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Refer To File # 504356-0001

VIA EMAIL ONLY

June 15, 2022

Jocelyn Drake, Zoning Administrator
Santa Cruz County Planning Department
701 Ocean Street, Fourth Floor
Santa Cruz, CA 95060
Jocelyn.Drake@santacruzcounty.us

Re: *Supplemental* Nossaman LLP Comments on Behalf of Applicants Judi and Alex MacDonell – June 17 Zoning Administrator Hearing re Application No. 211155 (22702 E. Cliff Dr., Santa Cruz, CA)

Dear Ms. Drake:

As you know, this law firm represents Judi and Alex MacDonell, the owners of 22702 E. Cliff Drive regarding Application No. 211155 for a Coastal Development Permit for a new single family dwelling to replace an older, existing single family dwelling. The matter is currently scheduled for a hearing on June 17, 2022. This letter supplements our letter of May 9, 2022. We reserve all rights to present further comment, whether in writing, or orally.

In your latest staff report for the June 17 hearing, you have cited a new, and clearly unlawful, basis on which to deny the MacDonells' application: At page 8 of your staff report, you state the staff "in response to questions raised by neighbors during public comment on the project, conducted further research in the permit history for the existing riprap shoreline protection structure." The staff report also states it was determined that the County of Santa Cruz did not have jurisdiction to issue the required Monitoring and Maintenance Agreement. The latter assertion is stated as no more than a conclusion, without any legal or factual support, which means that the assertion could not possibly survive any known standard of review in the event of litigation challenging the ultimate County decision on the MacDonells' application.

The staff report also represents that the "Zoning Administrator, as part of her due diligence consideration of this project, contacted the California Coastal Commission [this representation is untrue; the zoning administrator contacted only a member of the Coastal Commission staff, a significant legal distinction that is simply ignored in the staff report] to confirm that a Maintenance and Monitoring Agreement could be issued in accordance with the recommenced [sic] condition of approval." The report alleges that as a result of the communication with the Coastal Commission staff member, that a "maintenance and monitoring agreement would not be issued for this property to protect the proposed structure." Again, the predictions of the Coastal Commission staff member carry ***no legal weight***. The Commission

staff make recommendations to the California Coastal Commission, but may not make decisions for the Commission.

It is only on the basis of this erroneous and unsupported assertion by a Coastal Commission staff member, that the staff report concludes that the project cannot comply with these CZLUO coastal bluff setback restrictions, and that it would not be consistent with Objective 6.2 (slope stability) of the County of Santa Cruz certified Local Coastal Program (LCP).

To summarize, nothing in the staff report indicates on what basis you reached the conclusion that the County does not have jurisdiction over the existing riprap revetment or improvements thereto, or any required maintenance and monitoring agreement for the revetment. Any such ground for denial would, lacking any substantial evidence or legal basis, constitute an abuse of discretion.

As should also be apparent from our letter, you have cited no scientific or technical basis for rejecting either the project geologic report or the geotechnical investigation. Instead, you have cited a ***policy*** basis, allegedly supported by section 16.10.070 (H)(1)(b) and Objective 6.2 of the LCP as grounds for rejecting the two reports. Those cited grounds, however, have nothing whatever to do with the scientific validity of the reports, but instead represent policy bases for rejecting those reports and even those "policy bases" rely on an assertion by a Coastal Commission staff member that carries no legal weight.

You have, unfortunately, created no more than an extraordinary legal vulnerability for the County.

I look forward to addressing the zoning administrator on June 17, 2022. In the meantime, should you have any questions, please feel free to contact me at a time of mutual convenience.

Very truly yours,

John J. Flynn III
Nossaman LLP

JJF:art

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

June 16, 2022

Re: Application No. 211155
APN: 028-242-25

I am writing to express my opposition to approving this project as submitted and reviewed, and to strongly recommend that the Zoning Administrator determine that Variance Findings 1 and 3, regarding the interior height reduction, cannot be made. This position is fully supported by the facts and law, and will enhance the strength of the County position upon review.

Variance Findings

The Planning Department now recommends denial of this application based upon the inability to make certain findings, as seen in the current Staff Report. However, there are further findings that cannot be made. The requested variance for a seemingly minor vertical clearance reduction in the basement is analyzed in Variance Finding 1. I strongly assert that this finding cannot be made. It is clear that there are no physical limitations on this parcel that interfere with overall vertical height of this structure that would then lead to any interior clearance issues. It is also clear that this request for variance is made in an attempt to game the floor area ratio (FAR) determinations, in that the lowered interior clearance **of merely one half inch** has the effect of removing the entire basement from the FAR calculation. This is not an allowable reason for the grant of a variance. The analysis/discussion section for Variance Finding 1 (p. 19) should be revised as follows (or similarly):

> Variance Finding 1
> This finding cannot be made as there are no circumstances interfering with the overall structure in the vertical dimension that would lead to a need for a reduced internal vertical clearance.

Further, Variance Finding 3 requires that the variance not be a grant of special privilege. The current finding discussion states that other dwellings in the vicinity have had a basement garage. However, this project also includes a storage area of 1930 square feet. No similar situation can be found. This represents a grant of special privilege. Also, reducing the internal vertical clearance of the basement removes a significant amount of floor area from the FAR calculations. If properly included, the FAR goes up to 68%. This calculation includes the entire lot, even the portion not able to be built upon! Under no circumstance can this variance request be viewed as anything but a request for a grant

of special privilege. The analysis/discussion section for Variance Finding 3 (p. 19) should be revised as follows (or similarly):

> Variance Finding 3
> This finding cannot be made as this request would remove over 4000 square feet of floor area from the FAR calculation and result in a FAR significantly over the allowable maximum, as well as significantly higher than similarly situated properties, and lacks legitimate basis, as described with regard to Finding 1, above.

Accessory Structure

The Staff Report, at page 5, states that the "storage room meets the definition of an attached non-habitable accessory structure." Review of the County Code shows that it does not. Accessory structures are defined at 13.10.700-S, which defines "Structure, accessory" as "a detached, subordinate structure, or **a subordinate structure attached to a main structure by a breezeway**", emphasis added. A breezeway is a roofed outdoor passage. To the extent that the design depends upon the basement storage room being deemed an accessory structure (for the bathroom, for example), the project fails on this ground also.

Summary

I note that the Applicant's counsel has asserted that aspects of the latest County Staff Report presents positions that "could not possibly survive any known standard of review in the event of litigation". In response, I suggest that determining that Variance Findings 1 and 3 also cannot be made, for the reasons herein and as discussed by Attorney Parkin at the second hearing on this matter, is proper, wholly supported by the record, and would be able to withstand any and every known standard of review.

Thank you for your consideration of these comments.

Michael A. Guth