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October 15, 2021

VIA ELECTRONIC MAIL [*cityclerk@cityofpasadena.net*]
Mayor Victor M. Gordo,
Vice-Mayor and Councilmember Andy Wilson,
Councilmembers Tyron Hampton, Felicia Williams,
John J. Kennedy, Gene Masuda, Jess Rivas, Steve Madison
City Council, City of Pasadena
100 North Garfield Avenue
Pasadena, California 91101

Re: **STATEMENT OF APPELLANT AT 1812 LINDA VISTA REGARDING THE NEW PROJECT AT 1820 LINDA VISTA**

Appeal of Case No. ZENT2020-10016 // Hillside Dev. Permit #6838
City Council Agenda Item #12

Project Location:	1820 Linda Vista Avenue
Zoning:	RS-4-HD
Hearing Date:	October 18, 2021

Dear Mayor Gordo, Vice-Mayor Wilson, Councilmembers Hampton, Williams, Kennedy, Masuda, Rivas, and Madison:

This office represents neighboring property owner and the Original Project Appellant Jin Ser Park ("Appellant") in connection with the above-captioned appeal. Appellant challenged the Hearing Director's approval of the subject application and prevailed by a unanimous decision of the Board of Zoning Appeals (sometimes the "BZA") on April 22, 2021.

The Owner/Developer/Architect Applicant Matthew Feldhaus ("Applicant") originally proposed a massive expansion of his hillside single family residence, which would have greatly changed the massing of the structures thereupon and blocked Appellant's legally protected views. The original approval Applicant sought was for Hillside Development Permit #6838 to convert an existing 2,452 square-foot, single-story single-family residence, with an attached 366 square-foot garage, and an attached 439 square-foot

carport to the following: a 4,660 square-foot, two-story residence with an attached 754 square foot garage for a total gross area of 5,414 square feet (the "Original Project").

Having the Original Project utterly rejected at the BZA Hearing, Applicant *now* seeks the City Council's approval of a different, even more troubling project. The new project proposes a 3,853 square-foot residence with an attached 754 square foot garage, and 158 square feet of enclosed pool equipment in tandem with a deck expansion, infinity pool, and an 807 square-foot lower floor Accessory Dwelling Units ("ADU") for a total gross area of **5,572 square feet** (the "New Project"). The story poles still in place from the Original Project show that the very same view obstruction remains. Worse, the exemption from environmental review is now for an even more unwieldy construction project on a steep hillside next to liquefaction zones, a golf course, and a historic resource.

Furthermore, the "Public Notice" of the New Project is non-existent. Appellant learned of the New Project by virtue of reading the new staff report, which was only released in the evening of October 14. Moreover, the homes within the notice radius did not receive the traditional mailing notification. The expanded project footprint, the bypassing of public input at the Hearing Officer stage and consideration by the BZA, and the change of project in the goal of reaching a final decision by the City Council violate the Brown Act, due process, equal protection, and the Pasadena Zoning Code. This lack of due notice deprives the public of the opportunity to review and comment upon the project before a Hearing Officer, who would then make decisions in a public forum about the Hillside Ordinance and the project's impact on the environment.

Based on the foregoing, Appellant respectfully requests the City Council uphold the decision of the Board of Zoning Appeals and reject Hillside Development Permit #6838.

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I. THE NEW PROJECT STILL SUBSTANTIALLY INFRINGES ON APPELLANT'S PROTECTED VIEWS

Certain view corridors are a legally protected benefit that belongs to those who reside in the Hillside Development Overlay District (the "District"). The City of Pasadena Municipal Code ["PMC"] requires that applicants for hillside development permits avoid blocking certain views:

> ***
> New structures and tall landscaping shall not be centered directly in the view of any room of a primary structure on a neighboring parcel. Views shall be considered from windows *of any room in the primary structure. **New structures shall avoid blocking the following from <u>any room</u> of a main dwelling*** on a neighboring property:
>
> 1. Culturally significant structures such as the Rose Bowl, Colorado Street Bridge, City Hall, etc.;
>
> 2. Downslope views of the valley floor;
>
> 3. **Prominent ridgelines**; and/or
>
> 4. The horizon line.
>
> (PMC § 17.29.060-G [emphasis added.])

