005 | DAY WILLIAM H & SUSAN P TRE    | 118 WINDSOR AVE         | KENSINGTON         | CA    | 94708-1043    | 118     | WINDSOR          | AVE     | KENSINGTON | CA      | 94708-1043 |
| 12       | 572121007 | DEDRICK RUSSELL L TRE          | 25 WESTMINSTER AVE      | KENSINGTON         | CA    | 94708-1054    | 25      | WESTMINSTER      | AVE     | KENSINGTON | CA      | 94708-1054 |
| 13       | 572124014 | DICKINSON JOSHUA M             | 115 WINDSOR AVE         | KENSINGTON         | CA    | 94708-1042    | 115     | WINDSOR          | AVE     | KENSINGTON | CA      | 94708-1042 |
| 14       | 572140012 | DIENER S ROBERT TRE            | 161 YORK AVE            | KENSINGTON         | CA    | 94708-1044    | 161     | YORK             | AVE     | KENSINGTON | CA      | 94708-1044 |
| 15       | 570020004 | DOWLING ROBERT T & ROBERTA TRE | 715 WELLESLEY AVE       | KENSINGTON         | CA    | 94708-1011    | 715     | WELLESLEY        | AVE     | KENSINGTON | CA      | 94708-1011 |
| 16       | 570011012 | DRAEGER HAROLD T & MARIA TRUST | 685 WELLESLEY AVE       | KENSINGTON         | CA    | 94708-1009    | 685     | WELLESLEY        | AVE     | KENSINGTON | CA      | 94708-1009 |
| 17       | 572140027 | DUFFY DENYS                    | 1141 RANLEIGH WAY       | PIEDMONT           | CA    | 94610-1134    | 109     | YORK             | AVE     | KENSINGTON | CA      | 94708-1044 |
| 18       | 570020001 | EMES COLLEEN J TRE             | 703 WELLESLEY AVE       | KENSINGTON         | CA    | 94708-1011    | 703     | WELLESLEY        | AVE     | KENSINGTON | CA      | 94708-1011 |
| 19       | 572121005 | EASTON JOSEPH D TRE            | 29 WESTMINSTER AVE      | KENSINGTON         | CA    | 94708-1054    | 29      | WESTMINSTER      | AVE     | KENSINGTON | CA      | 94708-1054 |
| 20       | 572140007 | EMERY MICHAEL R & ELAINE TRE   | 124 WINDSOR AVE         | KENSINGTON         | CA    | 94708-1043    | 124     | WINDSOR          | AVE     | KENSINGTON | CA      | 94708-1043 |
| 21       | 572124010 | EVERETT SYLVIA L               | 133 WINDSOR AVE         | KENSINGTON         | CA    | 94708-1042    | 133     | WINDSOR          | AVE     | KENSINGTON | CA      | 94708-1042 |
| 22       | 572124017 | FAN ELLIOT TRE                 | 105 WINDSOR AVE         | KENSINGTON         | CA    | 94708-1042    | 105     | WINDSOR          | AVE     | KENSINGTON | CA      | 94708-1042 |
| 23       | 572123002 | FRACCHIA MARIO & BARBARA TRE   | 141 ST ALBANS RD        | KENSINGTON         | CA    | 94708-1034    | 141     | ST ALBANS        | RD      | KENSINGTON | CA      | 94708-1034 |
| 24       | 572140017 | FREELING SHIRA TRE             | 129 YORK AVE            | KENSINGTON         | CA    | 94708-1044    | 129     | YORK             | AVE     | KENSINGTON | CA      | 94708-1044 |
| 25       | 572122002 | GARFIN DAVID E & SUSAN B TRE   | 112 KENYON AVE          | KENSINGTON         | CA    | 94708-1027    | 112     | KENYON           | AVE     | KENSINGTON | CA      | 94708-1027 |
| 26       | 572100012 | GUTMAN KATHLEEN R TRE          | 125 KENYON AVE          | KENSINGTON         | CA    | 94708-1026    | 125     | KENYON           | AVE     | KENSINGTON | CA      | 94708-1026 |
| 27       | 572124006 | HERBERICH DAVID H              | 120 ST ALBANS RD        | KENSINGTON         | CA    | 94708-1035    | 120     | ST ALBANS        | RD      | KENSINGTON | CA      | 94708-1035 |
| 28       | 572122011 | HINES GEORGE & STEPHANIE A     | 115 ST ALBANS RD        | KENSINGTON         | CA    | 94708-1034    | 115     | ST ALBANS        | RD      | KENSINGTON | CA      | 94708-1034 |
| 29       | 572100015 | HOTSON CLAYTON P               | 111 KENYON AVE          | KENSINGTON         | CA    | 94708-1026    | 111     | KENYON           | AVE     | KENSINGTON | CA      | 94708-1026 |
| 30       | 572124011 | ILYIN JOHN                     | 129 WINDSOR AVE         | KENSINGTON         | CA    | 94708-1042    | 129     | WINDSOR          | AVE     | KENSINGTON | CA      | 94708-1042 |
| 31       | 572122003 | KASHYAP BHARAT R               | 3500 27TH PL W APT 422  | SEATTLE            | WA    | 98199-2176    | 116     | KENYON           | AVE     | KENSINGTON | CA      | 94708-1027 |
| 32       | 570020014 | KINGSLEY MADELINE ANDERSON TRE | 202 KENYON AVE          | KENSINGTON         | CA    | 94708-1000    | 202     | KENYON           | AVE     | KENSINGTON | CA      | 94708-1000 |
| 33       | 572122008 | KIRKBY RICHARD J & LISA J      | 125 ST ALBANS RD        | KENSINGTON         | CA    | 94708-1034    | 125     | ST ALBANS        | RD      | KENSINGTON | CA      | 94708-1034 |

