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ATTORNEY AT LAW

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February 6, 2025

Mayor Dale Byrne
City Council Members
City of Carmel-by-the-Sea
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rec'd by
Nova Romero
City Clerk
MK

RE: DS 24164/VA 24263
Support for Appeal of Planning Commission Decision of January 15, 2025

Dear Mayor Byrne and Councilmembers,

I have been retained to represent Dorothy Jernstedt, owner of the property located at 6 NE of 13th, Scenic Drive (the "Jernstedt Residence"), directly south of the real property that is the subject of City of Carmel by-the-Sea ("City") Application DS24164/VA24263 (the "Project"). My client has timely filed an appeal of the Planning Commission's decision on January 15, 2025 to approve the Project, which consists of a Design Review and Variance. This letter is in support of my client's appeal.

My client is appealing the Planning Commission decision on the following grounds: 1) The variance findings for the Project are not supported by substantial evidence and 2) The Project does not meet the City's Residential Guidelines and is inconsistent with Concept Finding Number 5.

The Variance Findings for the Project are not Supported by Substantial Evidence

Any grant of a variance must be accompanied by administrative findings that "bridge the analytical gap between the raw evidence and the ultimate decision or order." (*Orinda Ass'n. v. Bd. of Supervisors* (1986) 182 Cal. App. 3d 1145). A finding's requirement for a variance "serves to conduce the administrative body to draw legally relevant subconclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will leap from evidence to conclusions." (*Id.* at 1161). Substantial

evidence must support the findings and “whether the findings support the conclusion that all applicable legislative requirements for a variance have been satisfied...” (*Id* at 1160-61).

The Project variance at issue requests approval “of a Variance to replace the site coverage with an amount of 1,017 square feet (525 sf allowed; 756 sf allowed with permeability bonuses), 261 square feet above what would otherwise be permitted...” (See Staff Report for January 15, 2025 Planning Commission hearing on the Project (“Staff Report”), Page 8). According to the Staff Report, the site coverage consists of new driveways, new and replaced walkways, a *new view deck, patio*, new and replaced stairs and landings and a new light well.

Even though the site coverage triggering the variance request includes a new, 558 square foot view deck and a patio underneath the view deck, none of the six legally required variance findings discuss the view deck and patio in the analysis. Instead, each variance finding only analyzes the need for safe access to the residence due to the unusual topography of the site.¹ (See Exhibit A).

While all of the variance findings are insufficient since they fail to address the view deck and patio, I have outlined specifically how Findings A, B and F lack the substantial evidence necessary to legally support the granting of variance to the Zoning Ordinance.

Finding A

- A. That due to special physical circumstances applicable to the property, the strict application of the Zoning Ordinance will deprive the property of privileges enjoyed by other properties in the vicinity which were developed under the same limitations of the Zoning Ordinance.*

The Applicant’s Response, which the Planning Commission approved, states:

The topography of this site slopes from Scenic Road at an elevation height of approximately 49.9 to a rear elevation height of approximately 60.1. In response to a ten-foot difference in elevation, the existing house has two levels with the garage accessed at the lower level and the living space accessed at the upper level. The side yards and back of the house are at higher topographic elevation which is conducive to a reverse floor plan and main entrance on the upper level. Accessibility to the main entrance of the house requires a long pathway with stairs along the side of the house to a side entrance, a feature shared by multiple properties along Scenic Road. The stairs and landings for an elevation difference of 10 feet requires a significant length to access the main entrance. To not allow additional site coverage to safely access the main entrance would be a hardship for the owners.

¹ The City has relied on findings prepared by the Applicant and made its own analysis of three of the six required legal findings. The City’s response to the legal findings omits that without the view deck, no variance is needed.

According to the Staff Report, the Project does not propose any increase in floor area or height, but because of the substantial alteration in the exterior appearance of the residence, Tract 2 Design Study approval is necessary. (Staff Report, Page 2). Thus, the structure of the building is not moving or changing. The Existing Site Plan for the Project shows that there is already access to the residence via a long pathway with stairs and landings on the south side of the residence which is utilized to reach the entrance of the residence from Scenic Drive. (See Exhibit B). Access to the residence already exists in the same location as what is proposed in the Project. What the Applicant is really seeking a variance for is to add the view deck, patio and light well as no variance is necessary access.