The Original Staff report before the April 22 BZA Appeals Hearing concluded (with no meaningful analysis) that since the Original Project would "maintain the general height of the existing residence, … the existing view conditions [of Appellant's Property] would

not be impacted." (Staff Rep., p. 8.) However, the expansion of square footage for the Project will leave new structures and obstacles directly within the line of sight from Appellant's rooms to the Ridgeline. (See Exhibit I.) The October 18 Staff Report *now acknowledges the unlawful ridgeline view obstruction.* (Oct 18 Staff Rep., p. 14 ["Although it appears that a portion of the ridgeline would be blocked from a first-story window by the new roof-design of the single-story additions and remodel, the proposed structure is designed to avoid blocking views from surrounding properties to the maximum extent feasible." (Emphasis added)].) Of course, this completely understates the point since there are several first-floor windows and multiple rooms that would be affected by the view obstruction.[1] Furthermore, if Applicant wanted an exemption from compliance with the view ordinance or other relief from these provisions based on hardship, he could have asked for that in his application. He did not.

Planning Staff has no analysis of sight angles from the Project. (*See Topanga Association for a Scenic Community v. County of LA* (1974) 11 Cal.3d 506, 511 [for discretionary permits to be granted, there must be "substantial evidence [that] supports the findings that legislative requirements have been satisfied."]) The lack of analysis renders the Planning Department's review of the application critically defective and unsupported.

II. THE PROJECT IS NOT EXEMPT FROM CEQA BECAUSE THE LOCATION OF THE SITE AND UNUSUAL CIRCUMSTANCES SHOW THE PROJECT MAY HAVE A SIGNIFICANT EFFECT ON THE ENVIRONMENT

The same concerns about the environmental review of the project remain.[2] Though the Planning Staff seemingly ignores these concerns, there are particular and unusual circumstances that show the project may have a significant effect on the environment. Thus, the failure to prepare and Environmental Impact Report is a clear violation the California Environmental Quality Act ("CEQA") in this case. I will summarize the particular circumstances of the site and the proposed development that require the preparation of an EIR and the study of alternative projects:

(a) The property is located directly adjacent to a large liquefaction zone, which includes a historic watershed, the Arroyo Seco;
(b) The property to the north of the subject property, 1840 Linda Vista Avenue, is itself directly within a liquefaction zone, according to the California Earthquake Hazards Map maintained by the California State Department of Conservation;
(c) The Project seeks to double the footprint of the existing structures --- this is a massive expansion from structures previously in place, from structures that has

[1] Appellant is concurrently submitting to the City Council a file containing and video and photographs that give context to the layout and locations of the north-facing kitchen and dining room windows at 1812 Linda Vista Avenue.

[2] Appellant incorporates by reference the entirety of its arguments advanced at the BZA Hearing on April 22, 2021, including the letter dated April 20, 2021 that it submitted in advance of that hearing. The New Project does not fundamentally address the issues raised before the BZA.

been in place *since 1948,* alterations to façade and certain elements notwithstanding. The effect on the hillside, which likely has had substantial soil movement in the past **73 years** is something that must be reviewed in light of the load created by the new structures including the pool;

(d) Portions of the property contain a steep slope (over 50%), and the average slope for the remaining portions of the parcel is 29%;
(e) The subject property is located in a high fire severity zone;
(f) The subject property is located next to other properties at the top of the hillside which all sit next to the largest liquefaction zone in the City;
(g) The subject property itself sits within a landslide zone, according to the California Earthquake Hazards Map maintained by the California State Department of Conservation;
(h) The adjacent golf course with the watershed could be damaged in the event the soil on the subject property shifts due to earthquakes, landslides, or other soil movement and this could affect the watershed, a natural resource;
(i) The proposed swimming pool appears to put major strain on the further edge of the Project, which is closest to the steepest portions of the slope; and
(j) There is **still no identification or analysis of how many gallons the pool will hold and the resulting strain that would put on the hillside.** Landslide danger is evident, and the public has a right to evaluate this. This renders the application, even for the New Project, incomplete.

III. THE NEW APPLICATION EXACERBATES THE DENIAL OF EQUAL PROTECTION OF THE LAW AND DUE PROCESS BY IMPROPERLY FAVORING APPLICANT AT THE EXPENSE OF THE PUBLIC

1. Constitutional and Statutory Framework Concerning Due Process Applies to Administrative Hearings and Land Use Applications

The State of California recognizes a "much more inclusive" due process standard and "protects a broader range of interests than under the federal Constitution." (*Ryan v. California Interscholastic Federation-San Diego* (2001) 94 Cal. App. 4th 1048, 1069 [internal quotations and citations omitted]; (See also Cal. Gov. Code § 54950 et seq. [the Brown Act, which provides for open meetings and fair comment]; Cal. Gov. Code § 11340 et seq. [California Administrative Procedures Act.])

The City itself recognizes the importance of an *informed* and *fair* public participation in decisions affecting its citizens. Guiding Principle No. 7 provides: "Community Participation will be a permanent part of achieving a greater city. Citizens will be provided with timely and understandable information on planning issues and projects; citizens will directly participate in shaping plans and policies for Pasadena's future."