## EXHIBIT K-2

300 FT LIST

KR19-00011

7/30/2019

|    |           |                                |                        |               |    |            |     |             |     |            |    |            |
|----|-----------|--------------------------------|------------------------|---------------|----|------------|-----|-------------|-----|------------|----|------------|
| 34 | 572124018 | KOSEL CATHIE TRE               | 101 WINDSOR AVE        | KENSINGTON    | CA | 94708-1042 | 101 | WINDSOR     | AVE | KENSINGTON | CA | 94708-1042 |
| 35 | 572124016 | KOSEL JANICE E                 | 109 WINDSOR AVE        | KENSINGTON    | CA | 94708-1042 | 109 | WINDSOR     | AVE | KENSINGTON | CA | 94708-1042 |
| 36 | 570020005 | KWOCK MICHAEL RICHARD TRE      | 4221 217TH ST          | BAYSIDE       | NY | 11361-2946 | 719 | WELLESLEY   | AVE | KENSINGTON | CA | 94708-1011 |
| 37 | 572140014 | LAYERLE SEAN K                 | 1190 HUNTINGDON DR     | SAN JOSE      | CA | 95129-4110 | 139 | YORK        | AVE | KENSINGTON | CA | 94708-1044 |
| 38 | 572100013 | LEE BETTY Y TRE                | 119 KENYON AVE         | KENSINGTON    | CA | 94708-1026 | 119 | KENYON      | AVE | KENSINGTON | CA | 94708-1026 |
| 39 | 572140022 | LEE BRENDA                     | 107 YORK AVE           | KENSINGTON    | CA | 94708-1044 | 107 | YORK        | AVE | KENSINGTON | CA | 94708-1044 |
| 40 | 572122001 | LEE IAN TRE                    | 108 KENYON AVE         | KENSINGTON    | CA | 94708-1027 | 108 | KENYON      | AVE | KENSINGTON | CA | 94708-1027 |
| 41 | 572123003 | LEEMANS WIM & ANNETTE          | 140 ST ALBANS RD       | KENSINGTON    | CA | 94708-1035 | 140 | ST ALBANS   | RD  | KENSINGTON | CA | 94708-1035 |
| 42 | 572124015 | LEVIN RICHARD                  | 111 WINDSOR AVE        | KENSINGTON    | CA | 94708-1042 | 111 | WINDSOR     | AVE | KENSINGTON | CA | 94708-1042 |
| 43 | 572124002 | LEWIS DAVID A & JULIA A        | 2047 LOS ANGELES AVE   | BERKELEY      | CA | 94707-2428 | 106 | ST ALBANS   | RD  | KENSINGTON | CA | 94708-1035 |
| 44 | 572140016 | LOCHER FELIX C                 | 131 YORK AVE           | KENSINGTON    | CA | 94708-1044 | 131 | YORK        | AVE | KENSINGTON | CA | 94708-1044 |
| 45 | 570011011 | LOW EVELYN A                   | 351 CALIFORNIA ST #600 | SAN FRANCISCO | CA | 94104-2404 | 667 | WELLESLEY   | AVE | KENSINGTON | CA | 94708-1009 |
| 46 | 572140008 | MAYALI LAURENT & CHANTAL       | 126 WINDSOR AVE        | KENSINGTON    | CA | 94708-1043 | 126 | WINDSOR     | AVE | KENSINGTON | CA | 94708-1043 |
| 47 | 572122007 | MCKENZIE RALPH & KATHIE TRE    | PO BOX 121174          | NASHVILLE     | TN | 37212-1174 | 182 | KENYON      | AVE | KENSINGTON | CA | 94708-1027 |
| 48 | 572122006 | MILLER ELINORE M               | 128 KENYON AVE         | KENSINGTON    | CA | 94708-1027 | 128 | KENYON      | AVE | KENSINGTON | CA | 94708-1027 |
| 49 | 572140019 | MOHIT BEHRANG                  | 123 YORK AVE           | KENSINGTON    | CA | 94708-1044 | 123 | YORK        | AVE | KENSINGTON | CA | 94708-1044 |
