

CLERK OF THE
BOARD OF SUPERVISORS



COUNTY OF SANTA CRUZ

GOVERNMENTAL CENTER

701 OCEAN STREET - Room 500
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July 7, 1998

Board of Supervisors
701 Ocean Street, Room 500
Santa Cruz, CA 95060

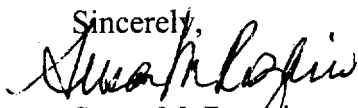
Re: Scheduling jurisdictional hearing regarding Application No. 97-0622; APN: 43-105-07; 413 Beach Drive

Members of the Board:

Pursuant to Section 18.10.340(c) of the Santa Cruz County Code, Attorney Douglas Marshall, on behalf of Jim and Judi Craik, has filed an appeal of the Planning Commission's decision regarding Application No. 97-0622. This application is a proposal to demolish an existing garage and to construct a two-story, single family dwelling with a garage below constituting a three-story dwelling. The property is located on the north side of Beach Drive (413 Beach Drive), about 3/4 mile southeast of the Esplanade and Rio Del Mar Boulevard.

IT IS THEREFORE RECOMMENDED that a jurisdictional hearing be scheduled for Tuesday, August 18, 1998 at 1:30 p.m. or thereafter for your Board to consider this matter.

Sincerely,


Susan M. Rozario
Chief Deputy Clerk

Recommended:


County Administrative Officer

cc: Planning
Attorney Doug Marshall
Norma Odenweller

DOUGLAS E. MARSHALL
ATTORNEY AT LAW
108 Locust Street, Suite 11
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Santa Cruz, California 95060

(408) 425-7900

July 2, 1998



County of Santa Cruz
Board of Supervisors
701 Ocean Street
Santa Cruz, CA 95060

HAND DELIVERED

RE: JURISDICTIONAL APPEAL FROM PLANNING COMMISSION
APPLICATION NO. 97-0622
APN 43-105-07 (413 BEACH DRIVE)

Members of the Board of Supervisors:

This is an appeal from a Planning Commission decision to uphold the Zoning Administrator's approval of the above-referenced application. It is submitted on behalf of Jim and Judi Craik, who own a home at 415 Beach Drive, next to the subject property.

In general, the Board of Supervisors should take jurisdiction of this appeal for all the reasons stated in County Code Section 18.10.340(c). In particular, the appellants object to the Zoning Administrator's approval of this project for the reasons stated in the May 11th appeal letter to the Planning Commission (Attachment 1), and as more specifically addressed in my June 23rd letter to the Planning Commission (Attachment 2). The appellants object to the Planning Commission's decision to uphold the Zoning Administrator's approval for the same reasons stated in these two (attached) letters. These letters show error, abuse of discretion, and the absence of supporting evidence in the decisions made to date. Additional reasons to take jurisdiction are provided in this letter.

Although some geotechnical arguments were presented to the Planning Commission by the applicant's consultants in response to one of the objections to approval raised by the appellants, the issues in dispute mostly involve whether there is compliance with certain state and local planning regulations. As to the geotechnical issue - which generally involves whether there can ever be any safe use of the back yard of properties located along Beach Drive - the County geologist has still not commented on the arguments presented by the applicant's consultants, other than what he apparently told the Zoning Administrator. This issue effects staffs justification for approval of the applicant's proposed front yard variance. A written response by the County geologist would help identify what additional information is needed to resolve this issue.

The more important issues for your consideration are those involving regulatory compliance. There are basically two such issues, which include: 1) whether it is permissible to grant the applicant's front yard variances when the constraints used to justify these variances are also applicable to the other properties in the vicinity; and 2) whether the applicant's proposal for a three-story dwelling is permissible based on Santa Cruz County General Plan Policy 8.6.3. These issues were addressed in some detail in my June 23rd letter to the Planning Commission (Attachment 2); and, I believe, they are especially important because they not only effect the County's decision here, but they could also effect decisions to grant front setback and height variances on the other parcels that exist along Beach Drive, over 40 of which are presently improved with only two-story dwellings.

Variance Issue

Without restating what was stated in my June 23rd letter (Attachment 2, pg. 3/"fourth" point), the policy problem with the front yard variances - and, for that matter, the height variance - is that they are based on constraints shared in common with everyone's property along Beach Drive. Thus, if the constraints cited by staff are sufficient, everyone along Beach Drive could also get these variances. But, this is inconsistent with the rules governing variances which, generally, speak to the need to show unique circumstances on the subject property in comparison with other property "in the vicinity."