Appellants have fundamental rights at stake conferred by statute/code: (1) the right to proper environmental review of nearby properties; and (2) the rights and protections

afforded to them as property owners in the District. (*Desmond v. County of Contra Costa* (1993) 21 Cal. App. 4th 330, 338-39 [observing that Contra Costa County Code required consideration of adjoining landowners with respect to discretionary approvals.]) Case law also requires adequate public notice where a Notice of Exemption from environmental review is proposed for a new project. (*Los Angeles Department of Water and Power v. County of Inyo* (2021) 67 Cal.App.5th 1018, 1033 ["Consistent with basic principles of due process, the notice given before a public hearing has a role in defining the opportunity provided to the public."] citing Mathews v. Eldridge (1976) 424 U.S. 319, 333 for the proposition that "the essence of due process is notice and the opportunity to be heard at a meaningful time and in a meaningful manner."]) The hearing notice for this appeal does not incorporate the New Project, it is procedurally defective, and the City Council should reject the New Project for that reason alone.

Further, the October Staff Report references the "geotechnical report" on page 2 that would presumably include the ADU as part of the project plans, but that is not available to the public. There is no way for the public to review and provide input into that process, and this denies due process to the Appellant and the public.

Applicant's appeal of the BZA decision only noted the following: "The Board of Zoning Appeals failed to follow the zoning code and state law in their findings when they denied Hillside Development Permit #6838." No further discussion was provided in this conclusory statement, and there was no indication that Applicant intended to submit a different project. With respect to the New Project, proper public notice was not provided, and the Planning Staff continues to exhibit strong bias in favor of Applicant by accepting and advocating no environmental review for a new, different (the ADU), and larger project.

2. *Planning Staff Has Taken on the Role of the Advocate for the Developer*

Not only do the emails exchanged before the BZA Hearing show the Planning Staff's attempted assistance to the developer to *avoid environmental review*, but in the New Project the Planning Staff would support a larger project by contradicting its original neighborhood analysis in favor of a different one that serves Applicant's needs.

Staff has continually exhibited strong bias in favor of the developer, going so far as to disagree with its previous neighborhood compatibility analysis (although both times, it simply chose the specifications that would assist the application). The Planning Staff also proposed that the City Council either find in favor of an entirely new neighborhood compatibility analysis, or reduce the project just enough so that it can rely upon its older analysis. It proposed 37 feet be reduced from the New Project, but how can Appellant or the public know what the reduction looks like or where it comes from?

Appellant has been denied the basic due process from a fair, impartial evaluation of the project by the Planning Staff.

The Hillside Ordinance and the General Plan are designed for the protection of the people of Pasadena. Applicant's needs do not outweigh those of the community.

IV. CONCLUSION

The New Project (a) *admittedly still* violates the View Ordinance; (b) violates CEQA, which would require an Environmental Impact Report under these circumstances; and (c) violates due process, equal protection, and the building code because Applicant effectively is trying to obtain a final City Council decision on a different, though even more troubling project. These problems render the New Project even more unlawful than the Old Project, which was previously denied.

Finally, Applicant seeks to improperly short circuit public comment and review of what amounts to a completely different project. The Original Project was smaller in size and did not include an ADU.

Appellant respectfully requests that the City Council uphold the decision of the Board of Zoning Appeals to deny the instant permit application.

Sincerely,

Stephen Weaver, Esq.

cc: Lilia Novelo, City Clerk's Office, via email [*lnovelo@cityofpasadena.net*]
Ruben Martinez, City Clerk's Office, via email [*rumartinez@cityofpasadena.net*]

Exhibit I

[Photographs Reflecting Obstruction of Protected Views Shown by Story Poles]

(1) View from Appellant's Dining Room [Protected View]
(2) View from Appellant's Dining Room [Colorized to Show Ridgeline Obstruction]
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October 15, 2021

Mayor Victor Gordo
Vice-Mayor Andy Wilson &
Honorable Members of the City Council Tyron Hampton, John J. Kennedy,
Steve Madison, Gene Masuda, Jessica Rivas, and Felicia Williams
Pasadena City Hall
100 North Garfield Avenue
Pasadena, CA 91101

Re: 1820 Linda Vista Avenue (Hillside Development Permit #6838)

Dear Mayor, Vice-Mayor, and Honorable Members of the City Council:

Our firm represents the applicant Matthew Feldhaus ("Applicant") in this appeal of the Board of Zoning Appeals' April 22, 2021 decision to overturn the Zoning Hearing Officer's decision and disapprove Hillside Development Permit #6838, which is on your October 18, 2021 Agenda.