| 50 | 572140003 | MORRISON GLENN A & GLORIA TRE  | 112 WINDSOR AVE        | KENSINGTON    | CA | 94708-1043 | 0   | WINDSOR     | AVE | KENSINGTON | CA | 94708      |
| 51 | 572140004 | MORRISON GLENN A & GLORIA TRE  | 112 WINDSOR AVE        | KENSINGTON    | CA | 94708-1043 | 112 | WINDSOR     | AVE | KENSINGTON | CA | 94708-1043 |
| 52 | 572124012 | NADOLNY EYLEEN S               | 125 WINDSOR AVE        | KENSINGTON    | CA | 94708-1042 | 125 | WINDSOR     | AVE | KENSINGTON | CA | 94708-1042 |
| 53 | 572121006 | NEDDERSEN CHRISTOPHER          | 27 WESTMINSTER AVE     | KENSINGTON    | CA | 94708-1054 | 27  | WESTMINSTER | AVE | KENSINGTON | CA | 94708-1054 |
| 54 | 572124008 | NG JUDITH TRE                  | 128 ST ALBANS RD       | KENSINGTON    | CA | 94708-1035 | 128 | ST ALBANS   | RD  | KENSINGTON | CA | 94708-1035 |
| 55 | 572140028 | ORETSKY DONIA J TRE            | 1020 W 12TH AVE        | CHICO         | CA | 95926-2144 | 117 | YORK        | AVE | KENSINGTON | CA | 94708-1044 |
| 56 | 572123001 | PECK RHODA                     | 200 KENYON AVE         | KENSINGTON    | CA | 94708-1000 | 200 | KENYON      | AVE | KENSINGTON | CA | 94708-1000 |
| 57 | 570011010 | PERRY DOUGLAS F & HODA A TRE   | 653 WELLESLEY AVE      | KENSINGTON    | CA | 94708-1009 | 653 | WELLESLEY   | AVE | KENSINGTON | CA | 94708-1009 |
| 58 | 572124005 | PETROZIELLO JOSEPH M           | 118 ST ALBANS RD       | KENSINGTON    | CA | 94708-1035 | 118 | ST ALBANS   | RD  | KENSINGTON | CA | 94708-1035 |
| 59 | 572140006 | RAMM ANDREW                    | 120 WINDSOR AVE        | KENSINGTON    | CA | 94708-1043 | 120 | WINDSOR     | AVE | KENSINGTON | CA | 94708-1043 |
| 60 | 572122004 | ROTHACHER WILLIAM & KATHERINE  | 120 KENYON AVE         | KENSINGTON    | CA | 94708-1027 | 120 | KENYON      | AVE | KENSINGTON | CA | 94708-1027 |
| 61 | 570020006 | SANDFORD ILDKO M TRE           | 725 WELLESLEY AVE      | KENSINGTON    | CA | 94708-1011 | 725 | WELLESLEY   | AVE | KENSINGTON | CA | 94708-1011 |
| 62 | 572140009 | SANDLER SIV M                  | 130 WINDSOR AVE        | KENSINGTON    | CA | 94708-1043 | 130 | WINDSOR     | AVE | KENSINGTON | CA | 94708-1043 |
| 63 | 572100014 | SAXENA KRISHAN M S & SAROJ TRE | 113 KENYON AVE         | KENSINGTON    | CA | 94708-1026 | 113 | KENYON      | AVE | KENSINGTON | CA | 94708-1026 |
| 64 | 572123004 | SCHMITT ROBERT J               | 135 WINDSOR AVE        | KENSINGTON    | CA | 94708-1042 | 135 | WINDSOR     | AVE | KENSINGTON | CA | 94708-1042 |
| 65 | 572122009 | SHERWOOD STEPHEN M & KELLY L   | 123 ST ALBANS RD       | KENSINGTON    | CA | 94708-1034 | 123 | ST ALBANS   | RD  | KENSINGTON | CA | 94708-1034 |
| 66 | 570011013 | SHERYON NILY                   | 1625 OCEAN VIEW AVE    | KENSINGTON    | CA | 94707-1250 | 695 | WELLESLEY   | AVE | KENSINGTON | CA | 94708-1009 |
| 67 | 572100016 | STADELHOFFER LISA TRE          | 109 KENYON AVE         | KENSINGTON    | CA | 94708-1026 | 109 | KENYON      | AVE | KENSINGTON | CA | 94708-1026 |