The problem here is that there is nothing unique about the subject property. Looking at the parcel map (Exhibit C in the Planning Commission staff report), the subject property is similar in size and shape to other properties along Beach Drive. As to wave run-up and landslide debris flow constraints, staff states that *"slope failure and flood hazard affect each parcel on Beach Drive."* (Planning Commission staff report, pg. 4). Jerry Weber, a Ph.D. Engineering Geologist, supports staffs opinion on this point in a letter dated May 8, 1998 (Attachment 2, second letter). Even the owners of the subject property agree with this, stating in a letter to the Planning Commission dated June 12, 1998, *"We agree with Geologist Jerry Weber's letter dated 5/8/98. Yes, all property along Beach Drive face the same geological risks."* For the applicant or the County Planning Commission to then say that the unique constraint is the application of FEMA rules to new development does not solve this problem since FEMA rules, or other rules, are not what makes a given property unique; and, in any event, FEMA rules would be applicable to any other property in the vicinity to the same degree they are applicable here if, for whatever reason, a property owner chose to build what has been proposed in this case. And, why this is so is because *"... all property along Beach Drive face the same geological risks. "*

As one court has suggested, if the County wants to approve what is proposed in this case, the County needs to adopt special rules that essentially avoid the need for variances in these circumstance. Certainly, the County could adopt special front setback and height rules for Beach Drive properties due to their shared constraints caused by the potential for wave run-up and landslide debris flow. But, this will require legislative action, as well it should so that everyone along Beach Drive can speak freely about the pros and cons of the rules governing development in their neighborhood without feeling that their comments will put them on one side or the other of what one of their neighbors may want to do on their property.

The point here is that variances are inappropriate for similar properties. What is needed instead is one set of rules that make sense for this neighborhood, and to only grant variances when a given property is not similar to those in the vicinity.

General Plan Issue

As to the General Plan issue, the problem here is that the mandatory two-story requirement of General Plan Policy 8.6.3 prohibits the approval of the applicant's proposed three-story dwelling. The reason it is prohibited is self-evident, but if an explanation is needed one is provided in my June 23rd letter to the Planning Commission (Attachment 2, pgs. 4, 5). Here, too, if the County wants to approve what has been proposed, this also will first require legislative action by your Board.

Frankly, I find it amazing that I am even having to address this issue at the Board level in that having addressed this issue at the Planning Commission level, I am surprised that the Commission proceeded to uphold the Zoning Administrator's approval.

Possibly even more surprising was staff's comments at the Planning Commission stating, in essence, that the proposal is not a three-story dwelling, but a two-story dwelling. This was surprising because all the public notices for this proposal and all of the staff reports for this proposal characterize it as a three-story dwelling; and, the Zoning Administrator also adopted variance findings for a three-story dwelling. Furthermore, I suggest you look at the plans for the proposal, and the photographic renderings, and just trust what your eyes tell you - it is obviously a three-story dwelling.

Since the staff reports never mentioned General Plan Policy 8.6.3 at the Zoning Administrator level, I assume the reason staff prepared variance findings for a three-story dwelling was because of the County Code's two-story limitation for the subject property. What was overlooked, however, was that while it is possible to grant a variance from the County Code, it is not possible to grant a variance from the applicable General Plan policies that staff failed to bring to the Zoning Administrator's attention. This was a serious mistake, wasting time and money on everyone's part; and, to now concoct an explanation that the proposal is really a two-story dwelling is even more disturbing.

Offering this two-story explanation for the first time at the Planning Commission hearing without any notice or discussion of this prior to the Planning Commission hearing was truly surprising, depriving the appellants of a reasonable opportunity to investigate and respond to this change. Such conduct deprives the appellants of their right to due process and a fair hearing. Oncemore, while the staff planner has told me that she alone made the decision to redefine this proposal as a two-story dwelling, it is at least true that her superiors also considered a "policy" to allow a three-story structure shortly after filing the May 11th Planning Commission appeal in this case, which discussed the General Plan's two-story limitation. Such a "policy" change was apparently being considered by David Lee, the Assistant Planning Director, as indicated in the attached E-Mail note from Martin Jacobson, dated May

15th (Attachment 3). Martin Jacobson reviewed the staff planner's report to the Planning Commission, as indicated on page 6 of that report. But, again, no such "policy" change was indicated in the Planning Commission staff report, and it was not until the middle of the appellants' presentation to the Planning Commission on June 24th that it became apparent that staff had invented a new justification for approval that I, regrettably, can only characterize as nothing more than a blatant effort to cover up their General Plan mistake.

The problem, of course, is that staffs "policy" interpretation has no legitimate basis since local policy is the sole prerogative of your Board based on legislation actually adopted by your Board. More specifically, staffs policy interpretation defies the plain meaning and intent of the applicable rules in this case, it defies what the applicant's plans clearly show, and it defies common sense.

First, the plain meaning and intent of General Plan Policy 8.6.3 is addressed in the "objective" for all the policies in Section 8.6 of the General Plan. The "objective" is:

"To encourage building design that addresses the neighborhood and community context; utilizes scale appropriate to adjacent development; and incorporates design elements that are appropriate to surrounding uses and the type of land use planned for the area."

Since this General Plan objective focuses on "design" and "scale appropriate to adjacent development" and the "surroundings," the intent of the two-story building limitation in General Plan Policy 8.6.3 is to regulate the visual impacts of the proposed dwelling's size and mass. The intent here has nothing to do with any kind of technical or engineering distinction as to what constitutes a "floor" or "habitable space." Since the stated intent is to address the impacts on "adjacent" or "surrounding" development, it is immaterial that the applicant's first level is only for a garage, storage and stairs, and that only the top two levels are for living space. The applicant's use of the interior area of their dwelling has nothing to do with whether the "scale" is "appropriate to adjacent development," which is purely a visual consideration based on the dwelling's exterior.