I. INTRODUCTION

Matthew and his young family seek nothing more than to remodel their home. Toward that end, they are appealing the BZA's April 22 decision. In short, the proposed project is located at 1820 Linda Vista Avenue (the "Property"), which is a lot with over 20,000 square feet. The application for a Hillside Development Permit ("HDP") proposed a residence that exceeded the maximum allowable Neighborhood Compatibility floor area of 3,816 square feet by 844 square feet. Under Code Section 17.29.080.G.a, therefore, a finding that, "No additional view impacts will occur to neighboring properties as a result of granting additional square footage" was required to be made in addition to the findings required under 17.29.080.F. The Zoning Hearing Officer ("HO") determined that the all of findings could be made as staff had shown, but the BZA disagreed and determined that the finding under 17.29.080.G for additional floor area could not be made.

Rather than re-design the project to construct an addition closer to Linda Vista Avenue, add a second story, or pursue other options under recently enacted State laws, the Applicant has addressed the concerns raised by the BZA by eliminating the square footage in excess of the Neighborhood Compatibility requirements. Further, since the proposed addition already was located on the interior and rear of the lot, it reduced any view impacts to the maximum extent feasible, thus complying with the Code. More specifically, the neighbor to the south has a two-story home that exceeds 5,000 square feet with unobstructed views from all protected places.[1]

Last, there are no cumulative impacts, no unusual circumstances that create a reasonable possibility that the project may result in a significant environmental impact, and no historical resource at issue in this case. The proposed project thus is exempt from environmental review pursuant to Categorical Exemption 1 of the California Environmental Quality Act ("CEQA") Guidelines.

As a result, given the revisions that eliminate the basis for the BZA's decision and the fact that the findings can be made, we respectfully request that you overturn the BZA decision and approve the HDP. Alternatively, as permitted under 17.72.070.B.3, should you want the BZA to consider the Applicant's revisions before considering this appeal, we would ask that you remand it accordingly.

II. FACTUAL BACKGROUND

A. Project Description and HDP Application

The proposed project now entails the construction of a 1,401 square-foot addition to the existing 2,452 square-foot, single-story single-family residence at the Property, with an attached 754 square-foot garage, and the removal of the attached 439 square-foot carport (the, "Project"). The addition results in a 3,853 square-foot residence with an attached 754 square-foot garage. A HDP is required for any addition exceeding 500 feet.[2]

The Property is located within the RS-4-HD (Single-Family Residential, 0-4 dwelling units per acre, Hillside Overlay District) zoning district. The Property descends east down a hillside toward the Arroyo Seco. The site topography is generally flat at the location of the existing and proposed improvements, and the average slope across the site is 29 percent.

On June 29, 2020, Applicant submitted his HDP application. On November 19, 2020, the City deemed the application complete.

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1. We understand that staff requested access to the neighbor's interior to verify his claims of such an obstruction, but the neighbor refused to grant such access.

2. A new swimming pool and an 807 square-foot Accessory Dwelling Unit (ADU) are also planned, but do not require a HDP and thus are not part of the Project.

B. <u>Concerns Expressed by Adjacent Neighbor and Neighborhood Association, the Staff's Recommendation to Approve the HDP, and Hearing Officer's Approval of the HDP</u>

On December 6, 2020, Kevin Kang, a neighbor residing at 1812 Linda Vista Avenue, contacted City staff with questions about the Project. On December 15, 2020, Applicant virtually met with City staff and Mr. Kang to discuss the Project and the HDP process. Mr. Kang did not identify any issues or concerns with the proposed project at this meeting.

Thereafter, on January 6, 2021, the Zoning Hearing Officer (HO) considered and approved the HDP at its regularly noticed hearing. There, the City staff report analyzed and concluded that all of the findings required to approve the Project could be made and that the Project was exempt from CEQA review. Based upon its analysis, Staff recommended approval of the HDP application with additional conditions of approval to address the neighbor's and other concerns raised at the hearing.

Further, the applicant provided a brief presentation. Three public comments in opposition to the Project were submitted to the HO, including two from the same attorney. Specifically, the neighbor to the south of the Property opposed the Project, citing privacy as the main concern. Additional concerns were raised by the neighbor related to potential impact on protected views, the proximity of the addition to the top edge of the slope, grading impacts, and the alleged incorrect application of a CEQA exemption. The Hearing Officer acknowledged the concerns and discussed them in relation to the City staff's recommendation. At the conclusion of the public hearing and after public testimony, the Hearing Officer approved the HDP with conditions and adopted the environmental determination.[3]

On January 11, 2021, the HO notified the Applicant in writing that that the HDP was approved ("HO January 11 Letter"). HO January 11 Letter, at 1. The Specific Findings for HDP # 6838 expressly stated, among other things, that:

- "As analyzed, ***the project will meet all applicable development standards*** for the RS-4-HD zoning district and Hillside Overly such as setbacks, lot coverage and floor area, height and ***neighborhood compatibility***." *Id.* at 3 (emphasis added).