During the Planning Commission hearing, City Staff used a slide entitled "Answers to Possible Questions" which is attached to this correspondence as Exhibit C. The slide depicts the potential smaller view deck and patio that the Applicant would be entitled to under the Zoning Ordinance if no variance was granted. Since a smaller view deck and patio would negate the need for a variance, the view deck and patio are the elements that trigger the need for a variance and must be addressed in the variance findings.

Under the standard set by the *Orinda Ass'n. v. Bd. of Supervisors* Court, the legal finding above is not sufficient since the City did not analyze how a strict application of the Zoning Ordinance, which would dictate a smaller view deck and patio, would deprive the Applicant of privileges enjoyed by other properties due to the special physical circumstances of the Applicant's own Property. The fact that the legal findings solely address access as a reason for needing a variance and seemingly elect not to mention the view deck and patio is misleading and a clear attempt to circumvent the legally required variance procedures.

Finding B

The second legal finding required for granting of a Variance states:

- B. That the variance will not constitute a grant of special privilege inconsistent with limitations on other property in the vicinity and within the same zone.*

The Applicant's Response, which the Planning Commission approved, states:

The granting of a safe pathway to the main entrance at the site of the house is a necessity, not a special privilege. All residences have a safe accessible means of entry into their residence, many with a side entrance similar to this property.

Just like in Finding A above, here, the legal finding approved by the Planning Commission again completely omits that the variance is not for access to the residence, as access already exists, but is actually a variance to allow the Applicant to construct a 558 sq ft view deck, as well as a patio. By failing to analyze, or even mention, the view deck and patio in the findings, the applicable legislative requirements for a variance have not been satisfied.

In addition, the granting of the variance *is* a special privilege the City denied my client, whose residence is directly next door to the Project, when she remodeled the Jernstedt Residence in 2006. The Jernstedt Residence was given Track 1 approval in 2006 for a remodel of an existing residence. Just like the Applicant, my client also desired to have an expanded "view deck" on the west end of the residence to take advantage of the oceanfront views. Unlike the 558 square foot deck proposed by the Applicant, my client was only asking for an approximately 13' x 6' (total of 78 sq. ft.) deck expansion. Just like the Applicant's Project, the Jernstedt Residence would have exceeded standards for the zoning district.

In contrast to the City's support for a variance for the Applicant on the Project, the City forced my client to demolish a 10' x 3' portion of her structure in order to gain approval for the 78 square foot deck expansion. (See Exhibit D depicting the floor area to be reduced and the deck expansion). Thus, the granting of the variance to allow the Applicant to exceed the allowable site coverage in order to have a view deck and patio is, in direct contradiction to the finding made when the Project was approved, a grant of a special privilege inconsistent with limitations on other property in the vicinity.

The Court in *Orinda Ass'n. v. Bd. of Supervisors* stated, "Moreover, courts must meaningfully review grants of variances in order to protect the interests of those who hold rights in property nearby the parcel for which a variance is sought. A zoning scheme, after all, is similar in some respects to a contract; each party foregoes rights to use its land as it wishes in return assurance that the use of neighboring property will be similarly restricted..." (*Id* at 1161). The City's granting of the variance on the Project is a special privilege the City refused to afford the Jernstedt Residence in 2006.

Finding F

F. That granting the variance will not be in conflict with the General Plan, or the general zoning objectives of the district within which the affected property lies.

The Applicant's Response states:

The granting of this variance is in response to an unusual condition due to the grade change naturally occurring on this property. For safety of owner and public access, the elevation change of ten feet requires appropriate stairs and pathways. The side entrance and access to the entry are compliant with the general zoning objectives for not having a grand entry.

City Staff's Response, which the Planning Commission approved, states:

As conditioned, the project will not be in conflict with the General Plan or zoning objectives of the R-1 zoning district or associated overlay districts. The project shall still comply with all other applicable standards with only an additional allowance for site coverage permitted.