Second, the definitions of what constitutes a "story" and what constitutes the "first" story in County Code Section 13.10.700 are as follows:

"Story. For planning and zoning purposes, that portion of a building included between the upper surface of any floor and the lower surface of the floor or ceiling above. An attic, basement, mezzanine, or under floor does not count as a story (Ord. 4159, 12/10/92).

Story, First. *The lowest story in a building which qualifies as a story, as defined herein, except that a floor level in a building having only one floor level shall be classified as a first story, provided such floor level is not more than 4 feet below grade, as defined herein, for more than 50 percent of the total perimeter, or not more than 8 feet below grade, as defined herein, at any point."*

Based on the definition of a "story," the applicant's plans are for a three-story dwelling because they show three floors - i.e., the "lower floor," the "main floor," and the "upper floor" - each having an upper and lower "surface;" and, none of these floors are exempted from the definition of what constitutes a "story" since none of these floors is an "attic," "basement," "mezzanine," or "under floor."

What the applicant's plans identify as the "lower floor" is the "first" story because it is the "lowest" story, as described above.

Furthermore, what the applicant's plans show as the "lower floor" is the first floor because it includes "floor area," as this term is defined in the County Code. County Code Section 13.10.700 defines "floor area" as follows:

"Floor Area. *floor area is that area within the surrounding exterior walls of a building, including the wall thickness and is the total of each story, mezzanine, and basement. Uncovered courtyards, or atriums which are open to the sky above do not count as floor area (4159, 12/10/91)."*

The "lower floor" includes "floor area" because it includes area surrounded by walls, and this area is not exempted from the definition of "floor area" because it is not an "uncovered courtyard" or "atrium."

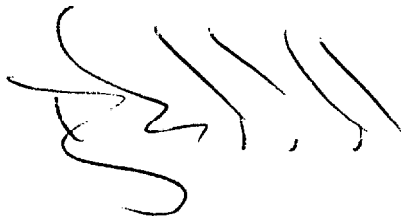
Third, staffs characterization of the applicant's proposal as a two-story dwelling based on how the interior space is used is not only inconsistent with the stated objective of General Plan Policy 8.6.3 (discussed above), it is also inconsistent with a reasoned analysis based on nearly all the applicable Local Coastal Plan issues, scenic issues, and privacy and view concerns of adjacent property owners. All of these issues - which have been specifically addressed at the Zoning Administrator and Planning Commission levels - require an analysis of the visual impacts caused by the height, location and mass of the proposed dwelling's exterior and front yard decks. As such, staff's interpretation of the applicant's proposal as a two-story dwelling based on how its interior space is used undermines the intent of the applicable regulatory rules in this case and serves no legitimate or logical purpose.

Conclusion

For whatever reason staff, the Zoning Administrator, and the Planning Commission have been willing to do whatever was needed to approve the applicant's proposal, despite local and state regulatory requirements. And, therefore, what we are now faced with is a legal dispute that only seems to be escalating. However, I believe it is important to understand where all of this began - and, that was simply that the proposal is "too much" for the site and the adjacent homes. It is too big. Neighboring homes are about 1350 to 1500 square feet, and the applicant's is about 2690 square feet, including garage space. It is too high. The neighboring homes are two-story, and the closest three-story home is seven parcels to the northwest of the applicant's property. It is too close to the street. Its second floor deck is 8 feet from the front property line, and the Craiks' second floor living area (next door) is 25 feet from the front property line. And, the Craiks have no second floor deck next to the applicant's property. Its a big "box," lacking the architectural character of the existing homes in the vicinity, many of which have staggered front yard setbacks and bay windows that break up the building mass. It needs variances from about every site regulation in the County Code, unlike its neighbors. It is, in short, over compensation for the constraints everyone faces on Beach Drive.

It is, therefore, requested that the Board take jurisdiction of this appeal and deny the proposal without prejudice so that a more appropriate two-story dwelling could then be approved.

Respectfully Submitted:



Douglas E. Marshall, Esq.
Attorney for Mr. & Mrs. Craik

RECEIPT # 29806
DATE 7/2/98
INITIAL lmj

DM:kf
cc: Mr. & Mrs. Craik

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May 11, 1998

Santa Cruz County Planning Commission
701 Ocean Street
Santa Cruz, CA 95060

**RE: APPEAL OF ZONING ADMINISTRATOR DECISION
APPLICATION NO. 97-0622
APN 43-105-07 (BEACH DRIVE)**

Dear Commissioners:

This is an appeal of a Zoning Administrator decision to approve the above-referenced application. It is submitted on behalf of Jim and Judi Craik who own a home next to the subject property.

In general, the reason for this appeal is that the Zoning Administrator has approved height and front yard variances for a three-story dwelling adjacent to existing two-story dwellings which, if built, would be materially injurious to the privacy and enjoyment of the adjacent dwellings. For example, upper floor decks on the approved dwelling would provide a birds-eye view of the private second floor decks on adjacent dwellings. Also, the front yard variances allow the approved dwelling to extend further toward the street than the existing dwellings next to it, obstructing the view of these existing dwellings. The size of the approved dwelling will give the appearance that the subject property is over built. The height and front yard variances are based on geologic constraints, including the potential for coastal flooding and landslide debris flow, which restrict the use of the subject dwelling's first floor and rear yard. But, the potential for coastal flooding and debris flow are constraints shared with all the properties along Beach Drive. Since the adjacent properties share these same constraints, there appear to be no special circumstances to justify variances for the subject property that exceed what has been allowed on the adjacent properties.