TOTAL: 85

PARCEL: 572-124-006

KENSINGTON DESIGN REV

EXHIBIT K-3

300 FT LIST

KR19-00011

7/30/2019

|    |               |                               |                      |            |    |            |     |           |     |            |    |            |
|----|---------------|-------------------------------|----------------------|------------|----|------------|-----|-----------|-----|------------|----|------------|
| 68 | 572140010     | STANTON LLEWELLYN F TRE       | 134 WINDSOR AVE      | KENSINGTON | CA | 94708-1043 | 134 | WINDSOR   | AVE | KENSINGTON | CA | 94708-1043 |
| 69 | 570020013     | STRITT STEVEN                 | 204 KENYON AVE       | KENSINGTON | CA | 94708-1000 | 204 | KENYON    | AVE | KENSINGTON | CA | 94708-1000 |
| 70 | 572100011     | TOOMBS CHARLES E & NANCY E    | 127 KENYON AVE       | KENSINGTON | CA | 94708-1026 | 127 | KENYON    | AVE | KENSINGTON | CA | 94708-1026 |
| 71 | 572122005     | VANDENEEDEN STEPHEN TRE       | 124 KENYON AVE       | KENSINGTON | CA | 94708-1027 | 124 | KENYON    | AVE | KENSINGTON | CA | 94708-1027 |
| 72 | 572124007     | VANHEUIT EILEEN J TRE         | 122 ST ALBANS RD     | KENSINGTON | CA | 94708-1035 | 122 | ST ALBANS | RD  | KENSINGTON | CA | 94708-1035 |
| 73 | 572124013     | WARD GILBERT II & LINDA M TRE | 121 WINDSOR AVE      | KENSINGTON | CA | 94708-1042 | 121 | WINDSOR   | AVE | KENSINGTON | CA | 94708-1042 |
| 74 | 572140015     | WEBB MATTHEW T                | 135 YORK AVE         | KENSINGTON | CA | 94708-1044 | 135 | YORK      | AVE | KENSINGTON | CA | 94708-1044 |
| 75 | 572124001     | WHISTLER JENNIFER L           | 100 ST ALBANS RD     | KENSINGTON | CA | 94708-1035 | 100 | ST ALBANS | RD  | KENSINGTON | CA | 94708-1035 |
| 76 | 572140011     | WU JUNQIAO                    | 3620 SKYPARK PL      | SAN PABLO  | CA | 94806-6104 | 136 | WINDSOR   | AVE | KENSINGTON | CA | 94708-1043 |
| 77 | 572140002     | YILMAZ DURMUS & SEBNEM        | 108 WINDSOR AVE      | KENSINGTON | CA | 94708-1043 | 108 | WINDSOR   | AVE | KENSINGTON | CA | 94708-1043 |
| 78 | 572124004     | ZHOU DESHENG                  | 114 ST ALBANS RD     | KENSINGTON | CA | 94708-1035 | 114 | ST ALBANS | RD  | KENSINGTON | CA | 94708-1035 |
| 79 |               | HOWARD MCKENNY                | 1039 SANTE FE AVENUE | ALBANY     | CA | 94706      |     |           |     |            |    |            |
| 80 | KENSINGTON MA | ATTN: PATRICK TAHARA          | 15 ARLMONT           | KENSINGTON | CA | 94707      |     |           |     |            |    |            |
| 81 | KENSINGTON MA | ATTN: CHRISTOPHER BRYDON      | 220 STANFORD AVE     | KENSINGTON | CA | 94708      |     |           |     |            |    |            |
| 82 | KENSINGTON MA | ATTN: MELISSA HOLMES-SNYDER   | 144 ARDMORE RD       | KENSINGTON | CA | 94707      |     |           |     |            |    |            |
| 83 | KENSINGTON MA | ATTN: DAM NOVICKAS            | 239 WILLAMETTE AVE   | KENSINGTON | CA | 94708      |     |           |     |            |    |            |
| 84 | KENSINGTON MA | ATTN: LLOYD COWELL            | 107 ARLINGTON AVE    | KENSINGTON | CA | 94707      |     |           |     |            |    |            |
| 85 | KENSINGTON MA | ATTN: LARRY NUCCI             | 636 WELLESLEY AVE    | KENSINGTON | CA | 94708      |     |           |     |            |    |            |