Pursuant to Section 17.10.060 of the City's Code of Ordinances, the City Council must maintain design guidelines and use the guidelines to review proposed construction. Residential Design Guideline 5.1 states, in part, as follows:

-Locate windows and balconies such that they avoid overlooking active indoor and outdoor use areas of adjacent properties.

As can be seen in Figure 3b on Page 6 of the Staff Report, the proposed view deck will look directly into the kitchen of the Jernstedt Residence. If the view deck were restricted to the size available to the Applicant without the grant of a variance, the view deck would be significantly smaller and would not extend out far enough to overlook my client's kitchen, and therefore would be in compliance with Residential Design Guideline 5.1.

Since the current view deck design violates Residential Design Guideline 5.1, granting the variance will be in *direct* conflict with the general zoning objectives of the R-1 district. Finding F is not supported by substantial evidence.

The Project does not meet the City's Residential Guidelines and is inconsistent with
Concept Finding Number 5

In determining whether to approve the Applicant's Design Study Application, the City must evaluate the proposed Project in accordance with the Residential Design Guidelines and ultimately make Concept Phase Approval Findings. As discussed above, the location of the extended view deck overlooks two kitchen windows into the Jernstedt Residence, impacting my client's privacy in her home. Those two windows both offer views of the ocean, beach and golf course, thus any proposed privacy screening blocking said windows would be very detrimental to the Jernstedt Residence.

Concept Finding # 5 states:

The project is consistent with the City's objectives for public and private views and will retain a reasonable amount of solar access for neighboring sites. Through the placement, location and size of windows, doors and balconies the design respects the rights to reasonable privacy on adjoining sites.

As discussed above in the section regarding Variance Finding F, the approval of the variance allows the Applicant to construct an extended view deck that looks into the kitchen of the Jernstedt Residence, in violation of Residential Design Guideline 5.1. The location and size of the view deck does not afford the Jernstedt Residence reasonable privacy. As such, Concept Finding # 5 cannot be met.

Conclusion

The granting of a variance is reserved for special physical circumstances in which a unique condition exists which would prevent a property owner from developing his property in the manner that other properties in the vicinity have been developed. A variance can only be granted if each of the six required findings are supported by substantial evidence. As discussed

above, each and every variance finding for the Project is deficient. Additionally, the design of the view deck violates Residential Design Guideline 5.1 and disrupts my client's privacy in the kitchen of her home. As such, Concept Finding # 5 cannot be met and the Design Approval should not have been granted.

I ask that you consider all of this information in determining whether a variance was truly appropriate for this particular Project. If the view deck was reduced to the allowable size under the Zoning Ordinance, all of my client's concerns would be met as there would no longer be a privacy issue. My client hopes to make her home available to the Council at the Property Tour prior to the hearing on this appeal so that you can have a better understanding of how the variance to allow the extended view deck impinges on my client's privacy in her home.

Very truly yours,

A handwritten signature in black ink, appearing to be 'KS' with a long horizontal stroke extending to the right.

Krista M. Ostoich, Esq.

Cc: Brandon Swanson, via email, bswanson@ci.carmel.ca.us
Encl(s): Exhibit A, Variance Findings Submitted by Applicant
Exhibit B, Existing Site Plan from Project
Exhibit C, Slide from City Staff Planning Commission Presentation
Exhibit D, Approved Plans showing required demolition in exchange for extended view deck on Jernstedt Residence

Exhibit “A”

- A. That due to special physical circumstances applicable to the property, the strict application of the Zoning Ordinance will deprive the property of privileges enjoyed by other properties in the vicinity which were developed under the same limitations of the Zoning Ordinance;**

Applicant's Response: The topography of this site slopes from Scenic Road at an elevation height of approximately 49.9 to a rear elevation height of approximately 60.1. In response to a ten-foot difference in elevation, the existing house has two levels with the garage accessed at the lower level and the living space accessed at the upper level. The side yards and back of the house are at higher topographic elevation which is conducive to a reverse floor plan and main entrance on the upper level. Accessibility to the main entrance of the house requires a long pathway with stairs along the side of the house to a side entrance, a feature shared by multiple properties along Scenic Road. The stairs and landing for an elevation difference of 10 feet requires significant length to access the main entrance. To not allow additional site coverage to safely access the main entrance would be a hardship for the owners.