- "The proposed two-story addition to the existing single-story residence complies with all the development standards set forth in the City's Zoning Code. . . . ***the***

3. "An agency's determination that a project falls within a categorical exemption includes an implied finding that none of the exceptions identified in the Guidelines is applicable. The burden then shifts to the challenging party to produce evidence showing that one of the exceptions applies to take the project out of the exempt category." *San Francisco Beautiful v. City and Cnty. of San Francisco*, 226 Cal. App. 4th 1012, 1022-23 (2014) (citation omitted).

project would be consistent with General Plan objectives and policies." *Id.* (emphasis added).

- "The proposed addition will be constructed in such a manner as to minimize impacts to surrounding property owners. . . . ***the proposed project will not be detrimental to the public health, safety, or welfare of persons or properties within the surrounding neighborhood.***" *Id.* at 4 (emphasis added).

- "The project is not located on the top of any prominent ridgelines and ***will not block protected views from neighboring properties***. The proposed project will ***meet the guidelines related to exceeding the Neighborhood Compatibility requirements.***" *Id.* (emphasis added).

- "The size of the proposed project (not including the proposed garage) is 4,660 square feet, which exceeds the maximum allowable Neighborhood Compatibility floor area of 3,816 square feet by 844 square feet. However, the additions are designed not to impact views, be in compliance with the ridgelines protection standard, and have a floor area ratio consistent with the properties within a 500 foot radius. . . . Furthermore, as designed, ***the placement of the proposed additions would not impede the protected view of an adjoining property.***" *Id.* (emphasis added).

- "The proposed two-story addition to the existing single-story dwelling will be located towards the interior of the lot away from the public rights-of-way and the most steeply sloping portions of the site. As a result, ***the project requires minimal changes to the grading, drainage, and landscaping.***" *Id.* at 5 (emphasis added).

C. Neighbor's Appeal to the BZA, Staff's Recommendation to Approve the HDP, and BZA's Decision to Overturn HO's Approval of HDP # 6838

On January 19, 2021, Jin Ser Park, the abutting property owner at 1812 Linda Vista Avenue ("Objecting Neighbor"), filed an appeal of the HO's decision to approve HDP # 6838 on the grounds that the Project is an out of scale development, fails to consider view rights, presents unusual circumstances, has cumulative impacts, and is a threat to historic/natural resources.

On April 21, 2021, the LVAA wrote to the BZA, to reiterate its concerns that were set-forth in its January 5, 2021 letter to the HO, and to further explain its complaints about the project description, reference to a deck and minimal grading, and excess neighborhood compatibility square footage.

In the Staff Report to the BZA dated April 22, 2021 ("April 22 Staff Report), City staff recommended that the BZA: (1) adopt the Environmental Determination that the Project is

exempt from CEQA pursuant to CEQA Guidelines Section 15301[4] (Class 1, Existing Facilities), recognizing that there are no features that distinguish the Project from others in the exempt class and therefore there were no unusual circumstances, and (2) uphold the HO's January 6, 2021 decision to approve the HDP based on the City staff's findings and conditions. April 22 Staff Report, at 20. The April 22 Staff Report found that the Project "***meets*** all applicable development standards required by the Zoning Code for the RS-4-HD zoning district and the ***additional development standards required within the Hillside Overlay District including the Neighborhood Compatibility guidelines of the Hillside Ordinance***." *Id.* (emphasis added). Furthermore, ***"[e]xisting views and privacy would be maintained after the project. It is anticipated that the proposed location would not be detrimental or injurious to surrounding properties or improvement***." *Id.* (emphasis added). Therefore, "based on staff's analysis, as conditioned, ***[the Project] would be compatible with the adjacent land uses and would not result in any adverse impacts to the surrounding area with the recommended conditions of approval***." *Id.* (emphasis added).

The April 22 Staff Report also found that all of the requisite findings for a HDP approval could be made (*id.* at 20), and specifically noted the following:

- With respect to neighborhood compatibility, the Project's 4,660 square feet of floor area (excluding the garage) exceeds the Neighborhood Compatibility threshold by 844 square feet. However, pursuant to Municipal Code § 17.29.080.G, guidelines are available for exceeding Neighborhood Compatibility floor area. The Project complies with the criteria for exceeding it because: (1) the Project has been designed to avoid blocking culturally significant structures, downslope views, prominent ridgelines, and/or the horizon line from neighboring properties; and (2) the Project is in scale with the context and character of the development in the neighborhood. *Id.* at 6-7.