TOTAL: 85

PARCEL: 572-124-006

KENSINGTON DESIGN REV



**RUDDER LAW GROUP**

**EXHIBIT L**

Subject: Talked to Nicole

EXHIBIT L

Date: Friday, March 1, 2019 at 3:16:40 PM Pacific Standard Time

From: Kate Rauch

To: Sonia Bustamante

She doesn't need to talk to John at this point. Her neighbor's project is winding through the process and could always get appealed to the Board of Supervisors. I took her complaint against a specific KMAC member.

Kate

Sent from my iPhone

*[Faint, illegible text, likely a forwarded email or a very low-quality scan of a document.]*



**RUDDER LAW GROUP**

**EXHIBIT M**

## EXHIBIT M

Friday, October 4, 2019 at 2:13:23 PM Pacific Daylight Time

**Subject:** Re: 120 St. Albans Kensington

**Date:** Thursday, August 1, 2019 at 2:13:01 PM Pacific Daylight Time

**From:** patricktahara

**To:** Kate Rauch

interesting change in plan.

I am assuming that the neighbor, nicole, had seen this change? or she worked up even over this one.

Patrick Tahara  
415-307-4042

----- Original message -----

**From:** Kate Rauch <Kate.Rauch@bos.cccounty.us>

**Date:** 8/1/19 10:11 AM (GMT-08:00)

**To:** Aruna Bhat <Aruna.Bhat@dcd.cccounty.us>

**Cc:** patricktahara@comcast.net

**Subject:** Re: 120 St. Albans Kensington

I assume this redesign needs to go back the the KMAC?

Kate

Sent from my iPhone

On Aug 1, 2019, at 9:58 AM, Aruna Bhat <Aruna.Bhat@dcd.cccounty.us<mailto:Aruna.Bhat@dcd.cccounty.us>> wrote:

Please see the attached Small Lot application KR19-00011 that is out for public review.

-----  
Danielle Kelly  
Department of Conservation and Development  
30 Muir Road  
Martinez, CA 94553  
925-674-7789  
925-674-7205- Main Line  
danielle.kelly@dcd.cccounty.us<mailto:danielle.kelly@dcd.cccounty.us>

<image002.png>

**From:** Kate Rauch <Kate.Rauch@bos.cccounty.us<mailto:Kate.Rauch@bos.cccounty.us>>

**Sent:** Wednesday, July 31, 2019 10:28 AM

**To:** Aruna Bhat <Aruna.Bhat@dcd.cccounty.us<mailto:Aruna.Bhat@dcd.cccounty.us>>; Jennifer Cruz

<Jennifer.Cruz@dcd.cccounty.us<mailto:Jennifer.Cruz@dcd.cccounty.us>>;

patricktahara@comcast.net<mailto:patricktahara@comcast.net>

**Subject:** 120 St. Albans Kensington





**RUDDER LAW GROUP**

**EXHIBIT N**

**EXHIBIT N**

Jillian Blanchard &lt;jblanchard@rudderlawgroup.com&gt;

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**120 St. Albans Road - DP# 19-3019 - ZA Review**

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Jillian Blanchard <jblanchard@rudderlawgroup.com>  
To: aruna.bhat@dcd.cccounty.us  
Cc: Nicole Ashar <nicoleashar@ymail.com>  
Bcc: Jillian Blanchard <jblanchard@rudderlawgroup.com>

Wed, Jan 8, 2020 at 12:25 PM

Ms. Bhat:

Thank you for reconsidering DP # 19-3019 regarding the proposed development at 120 St. Albans Road. As a follow up to Monday's hearing, and before you make your determination, I wanted to reach out to you regarding a few items.