More specifically, the reasons for this appeal are as follows.

First, the special circumstances finding fails to state why this property is any different from any other property next to it for purposes of front yard variances. In this regard, the enclosed May 8th letter from Jerry Weber, a Ph.D. Engineering Geologist, indicates that all the properties along Beach Drive have the potential for landslide debris in their rear yards. As such, why should any property subject to having landslide debris in its rear yard be allowed to extend any further into its front yard than adjacent dwellings which are also subject to having landslide debris in their rear yards? The Zoning Administrator staff report findings mention the subject property's shape and topography, but there is no explanation why its shape and topography justifies a setback that is any different than the adjacent properties. Oncemore, since its shape and topography are characteristics it shares in common with adjacent properties, these factors support permit denial, not permit approval.

Second, the special circumstances finding for front yard variances is flawed in that the above-mentioned letter from Jerry Weber concludes that the loss of use of the rear yard is generally limited to the rainy season. In his opinion, the rear yard could still be used during the rest of the year. This would at least indicate that a variance for a front yard deck (to make up for the loss of use of the rear yard) would not make any sense since a front yard deck in the rainy season would seem to be about as useless as the rear yard in the rainy season.

Third, the special circumstance findings for the third floor and dwelling height lack a factual basis in that we are not told why the loss of use of the first floor as living space, due to the potential for coastal flooding and debris flow, justifies three floors. As the above-mentioned letter from Jerry Weber tells us, all the properties along Beach Drive have the potential for coastal flooding and debris flow. So, why do these factors support approving a dwelling any higher than the adjacent two-story dwellings? Why is a two-story dwelling not adequate? This has not been addressed despite General Plan Policy 8.6.3, which specifically limits residential structures to two stories on property like the subject property. In order to approve a three-story structure, General Plan Policy 8.6.3 requires this to be "explicitly" provided for in the Residential Site and Development Standards Ordinance. But, what "explicit" basis for a third story exists here? Surely, the second floor could be fully utilized as living space, with parking on the floor below. Also, since several adjacent properties on both sides of the subject property are two stories, what are the "privileges enjoyed by other property in the vicinity" that justify a three-story dwelling?

Fourth, the Zoning Administrator's variance findings, Coastal Zone findings and development permit findings all fail to address the impact of the proposal on the privacy of adjacent properties. Adequate privacy is specifically mentioned in County Code Section 13.10.321(a)(5) as one of the purposes of the residential zone district where the subject property is located. The problem here is that the upper decks of the approved three-story dwelling provide a view of the private second floor decks on adjacent properties. This is particularly a problem for properties in this area of Beach Drive since these second floor decks are often the only area they have to sit in the sun and privately enjoy their beach property. The approved dwelling is, therefore, inconsistent with the purposes of the zone district where it is located, as well as being incompatible with and injurious to other properties in the vicinity.

Fifth, approving a three-story dwelling and an upper deck to extend further toward the street than the existing two-story dwellings next to it appears to violate General Plan Objective 8.6 in that the "scale" of the approved dwelling is inappropriate in comparison to adjacent development. The approved dwelling will dwarf the dwellings next to it, as shown in the two photographic renderings submitted with this appeal. These photographs and others were also submitted at the Zoning Administrator level. However, the Zoning Administrator findings fail to address the visual impacts of the greater amount of development on the subject property despite General Plan Policy 86.1, which directs staff to "recognize the potential for significant impacts to community character from residential structures which are not well-proportioned to the site . . ." In any event, the approval of such a dwelling in the Coastal Zone violates County Code Section 13.20.130(b)(1), which requires the design of new development to be "...visually compatible and integrated with the character of surrounding neighborhoods" which, here, are predominately two-story dwellings.

Sixth, since the height and front yard variances here exceed the scope of development enjoyed by similarly situated properties next to the subject property, they should be denied as a grant of special privileges. They are simply unnecessary in order for the subject property to be used for residential purposes in a manner that is compatible with neighboring properties.

In sum, the approved variances exceed what is appropriate to compensate the subject property for the constraints shared by everyone on Beach Drive. These constraints may properly justify development approval consistent with what, in fact, has been allowed on adjacent properties. But, variances to allow development in excess of what has been allowed on adjacent properties are detrimental to the neighborhood and can not be supported by the required findings. Therefore, the application should be denied without prejudice so that a more appropriate two-story design can then be approved.