- B. That the variance will not constitute a grant of special privileges inconsistent with limitations on other property in the vicinity within the same zone;**

Applicant's Response: The granting of a safe pathway to the main entrance at the site of the house is a necessity, not a special privilege. All residences have a safe accessible means of entry into their residence, many with a side entrance similar to this property.

- C. That the variance will not be detrimental to adjacent property or injurious to public health, safety or welfare;**

Applicant's Response: This request for a variance will maintain the existing topography which safely transitions to the adjacent property. The new stairs, landings and pathways will continue the natural slope of the topography along the side of the building to provide a safe means of ingress and egress for the residence. The existing vegetation provides adequate privacy for all site improvements requested.

Staff's Response: Granting the variance will not be detrimental to adjacent properties, or injurious to public health, safety or welfare. The applicant shall still be required to comply with the applicable requirements of the underlying zoning district, overlays, and standard conditions of approval including but not limited to site drainage and storm water retention, landscaping, and tree planting/forest enhancement. The variance would only grant additional site coverage provided the additional coverage still allows for required site features (drainage, landscaping, trees, etc) to be maintained on-site first.

- D. That the condition or situation of the property for which the variance is sought is not so general or recurrent in nature as to make reasonable or practical the formulation of a general regulation to address such condition or situation;**

Applicant's Response: The change in topography in the side yard setbacks deems it necessary to have stairs and pathways for safe access as a specific hardship to this property. This condition is due to an oddly shaped front property line and narrow width requiring a garage and off-street parking.

- E. That the situation or condition for which the variance is sought was not the result of actions of the existing or any prior owner of the property; and**

Applicant's Response: The request for a variance is the result of a drastic change in topography from the front property line to the rear property line. The garage requirements at the lowest grade elevation require a width such that the side of the house is required for accessibility on the sloping topography of the natural site.

- F. That granting the variance will not be in conflict with the General Plan, or the general zoning objectives of the district within which the affected property lies.**

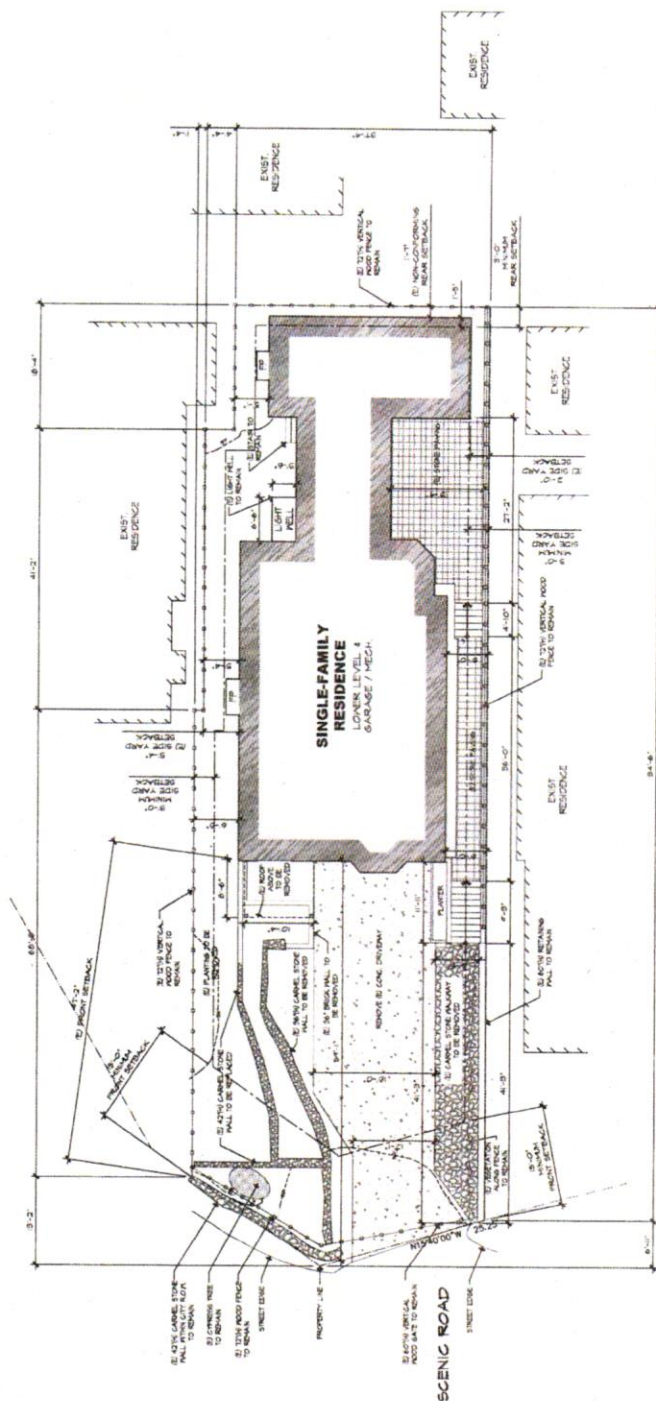
Applicant's Response: The granting of this variance is in response to an unusual condition due to the grade change naturally occurring on this property. For safety of owner and public access, the elevation change of ten feet requires appropriate stairs and pathways. The side entrance and access to the entry are compliant with the general zoning objectives for not having a grand entry.