First, you mentioned receiving written testimony from KMAC representatives. As this testimony most likely addresses the claims we have raised on the record, I would appreciate the chance to respond to this testimony, or at the very least, to review it. It is highly unusual for an 'impartial decision-maker' to file testimony *in support* of a project and does not in anyway support KMAC representative claims that they have been impartial. I would appreciate it if you would forward the KMAC testimony at your earliest convenience, which will save my clients from having to file a 9th Public Records Act request with the County to receive information relevant to their property rights.

At Monday's hearing, the architect for the applicant suggested that the proposed expansion was a two-story addition on a two-story structure. That is simply not correct. Both the Staff Report and the Application make clear that the existing structure is three stories, which is prohibited by CCC §84-4.802. The applicant's architect made this clear when he stated *correctly* in the February KMAC meeting that "a variance is required due to the fact that the house as it already exists **is considered a 3-story structure.**" (Oral Testimony of Howard McNenny, applicant's architect, KMAC meeting February 2019.) This fact remains true whether the addition is on the north or south side of the structure. As described in extensive correspondence to the County, a proposed expansion of the top two floors of a three-story building requires a variance - pure and simple.

For purposes of determining the number of stories, a basement counts as a story if the finished floor level directly above the basement is more than six feet above grade **at any point** (CCC Code §82-4.266), which is absolutely the case here. A basement is further defined in the Kensington Combining District ("KCD") as "any area in a building or structure where the finished floor directly above the area is less than four feet above preconstruction grade or finished grade, whichever is lower." Again, this is the case with the house on 120 St. Albans Road. The analysis does not hinge in anyway on the definition of a 'crawl space' as suggested by County staff and repeated by the applicant's architect in Monday's hearing. Moreover, it is unclear why the County would rely on a novel - and unsupported - legal interpretation to avoid a variance in violation of its own Code, particularly in this situation, in which a neighbor has very real, legitimate concerns about significant impacts to long-range views, privacy, and property values. Approving the current design without a variance would not be legally supportable and would lead to a protracted legal battle to force the County to comply with its own laws.

The primary goals here are to avoid significant impacts to long-range views, privacy, and property values, and of course, to comply with planning and zoning laws. Some suggestion was made yesterday that the County is allowed to authorize *some* impacts to views and privacy. We would remind you of the Kensington Combining District Ordinance, which requires the County to: a) **minimize** impacts to surrounding neighbors; b) **protect** the value and enjoyment of the neighbor's property; and c) **maintain** property values. Authorizing obstructions to my client's *only* long range views of the Bay Bridge on the upper floor would not serve to minimize impacts or protect my client's value and enjoyment of their property. We have provided substantial evidence to suggest that there will be significant impacts to long range views from the upper level and out of the kitchen sink window on the lower level, which will also significantly impact my clients' privacy and property values. If the County believes the project will not cause such significant impacts, it is critical that they require the applicant to install story poles to establish this fact before allowing applicants to construct a permanent expansion. Without story poles to prove otherwise, the County will be making a finding contradictory to the substantial evidence on the record.

We also remind you that the variance standards require that the County (indeed the applicant) make a showing that there is no grant of special privilege here. Allowing one neighbor to essentially steal the view of another would clearly be a grant of special privilege without a proper showing of special need.

We also note that the County continues to reference the new deck as a replacement. As described at length at the first hearing on December 16, 2019, the new deck is proposed to start approximately 5 1/2 feet out from the existing structure,

which would lead to an additional **6-7 feet** from the existing house, significantly impacting my clients' long range views, privacy, and property values. The Staff Report incorrectly states a critical dimension of the deck, claiming that it will only stick out 1.5 feet. Given the proposed house addition plus the new 10.5 foot deck, the new deck will be mostly outside of the existing deck footprint (which is only 9 feet from the existing structure). These critical miscalculations could cost my clients the loss of an astounding long-range view and privacy from their kitchen sink window, key selling points of their home. These inaccuracies also could be avoided by installing story poles to show the actual impacts associated with the proposed design.