Respectfully Submitted,

Douglas E. Marshall, Esq.
Attorney for Mr. & Mrs. Craik

Enclosures: 1) Letter from Jerry Weber to Judi & Jim Craik, dated May 8, 1998
2) (2) Photographs

DM:kf
cc: Mr. & Mrs. Craik

ATTACHMENT 1
Page 3 of 5

Gerald E. Weber
 Consulting Engineering Geologist
 613 Graham Hill Road
 Santa Cruz, California 95060
 (408) 426-1367 Fax (408) 426-5340

May 8, 1998

Judi and Jim Craik
 313 Beach Drive
 Rio Del Mar, CA 95003

Subject: Geologic report by Foss, Nielsen for APN 43-105-07 - Beach Drive, Rio Del Mar, Santa Cruz County

Dear Mr. And Mrs. Craik:

At your request I have reviewed both the "engineering geologic" and "geotechnical engineering" reports on the above referenced property, along with the Santa Cruz county Planning Department's file on the proposed development. Both the Engineering Geologic Report and the Geotechnical Engineering Report adequately address the geologic conditions on the property and provide adequate mitigating measures for the debris avalanche flow and coastal flooding hazards. The level of hazard to the subject property from both debris avalanches/flows and coastal flooding is essentially the same as for all of the other homes along Beach Drive

My only disagreement is in respect to the usage of the back yard of the subject property. Foss, Nielsen and Associates apparently contend that the back yard should not be used, period. Their letter suggests that the back yard should not be used at any time for any purpose because it is to act as a reservoir for debris avalanche/flow material. I believe this is an overly conservative conclusion. Since debris avalanches and flows tend to occur under specific weather and/or seismic conditions, it seems that the back yard could be used for other purposes for the majority of the year - the non-rainy season.

-Rainfall Induced Debris Avalanches and Flows: Debris avalanches and flows typically occur within the loose weathered debris and soils that occur on steep hillsides. In addition they are generally shallow slab failures within surficial materials, with the slope failure removing only a thin layer of material from the face of the hillside. Finally, they generally occur in response to high intensity rainfall during major storms, typically following some threshold level of precursory rainfall. Without question, landslides of this type are what we have historically observed to occur on the slopes above Beach Drive.

It is reasonable to conclude that this type of slope failure will occur primarily, if not exclusively, during the rainy season. Since some precursor threshold of total rainfall must be reached for debris flows to occur, the pattern of rainfall is important in analyzing the potential for the generation of these types of slope failures. Typically, precursor rainfall totals in Santa Cruz County do not reach the critical threshold for debris avalanches and flows until late December or early January, again, depending on the pattern and intensity of rainfall. In some years the

threshold is reached earlier, say early to mid December, while in drought years the threshold may never be reached.

As slopes drain during and after the rainy season the water saturation drops below the threshold level, reducing dramatically the potential for this type of slope failure to occur. This generally occurs sometime between early April and mid May, although it may occur much earlier during low rainfall years.

This suggests that the back yard will be exposed to a very low potential for debris avalanches during the bulk of the year. Even during exceedingly wet years the back yard should be useable from early May through early December - approximately 7 months. During drought years the back yard should be useable for most of the year, probably 11-12 months.

Seismically Induced Debris Avalanches and Flows: Avalanches and flow landslides can also be triggered on steep slopes by intense seismic shaking. Obviously, the subject property is subject to this type of failure. The 1989 Loma Prieta Earthquake triggered numerous landslides on the face of the sea cliff at both Beach Drive and Las Olas Drive. These slope failures occurred despite the fact that the earthquake occurred during an extended drought. Unfortunately, it is not yet possible to accurately predict large earthquakes, and one could occur at any time. However, once again, the hazard to the subject property is approximately the same as that for all other homes along Beach Drive and countless other properties in California.

Since large earthquakes tend to occur infrequently, the potential for this type of event to occur should be judged as low. Consider that the interval between the great San Francisco Earthquake of 1906 and the Loma Prieta Earthquake was 83 years. The risk associated with an earthquake induced ground failure in the back yard of a home along Beach Drive is certainly less than the risk associated with driving a car for a lifetime, where your chances of death are about 1 in 50, or 2%. Obviously, this does not mean that a catastrophic seismic event cannot occur at the site, only that it is improbable and the risk posed is relatively low.

In summation, I think the Fear-around restriction of the usage of the back yard is overly conservative and not supported by our understanding of the processes in question. Debris avalanches and flows occur primarily during high intensity storms during the rainy season. They require saturation of the soil and therefore, do not commonly occur year-around.

If you have any questions regarding this brief analysis please contact me.

Very truly yours,



Gerald E. Weber, Ph.D.
Certified Engineering Geologist #1495

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June 23, 1998

Santa Cruz County
Planning Commission
701 Ocean Street
Santa Cruz, CA 95060

HAND DELIVERED

**RE: APPLICATION NO. 97-0622
APN 43-105-07 (413 BEACH DRIVE)
JUNE 24th PC HEARING, ITEM No. 2**

Dear Commissioners:

This letter is written on behalf of the appellants in response to the staff report prepared for the above-referenced Planning Commission hearing.

Having approved this item at the Zoning Administrator level, it is understood that it is Planning Department policy to defend this approval at the Planning Commission level. Therefore, it was not anticipated that staff would change their recommendation, despite whatever merit they found in the appeal of this approval. However, it was anticipated we would receive some additional explanation for their recommendation in light of the issues raised in the appeal. This would also seem reasonable given the Planning Department's \$1,431.00 fee for the appeal. And, while the staff report does provide some rather detailed descriptive information, its response to the issues raised in the appeal are stated in conclusionary terms that still fail to explain why the facts staff mentions support the Zoning Administrator's findings, and why the adopted findings support the Zoning Administrator's approval. Accordingly, it is the appellants' position that the issues raised in their appeal have not been narrowed as a result of the staff report.