- With regard to the deck, "[b]oth the upper floor and lower floor additions are placed to the rear of the property and are set in such an area and designed in a manner that visibility from off the property would be limited and that ***any protected*** view corridors are maintained for adjacent properties." *Id.* at 8 (emphasis added). Furthermore, the "additions are setback more than 100 feet from the top edge of the Arroyo Seco Slope Bank, and more than 250 feet from the rear property line, thereby ***preserving the privacy of surrounding lots to the north, south, and east***." *Id.* (emphasis added).

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4. Specifically, Section 15301 exempts additions to existing structures, provided that the addition will not result in an increase of more than 10,000 square feet when the project is in an area where all public services and facilities are available to allow for maximum development permissible in the General Plan, and the area in which the project is located is not environmentally sensitive. The Project did not exceed this threshold. April 22 Staff Report, at 1, 15-16.

- With regard to view protection for Objecting Neighbor's property, "views from within the interior of the adjacent two-story structure at 1812 Linda Vista Avenue are limited to portions of the neighboring project site's existing roof's ridgeline and the sky above. Since the proposed project will continue to maintain the general height of the existing residence, ***these existing view conditions would not be impacted.***" *Id.* (emphasis added). After the Applicant installed temporary silhouette (story poles) on the Property, the City staff concluded that Project "would not reasonably impact any protected views from adjacent properties. Although portions of the silhouette are visible from various vantage points, there is ***no protected view obstruction***. In addition, portions that are visible, are not reasonably centered directly in the view of the abutting properties, consistent with the intent of the Zoning Code. Therefore, staff has determined the project minimizes view impacts and is ***consistent with the view protection standards of the Zoning Code.***" *Id.* at 9 (emphasis added).

- With regard to geotechnical investigation, Irvine Geotechnical, Inc. excavated seven test pits on the project site and concluded that the grading and proposed structure will be safe against hazard from landslide, settlement, or slippage and the Project will have "***no adverse effect on the geologic stability of the adjacent properties***", including the consideration of constructing a pool in the proposed location, "provided recommendations are followed." *Id.* (emphasis added).

Furthermore, pages 11 through 18 of the April 22 Staff Report expressly addressed in great detail each of the objections raised by Appellant and the LVAA, as summarized below:

- Regarding the claim that the Project is an out of scale development, the City staff stated that the claim "does not relate to how staff analyzes neighborhood character as part of the required neighborhood compatibility analysis." *Id.* at 11. As summarized on pages 6-7 of the April 22 Staff Report, projects subject to a HDP are to consider the character and scale of the existing development in the neighborhood of the lots located within a 500-foot radius of the site, and for lots larger than 20,000 square feet, the review authority may approve additional floor area above the maximum permitted by Neighborhood Compatibility after reviewing site conditions and compliance with Hillside District standards. Here, the City staff was able to make the findings to support an approval of additional floor area because: the Project was in compliance with the neighborhood compatibility analysis and the maximum FAR allowances for the Property, and the Project is in scale with the context and character of the development. *Id.* at 11-12. ***Objecting Neighbor's focus on the average building size thus was misplaced because the median building size is the relevant criteria.*** *Id.* at 11-12. Last, Objecting Neighbor did not provide substantial evidence in support of the claim that the Project was not consistent with the General Plan. *Id.* at 12-13.

- Regarding the claim that the City failed to consider view rights, the City staff found that the proposed location of the addition "***would not block views from***

neighboring properties that the City would otherwise protect." *Id.* at 14 (emphasis added). The April 22 Staff Report reiterated its statements from pages 8-9 of the same report, specifically addressing views from 1812 Linda Vista (Objecting Neighbor's property) to reach the conclusion that the Project ***would not impact protected views*** from that residence. *Id.* at 14-15. City staff took photos from the Appellant's property towards the location of the proposed addition and concluded that there were no view obstructions. Photos were presented as part of the staff report.

- Regarding the claim that unusual circumstances apply, the City staff confirmed the Project is exempt from environmental review under CEQA Guidelines because there are no features that distinguish the Project and therefore there are no unusual circumstances. *Id.* at 15. The full scope of the work and the modification to the existing residence were considered and were determined to meet the standards of the Class 1 Categorical Exemption. *Id.* at 16. The April 22 Staff Report reiterated its analysis from page 2 of the same report, as well as the HO's addendum,[5] in support of the recommendation that the Project is exempt from CEQA. *Id.* at 16-17.