There are simple solutions that the County must employ to avoid a protracted legal battle. Require the applicants to install story poles to establish the actual impacts from the project. If the project does not permanently damage my client's long range views, privacy, and property values, then perhaps a variance and DP can be approved. Another, more direct, solution, if the applicants are unwilling to install story poles, would be to have the applicants redesign the project to actually minimize impacts on my clients' views by: 1) reducing the size of the enormous deck footprint to 3.5 feet, (to stay within the existing footprint and be a true replacement deck); and 2) reducing the extent of the upper level to sit behind the existing structure (or 'nook') to preserve my client's long range views on the upper level. If the County fails to follow its own Code, acknowledge the substantial evidence on the record, and approves the project as designed without sufficient minimization measures, my clients will be left with no option but to appeal the decision.

Finally, any proposal to revise the design to address the setback issue, remove the window, or reduce the size of the deck/upper level should include resubmittal of project designs to ensure proper review and vetting before approval. This approval process has been fraught with due process violations and inattention to detail that has cost my clients (and the applicants) dearly. In addition to the extensive PRA requests we've been forced to file to simply understand the project, the County has failed to provide adequate notice or adequate meeting minutes of administrative decisions. Indeed, one cannot even hear the audio from Monday's hearing on this matter on the County's website. We strongly recommend that the County carefully work to address these laps in procedure and rectify our due process concerns by following the solutions suggested above.

Sincerely,  
Jillian

--

**Jillian B. Blanchard**

**Rudder Law Group, LLP**

1101 Marina Village Pkwy, Suite 201

Alameda, CA 94501

Direct: 415.867.6769

[www.RudderLawGroup.com](http://www.RudderLawGroup.com)

**CONFIDENTIAL MESSAGE**

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**RUDDER LAW GROUP**

**EXHIBIT O**

**EXHIBIT O**

Jillian Blanchard &lt;jblanchard@rudderlawgroup.com&gt;

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**120 St. Albans Road - DP# 19-3019 - ZA Review**

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Jillian Blanchard &lt;jblanchard@rudderlawgroup.com&gt;

Thu, Jan 16, 2020 at 1:55 PM

To: Lawrence Huang &lt;Lawrence.Huang@dcd.cccounty.us&gt;, Margaret Mitchell &lt;Margaret.Mitchell@dcd.cccounty.us&gt;

Cc: Nicole Ashar &lt;nicoleashar@ymail.com&gt;

Bcc: Jillian Blanchard &lt;jblanchard@rudderlawgroup.com&gt;

Lawrence and Margaret:

Unfortunately, the County has chosen yet again to stonewall my clients -instead of considering their very reasonable requests and concerns- by failing to respond to a simple request for a copy of the KMAC written testimony regarding DP#19-3019, which testimony directly addresses my clients' arguments - See below. This continued effort to stonewall my clients and prohibit a transparent look into the County's land use processes only further evidences the County's bias against my clients and the various due process violations associated with this particular land use approval. **A simple request for relevant written testimony that will directly affect my clients' property should not be withheld and should not require a formal Public Records Act ("PRA") request to obtain.** And yet, here we are again, forced to submit the **12th PRA Request** for this project, simply to understand the arguments being raised against my clients.

**Please consider this a supplemental PRA request to receive Any and All "Records" or "Writings" (as defined below) relating to any plans, submittals, applications, or Communications from or to the County relating to the Property (120 St. Albans Road), including any reference to land use application DP#19-3019, #KR19-0011 and/or any other applications for development ("collectively, Land Use Applications") that have been submitted regarding the Property between October 9, 2019- today (January 16, 2020), including any communications between the County and the applicants regarding any Land Use Applications. Specifically, please provide us with a copy of any and all written submittals from KMAC members to the County's Zoning Administrator regarding the Property and the ongoing Land Use Applications.**

For purposes of this request and the avoidance of doubt, we provide the following clarifying definitions for the following terms:

"All" and "any" each mean "any and all."

"Communications" mean all verbal and written communications of every kind between and among the parties specified, including but not limited to telephone calls, conferences, conversations, meetings, notes, correspondence, emails, and memoranda.

"County" means Contra Costa County, including its officers, staff, managers, appointees, employees, contractors, agents, representatives, attorneys, and consultants, including in particular, employees of the Department of Conservation and Development.

"KMAC" means the Kensington Municipal Advisory Committee, including its officers, staff, managers, employees, contractors, agents, representatives, attorneys, and consultants.