However, without restating all six of the issues raised in the appellants' May 11th appeal, this letter focuses on just two of these issues, either one of which require permit denial. These two issues include: 1) the inadequacy of the findings for the second story front yard variance; and, 2) why the proposed three-story dwelling is inconsistent with the mandatory two-story requirement set forth in Santa Cruz County General Plan Policy 8.6.3.

Inadequacy of Findings for Second Story Front Yard Variance

First, each of the Zoning Administrator's findings for the second story front yard variance are uncertain and difficult to understand because each finding applies to four completely different variances. These four variances are for height, parking, number of stories, and reduced front yard setbacks for the proposed dwelling

and deck(s). Given this method, it is unclear where the findings for any one of these variances end and the findings for any one of the other variances begin. It is even unclear whether there are two or three front yard variances. This method effectively prevents scrutiny of these findings for compliance with the findings requirements of Government Code Section 65906 and, as such, this method violates the intent and purpose of this code section as explained by our State Supreme Court in Topanga Assn. for a Scenic Community v. County of Los Angeles (1974) 11 C3d 506.

Second, looking at the findings together with the rest of the staff report, it appears - although I can not say for certain - that the factual support for the second story front yard variance is based solely on a letter from Hans Nielsen, the applicant's Geologist, a copy of which is attached to the staff report and marked as Exhibit D. The Hans Nielsen letter states that "... *the rear yard should be kept free of decks and should not be used for a recreational area . . . [because] this area is reserved for storage of landslide debris in the unfortunate event that a slope failure occurs above the site and flows into the rear yard.*" Presumably, therefore, a second story front yard variance is needed to make up for the loss of the rear yard. But, the opinion of Hans Nielsen was not shared by the County geologist at the time of the Zoning Administrator hearings, as evidenced by what the Zoning Administrator stated on the record at these hearings. Apparently, the County geologist has stated that the applicant's rear yard can be used for a ground level deck. For this reason it is not surprising that the County's geologist has not provided written support for the Hans Nielsen letter in the staff report for your commission. Furthermore, the opinion of Hans Nielsen was qualified and, in part, rejected in a letter from Jerry Weber, a Ph.D. Engineering Geologist. The letter from Jerry Weber was submitted with the appeal in this case, and his letter and the appeal letter are both marked as Exhibit A. No evidence has been submitted in response to Jerry Weber's letter.

Third, the special circumstance finding fails to explain why the applicant's property is any different from any other property adjacent to it for purposes of a second story front yard variance and, for similar reasons, this variance is a grant of special privilege. This is so because staff believes, as is also indicated in the above-mentioned letter from Jerry Weber, that "*slope failure and flood hazard affect each parcel on Beach Drive*" (staff report, pg. 4). Therefore, findings that rely on these constraints do not support a variance that exceeds what exists on adjacent properties. The Zoning Administrator's findings also mention the subject property's shape, topography and size, but here, too, since these are factors shared in common with adjacent properties these factors do not support a variance that exceeds what exists on adjacent properties. Notably, there are no other factors cited that speak to unique site conditions, which are the focus of variance findings. Furthermore, the Zoning Administrator fails to quantify or qualify his findings by not comparing the extent of the front yard development rights enjoyed by others next to the applicant's property, and by not explaining the relative impact of the proposed second story front yard variance on adjacent properties.

The objections noted above are illustrated by a comparison of the applicant's proposed second floor front yard variance with the second floor development existing on each side of the applicant's property. The applicant's proposed second floor has a deck which would extend across nearly the entire frontage of the applicant's

dwelling at a distance of 8 feet from the front property line. The living space on the applicant's second floor also extends across the entire frontage of the applicant's dwelling at a distance of 16 feet from the front property line. In comparison, immediately to the southeast of the applicant's property, the Craik property (located at 415 Beach Drive) has no second floor deck next to the applicant's property, and the living space on the Craiks' second floor is at least 25 feet back from the front property line. The Craiks do have a deck on the southeasterly portion of their second floor, which extends over only 40% of their property at a distance of 11 feet from their front property line. This means that the applicant's living space is about 9 feet in front of the northwesterly side of the Craiks' home, and their deck is about 17 feet in front of the northwesterly side of the Craiks' home. This is a considerable disparity in setbacks. In addition to privacy concerns, this significantly blocks the Craiks' existing ocean views, in violation of County Code Section 13.11.072(b)(2)(ii), which states that "[d]evelopment should minimize the impact on private views from adjacent parcels, wherever practicable. " And, to the northwest of the applicant's property the second floor of the home on that parcel (located at 411 Beach Drive) is 10 to 11 feet from the front property line. The second floor setbacks of the two homes on each side of the applicant's property generally characterize the existing development of homes adjacent to the applicant's property. Fourteen of these (contiguous) homes are two stories. Basically, the applicant's proposal is a three-story "box" that extends further toward the street than adjacent properties and, as to its second floor, it also differs from adjacent properties in that its entire frontage fails to comply with current setback requirements. Since these adjacent homes are also subject to landslide debris flow in their rear yards, why should the applicant's second floor deck be allowed to extend any further toward the street than they do? This is a question of degree, and it is not answered by general findings that merely list constraints to justify variances without detailed comparisons with adjacent properties, and without a careful assessment of the impact on adjacent properties.