- Regarding the claim that there are cumulative impacts, the City staff found that there was no evidence of unusual circumstances and cited to the HO's addendum as evidence that "several homes have been safely built, and safely expanded, on the east side of Linda Vista Avenue, going back several decades." *Id.* at 17. The property owners directly adjacent to the north and the west have existing pools and decks that face downslope to the east without any historical issues. The City enforces municipal codes that "ensure the safety of new development; as verified through the City's grading permit, demolition permit, and building permit plan-check review process; and through a series of on-site inspections by city staff during site grading, demolition and construction." *Id.*

- Regarding the claim that there is a threat to historic/natural resources, the City staff pointed to the Design & Historic Preservation Section's review of the Property and determination that the Property was substantially altered with an addition of enclosed floor area, an open courtyard, and a carport, in 1965 and was not eligible for historical designation. *Id.* Also, the City staff cited to the HO's

5. In connection with the appeal to the BZA, the HO submitted an addendum dated March 20, 2021 ("HO March 20 Addendum") addressing the issues raised by Objecting Neighbor. With respect to the neighborhood compatibility calculations, the HO noted that Objecting Neighbor sought to exclude the two largest homes and to exclude vacant lots from the analysis, but that the City's code, policies, and procedures do not allow individuals to be selective about which lots are included in the Neighborhood Compatibility calculations. HO March 20 Addendum, at 3. The HO concluded that Objecting Neighbor had not provided a sufficient basis upon which to overturn the January 6, 2021 decision to approve the HDP and that the appeal should be denied. *Id.*

addendum to highlight several conditions of approval which address the safety concerns raised by Appellant. *Id.* at 17-18.

At the April 22, 2021 hearing, the BZA heard from the City staff, the Applicant, the Objecting Neighbor's counsel and LVAA. The City staff's Powerpoint presentation concluded that Objecting Neighbor's claims were unsubstantiated due to lack of supporting facts or evidence and highlighted the following points, among others:

- There was "no merit to the argument that a smaller house being proposed on an immediately adjacent lot is 'out of scale.'"
- The City does not protect Objecting Neighbor's views across the subject Property site.
- That the Property did not include features that would preclude the Project from qualifying for a categorical exemption under CEQA.
- Two of the alleged "unusual circumstances" (steepness of the lot and location adjacent to open space in a liquefaction zone) apply to many properties on the East side of Linda Vista Avenue. Objecting Neighbor did not provide evidence showing that the property being adjacent to a liquefaction zone is "in any way, unique or unusual." The subject property is not considered to be in a liquefaction zone.
- The preliminary geotechnical report did not find any significant concerns with the Project and includes recommendations for continued slope stability. The Project could be safely built in light of the permitting process, plan-check review process, and on-site City inspections.
- The Design & Historic Preservation Section found that the Property was substantially altered in 1965 and the house at the Property was not eligible for historical designation. The Project qualifies for the specified CEQA categorical exemption and does not meet the eligibility requirements for the exception clause because the Project would not cause a substantial adverse change in the significance of a historic resource.
- Objecting Neighbor's contention that Applicant was attempting to piecemeal the project and/or hide the Project from public input was based on emails taken out of context. Indeed, Applicant simply inquired about options with regard to the proposed project, and was advised to comply with the HDP rules and rules regarding ADUs. ADUs are subject to ministerial review, allowed by-right, and are not subject to CEQA. The City staff found that there was no project segmentation or serial permits.

At the conclusion of the public hearing on April 22, 2021, Commissioner Hansen moved to disapprove the Project, and the BZA approved the motion with a 5-0 vote, on the grounds that the fining under 17.29.080.G for additional square footage in excess of the Neighborhood Compatibility maximum could not be made.

III. THE HDP SHOULD BE APPROVED FOR THE REASONS SET FORTH IN THE HO JANUARY 11 LETTER AND THE APRIL 22 STAFF REPORT AND BECAUSE RECENT REVISIONS TO THE PROJECT RESOLVE ANY REMAINING ISSUES

A. Findings Support the Approval of HDP # 6833

For the reasons set forth in the HO's letter dated January 11, 2021 and accompanying findings and conditions of approval, and the April 22 Staff Report (summarized in detail above in Sections II.B and III.B), the Applicant firmly believes that the requisite findings for a HDP can be made. As a result, the City Council should also adopt these findings, and overturn the BZA April 22 decision.

B. Recent Revisions to the Project Eliminate the Basis for the BZA's Decision

The BZA overturned the HO's approval of the HDP on the grounds that granting excess neighborhood compatibility and blocking of views could not be permitted. To the extent that the City Council wishes to address the BZA's concerns, the recent revisions to the Project eliminate them in their entirety.