"Property" mean that certain real property commonly referred to as 120 St. Albans Road in Kensington, California.

"Records" include, without limitation, all writings and documents of every type in your possession, control, or custody, including but not limited to the following items, whether printed or reproduced by any process, including documents sent and received by electronic mail, or written or produced by hand: computer data files, information stored in electronic media, including on computer tapes, disks, or diskettes, tapes, inputs, outputs, and printouts; notes; letters; correspondence; communications; telegrams; memoranda; summaries and records of telephonic and telegraphic communications; summaries and records of personal conversations; diaries; appointment books; reports (including any and all draft, preliminary, intermediate, and final reports); surveys; studies; comparisons; tabulations; budgets; workpapers; charts; plans; maps; drawings; engineering and other diagrams; photographs; film; microfilm; microfiche; tape and other mechanical and electrical audio and video recordings; data compilations; log sheets; ledgers; vouchers; accounting statements; books; pamphlets; bulletins; minutes and records of meetings; transcripts; stenographic records; testimony and exhibits, including workpapers; copies, reports, and summaries of interviews and speeches; reports and summaries of investigations; opinions and reports of consultants; reports and summaries of negotiations; press releases; newspaper clippings; drafts and revisions of draft of documents; and any and all other records, written, electrical, mechanical, and otherwise.

“Relating To” means concerning, pertaining to, referring to, describing, mentioning, containing, evidencing, constituting, dealing with, discussing, considering, analyzing, studying, reporting on, commenting on, setting forth, supporting, recommending or otherwise concerning in any manner whatsoever the subject matter of the request.

“Writing” means any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by email or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.

We believe that no express provisions of law exist that exempt the Records from disclosure. As you determine whether this request seeks copies of disclosable public records, be mindful that Article I, Section 3 (b)(2) of the California Constitution requires the County to broadly construe a statute, court rule, or other authority if it furthers the right of access to the information we have requested and to narrowly construe a statute, court rule, or other authority if it limits the public’s right of access.

To the extent that there are any responsive Records, or portions thereof, which the County determines to be exempt from disclosure and seeks to withhold, please provide us with prompt notification of the County’s intent to withhold such Records, together with an index and general description of such Records, the names and titles or positions of each person responsible for the denial of our request, and the reason(s) for the denial. If a portion of the information we have requested is exempt from disclosure by express provisions of law, Government Code Section 6253(a) additionally requires segregation and deletion of that material in order that the remainder of the information may be released.

We agree to appropriately reimburse you for your copying, scanning, and reproduction costs. Where feasible, we strongly prefer electronic copies of all responsive Records. It is our understanding that, by submitting this single request to your office, you will notify all appropriate divisions and departments within the County to produce any and all responsive Records.

**Pursuant to Government Code Section 6253(b), we ask that you make the Records “promptly available,” to avoid impeding my clients’ rights to a fair appeal of any County decisions regarding this Project.**

Sincerely,  
Jillian

[Quoted text hidden]



**RUDDER LAW GROUP**

**EXHIBIT P**

# EXHIBIT P

**Margaret Mitchell**

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**From:** Howard McNenny <h.mcnenny@comcast.net>  
**Sent:** Tuesday, January 07, 2020 12:13 PM  
**To:** Margaret Mitchell  
**Cc:** Mary Hanley  
**Subject:** 120 St. Albans

Dear Margaret:

As you probably know, after the hearing yesterday, the Zoning Administrator decided to take all under consideration and render the verdict in two weeks. I don't know if she will be conferring with you or with Ruben in the mean time, but if so, there is something I might suggest you clarify. This would be on the subject of Ms. Blanchard's position that we should be required to go through the variance process. She made the claim that she could find on precedent for an addition being approved to an existing non-conforming house without going through this process. I am sorry I was not quick enough to mention it, but there is in fact a very obvious example of exactly that: the neighbor's own house at 118 St. Albans. I remember asking you if the addition to that house ever got a variance and you said no...only a Development Plan. Clearly, this is a 3-story house.

Just as an aside, I also would ask that the photos used as evidence in Ms. Blanchard's brief be viewed with some skepticism. I have heard that someone at the neighboring house may have been leaning out a window to get the most extreme perspective possible. Nothing I saw myself, but I do think the KMAC photos should carry the most weight.

Thanks for the assistance.

Howard McNenny, AIA

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