Fourth, and most importantly, where the constraints on the subject property do not differ substantially with the constraints on adjacent properties, an appellate court of this State has held that a variance may not be justified due to a desire to achieve compliance with other regulatory goals. Orinda Assn. v. Board of Supervisors (1986) 182 CA3d 1145, 1165-1167. Put another way, variances must stand on their own based on unique site conditions. As such, a variance should not be granted in this case to compensate the property owner for compliance with wave run-up and debris flow constraints when these same constraints are applicable to adjacent properties. To do so would, essentially, mean that similar variances could be granted just for the asking by any property owner on Beach Drive. This is contrary to the purpose of our State variance statute, which "... contemplates that at best only a small fraction of any one zone can qualify for a variance. " Orinda, supra, pg. 1166. Therefore, if your Commission wants to uphold what has been approved by the Zoning Administrator, this will first require legislative action by our Board of Supervisors to change the rules governing site regulations for all properties along Beach Drive so as to eliminate the need for the type of variances we see here. Nothing less is permissible.

Inconsistency with the Mandatory Two-Story Requirement of General Plan Policy 8.6.3

Santa Cruz County General Plan Policy 8.6.3 states the following:

“Story Limitation

Residential structures shall be limited to two stories in urban areas and on parcels smaller than one acre in the rural areas except where explicitly stated in the Residential Site and Development Standards ordinance.” (emphasis added)

This General Plan Policy was adopted by our Board of Supervisors on May 24, 1994, and made effective on December 19, 1994. Since the applicant purchased the property in 1996, as indicated on the attached copy of the deed marked as Exhibit 1, this General Plan Policy has been applicable to the subject property the entire time she has owned this property.

Unfortunately, staff failed to address this General Plan Policy at the Zoning Administrator level, where variance findings were approved for the applicant's proposed three-story dwelling. Staff now attempts to dismiss the importance of this General Plan Policy by pointing out the need to comply with General Plan Flood Hazard Policies 6.4.3 and 6.4.8 which, they infer, should allow a three-story dwelling in this case (staff report, pg. 4).

However, there is no mechanism in local or State land use regulations to authorize a variance from a County General Plan Policy; and, while it is possible that General Plan compliance may not be required to approve a variance in some jurisdictions, this is not true in Santa Cruz County. To approve the proposal before your Commission requires compliance with General Plan Policy 8.6.3; and, for the Zoning Administrator to approve a variance from this policy is an act in excess of his jurisdiction.

More specifically, consistency with General Plan Policy 8.6.3 is required because:

1. In the Authority and Purpose section of Chapter 8 of the General Plan it states that *“all projects shall be consistent with the policies of this chapter,”* which include Policy 8.6.3;

2. The terms of General Plan Policy 8.6.3 make it applicable in that the subject property is within an “urban area” (since it is within the Urban Services Line) and, even if it was not in an urban area, it is “smaller than one acre” (staff report, Exhibit C);

3. There is no exception from General Plan Policy 8.6.3 in that there is no “explicit” provision in the Residential Site and Development Standards Ordinance authorizing an exception from this policy given the location of the subject property ;

4. County Code Section 13.01.130(a) states that “no discretionary land use project, public or private, shall be approved by the County unless it is found to be consistent with the adopted General Plan,” and a variance to build a residential structure is clearly a discretionary project. Also, County Code Section 13.10.230, which regulates variance approvals, expressly states in subsection “a” of this code section that variances are “discretionary;” and

5. Because the subject property is in a mapped Coastal Scenic Resource Area and within the viewshed of a scenic corridor (staff report, Exhibit C) and therefore meets the definition of a “sensitive site” per County Code Section 13.11.030(u), design review is required per County Code Section 13.11.040(a) and, as such, County Code Section 13.11.070(d) requires compliance with the General Plan for this project.

The Zoning Administrator’s General Plan consistency findings are inadequate and are not supported by substantial evidence. Furthermore, no such findings can be made for a three-story residence at the subject property because of the specific and mandatory language in General Plan Policy 8.6.3. Nor is there any precedent for such findings along Beach Drive. While staff is correct in stating that 19 of the 61 homes on Beach Drive between the Esplanade and the gated access are three stories in height, none of these homes were built following the adoption of General Plan Policy 8.6.3 in 1994. Indeed, none of these homes were built in the 1990’s. The dates these 19 homes were built is indicated in Exhibit 2, attached hereto. Also, none of these three-story homes are adjacent to the applicant’s property. Homes on both sides of the applicant’s property are two stories, and the closest three-story home is seven parcels to the northwest of the applicant’s property.

“Under State law, virtually any local decision affecting land use and development must be consistent with the applicable general plan and its elements.” Harroman Co. v. Town of Tiburon (1991) 235 CA3d 388,395. While, as a general rule, a given project need not be in perfect compliance with each and every General Plan Policy, our State courts have held that there must be consistency with specific and mandatory General Plan Policies, such as we have in this case. See, for example, Families Unafraid to Uphold Rural Etc. County v. Board of Supervisors (1998) 62 CA4th 1332, 1341-1343; and, San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino (1984) 155 CA3d 738,753.