Staff Response: As conditioned, the project will not be in conflict with the General Plan or zoning objectives of the R-1 zoning district or associated overlay districts. The project shall still comply with all other applicable standards with only an additional allowance for site coverage permitted.




Exhibit

“B”

SITE COVERAGE CALCULATIONS	
DRIVEWAY	944 SF
WALKWAYS & STAIRS	836 SF
PATIOS	421 SF
LIGHTWELL	17 SF
PLANTER WALLS	3 SF
TOTAL SITE COVERAGE	2,236 SF



LEGEND

	(E) PERMEABLE PAVERS
	(E) CONCRETE DRIVEWAY
	(E) STONE PAVING

EXISTING SITE PLAN



PROJECT NORTH A

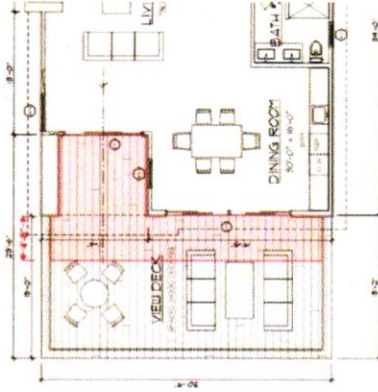
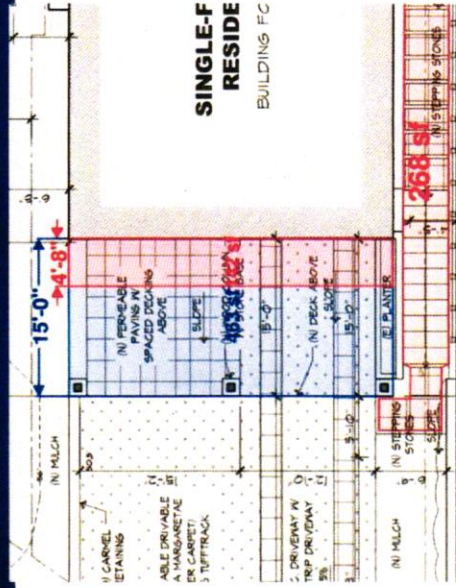
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Exhibit

“C”