Here, too, if your Commission wants to uphold what has been approved by the Zoning Administrator, this will first require legislative action by our Board of Supervisors to change the General Plan Policies applicable to the properties on Beach Drive.

Conclusion

Without legislative action and adequate findings, as discussed herein, the proposal must be denied.

Respectfully Submitted:

Douglas E. Marshall, Esq.
Attorney for Mr. & Mrs. Craik

Enclosures

DM:kf
cc: Mr. & Mrs. Craik
County Counsel

ATTACHMENT 2
Page 6 of 9

RECORDING REQUESTED BY
Old Republic Title Company VOL. 5957 PAGE 874
178708-ASD

APN 043-105-07

WHEN RECORDED MAIL TO

Name NORMA ODENWELLER & ROBERT W.
FLECK
Street Address 101 FIRST ST., SUITE 461
City State Zip LOS ALTOS, CA 94022

Recorded
Official Records
County Of
SANTA CRUZ
RICHARD W. BEDAL

I REC FEE 10.00
TAX 211.75

08:00AM 24-Dec-1996 I cdc
Page 1 of 2

SPACE ABOVE THIS LINE FOR RECORDERS USE

Grant Deed

The undersigned grantor(s) declare(s):

Documentary transfer tax is \$211.75

(X) computed on full value of property conveyed, or

() computed on full value less value of liens and encumbrances remaining at time of sale.

(X) Unincorporated area: () City of _____

() Realty not sold.

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged.

ROBERT S. REID A MARRIED MAN

hereby GRANT(S) to NORMA P. ODENWELLER, an unmarried woman, as to an undivided 50% interest and ROBERT W. FLECK, an unmarried man, as to an undivided 50% interest, as Tenants in Common

that property in SANTA CRUZ County, State of California, described as:

See Exhibit "A" attached hereto and made a part hereof

Mail Tax Statements to Grantee at address above

Date December 20, 1996

ROBERT S. REID

STATE OF CALIFORNIA

COUNTY OF Santa Cruz

On December 20, 1996, before me, the undersigned, a Notary Public in and for said State, personally appeared

ROBERT S. REID

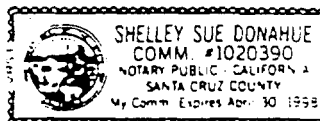
personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument

WITNESS my hand and official seal

Signature

Name SHELLEY SUE DONAHUE

(typed or printed)



(This area for official notarial seal)

MAIL TAX STATEMENTS AS DIRECTED ABOVE

VOL. 5957 PAGE 875

Order No. : 178708-A

EXHIBIT "A"

The land referred to is situated in the State of California, County Of Santa Cruz, in the unincorporated area, And is described A' follows:

Lot 8, in Block 97, as shown upon that certain map • attltld, "Map Of Subdivision Number 8, Aptos Beach Country Club Properties, Aptos, Santa Cruz County, California", filed for record August 24, 1928. in Volume 24 of naps, at Page 26. Santa Cruz County Records.

EXCEPTING therefrom all mineral rights, as reserved by Santa Cruz Land Title Company In the deed recorded June 16, 1936 in Book 311, Page 133, Official Records, Santa Cruz county.

Assessor's Parcel Number: 043-105-07

Exhibit 2
(Three-Story Homes on Beach Drive)

	<u>Owner</u>	<u>Address</u>	<u>APN</u>	<u>Year Built</u>
1.	Franich	313	043-082-06	1985
2.	O'Brien	315	043-082-07	1989
3.	Lomonaco	317	043-082-08	1973
4.	Crowley	337	043-095-34	1986
5.	Branson	339	043-095-33	1986
6.	McNally	340	043-095-32	1974
7.	Simons	345	043-095-29	1973
8.	DeSimas	347	043-095-28	1981
9.	Brunner	353	043-095-26	1948
10.	Fielding	357	043-095-24	1966
11.	Cane10	359	043-095-23	1965
12.	Harland	363	043-095-22	1961
13.	Goscila	367	043-095-20	1962
14.	Waterman	369	043-095-19	1962
15.	Vaudagna	379	043-095-14	1963
16.	Lane	386	043-095-10	1965
17.	Popplewell	387	043-095-09	1965
18.	Monia	395	043-105-38	1986
19.	Nomellini	437	043-105-22	1963

VIEW THE NOTE

EC1

From: PLN415 --SCRUZA
To: PLN140 --SCRUZA

Date and Time 05/15/98 14:44:38

From: Martin J. Jacobson, AICP
Principal Planner

Subject: Appeal

Don't make any commitments to a hearing date on the Beach Drive appeal until I return from vacation. Dave Lee wants to have a policy discussion regarding allowing 3-story structures in this part of the County. Thanks. Martin

E N D O F N O T E

PF1 Alternate PFs PF2 File NOTE PF3 Keep PF4 Erase PF5 Forward Note
PF6 Reply, PF7 Resend PF8 Print PF9 Help PF10 Next PF11 Previous PF12 Return