Answers to Possible Questions

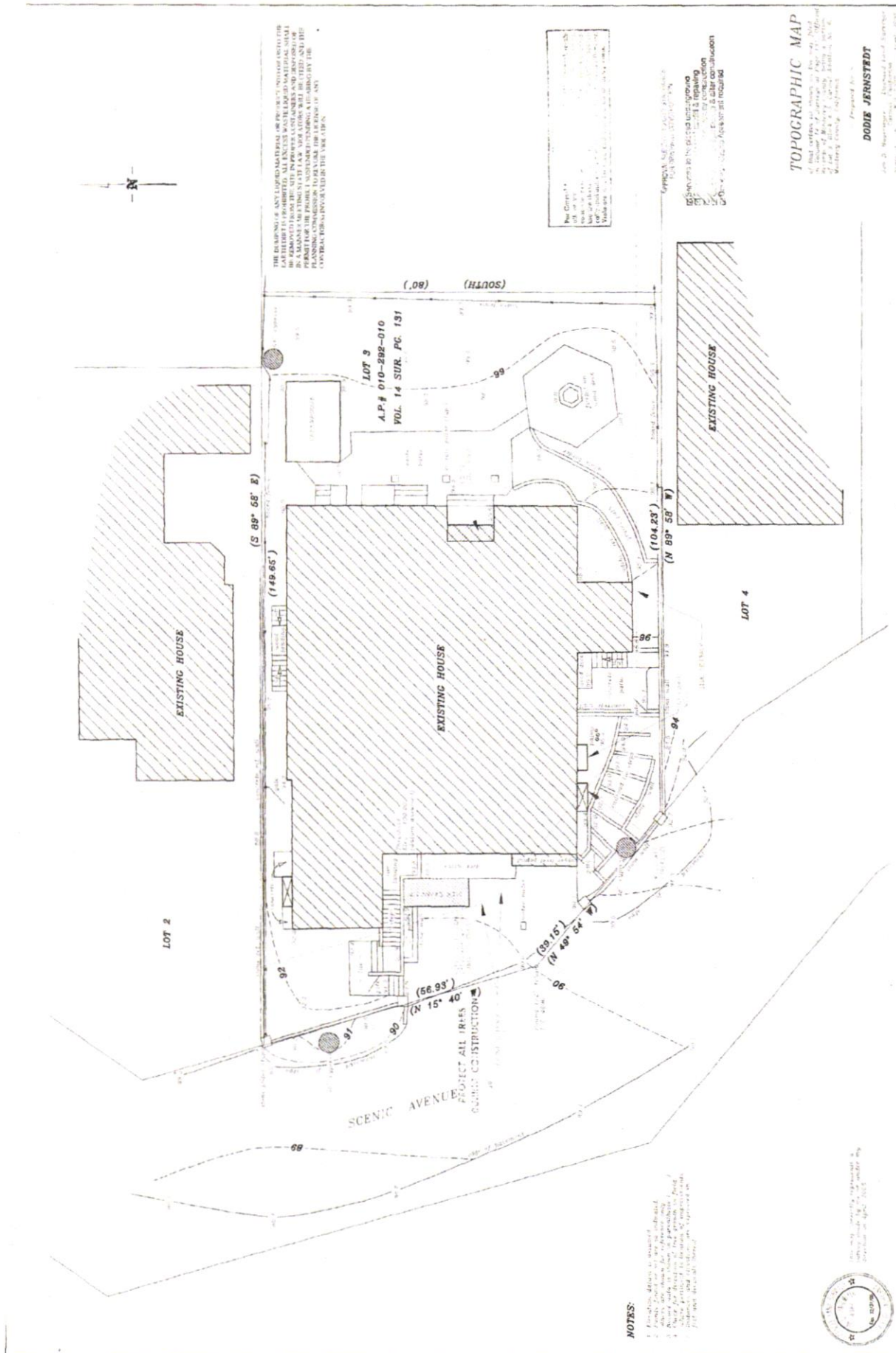


3. If deck (and patio below) are reduced to an amount which would comply with site coverage limits:
 - Deck would project approximately 4'8" (+/-);
 - Illustrative example only – not a recommendation.

Building Site Area	Allowed Square Footage/ Base Floor Area	Site Coverage	Site Coverage w/Bonus
5,762	2389	525	756
Existing Total Site Coverage:			
		Impermeable	Permeable
		2,236 sf	0
Proposed Total Site Coverage			
		Impermeable	Permeable
		1,017 sf	827
Variance Request			
		261 sf of additional site coverage	

Exhibit

“D”



TOPOGRAPHIC MAP

RODIE JERNSTEDT

[illegible]