In particular, the Applicant's plans dated September 30, 2021 ("Revised Plans") demonstrate that the Project has been revised to remove the 844 square feet in excess Neighborhood Compatibility floor area (the, "Revised Project").

As such, with respect to the BZA's concern about excess Neighborhood Compatibility floor area, the Revised Plans show that the square footage of the proposed building is now 3,853, which is 605 square-feet ***less than the maximum allowable square footage of 4,458***. *See* Revised Plans, at 2 (Neighborhood Compatibility Analysis RS-4-HD Properties Only table). The proposed FAR is 7.7%, ***below*** both the Median FAR of 8.90% and the average FAR of 12%. *Id.* As a result, ***the Revised Project no longer calls for any excess Neighborhood Compatibility floor area.***

Last, the revised Project continues to comply with Section 17.29.060.G of the Code, which provides as follows:

> **View protection**. A proposed structure shall be designed and located so that it avoids blocking views from surrounding properties ***to the maximum extent feasible***, as determined by the review authority, and including, but not limited to, consideration of the following:

1. The feasibility of relocating the proposed structure to another part of the site;
2. The feasibility of modifying the massing of the proposed structure such that views from surrounding properties would not be impacted; and
3. The feasibility of minimizing architectural features that may intrude upon views from surrounding properties.

. . . .

1. New structures and tall landscaping shall not be centered directly in the view of any room of a primary structure on a neighboring parcel. Views shall be considered from windows of any room in the primary structure. New structures shall avoid blocking the following from any room of a main dwelling on a neighboring property:

    1. Culturally significant structures such as the Rose Bowl, Colorado Street Bridge, City Hall, etc.;
    2. Downslope views of the valley floor;
    3. Prominent ridgelines; and/or
    4. The horizon line.

    Views of open sky, existing foliage, private yards, and existing structures on surrounding properties shall not be taken into consideration by the review authority.

Municipal Code § 17.29.060.G (emphasis added). As explained above, the proposed residence already is located on the interior and rear of the lot, and thus already has reduced any view impacts to the maximum extent feasible.

IV. THE PROJECT IS CATEGORICALLY EXEMPT UNDER CEQA GUIDELINES

The Revised Project is categorically exempt as explained in the Staff Report. The following supports that conclusion.

A. CEQA Categorical Exemptions from Environmental Review

CEQA applies only to activities that meet the definition of a "project"[6] under the statute and its implementing administrative regulations. *May v. City of Milpitas*, 217 Cal. App. 4th

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6. CEQA defines "project" to mean: "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following: (a) An activity directly undertaken by any public agency. (b) An activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies. (c) An activity that involves the issuance to a person of a lease, permit, license,

1307, 1319-20 (2013). Under CEQA, a project is any activity undertaken, assisted, or authorized by a public agency that may have a significant effect on the environment. *May*, 217 Cal. App. 4th at 1320. "Significant effect on the environment" means "a substantial, or potentially substantial, adverse change in the environment." Cal. Pub. Res. Code § 21068.

The first step in CEQA analysis is a determination whether the activity in question amounts to a "project." *May*, 217 Cal. App. 4th at 1320. Once a lead agency determines that an activity falls within the statutory definition of a "project," it must then determine whether the project is nevertheless exempt from CEQA. *Id.* CEQA authorizes the adoption of regulatory exemptions for classes of projects. *Id.* at 1321. The CEQA Guidelines refer to them as categorical exemptions and they are set forth in the CEQA Guidelines. *Id.* (citing to CEQA Guidelines, § 15300 et seq.). There is 1 categorical exemption applicable to the Project: Categorical Exemption 1 pursuant to Cal. Code Regs. tit. 14, § 15301 (for existing facilities).[7]

"An agency's determination that a project falls within a categorical exemption includes an implied finding that none of the exceptions identified in the Guidelines is applicable. The burden then shifts to the challenging party to produce evidence showing that one of the exceptions applies to take the project out of the exempt category." *San Francisco Beautiful*, 226 Cal. App. 4th at 1022-23. The CEQA Guidelines specify six exceptions to the categorical exemptions. Cal. Code Regs. tit. 14, § 15300.2.

The Objecting Neighbor may assert that three potential exceptions apply: (1) exemptions are inapplicable where the "cumulative impact of successive projects of the same type in the same place, over time is significant"; (2) 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," and (3) categorical exemption shall not be used for a project which may cause a substantial adverse change in the significance of a historical resource." Cal. Code Regs. tit. 14, § 15300.2, subsections (b), (c) & (f).

For the reasons explained below, none do, nor can the requisite showing be made.

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certificate, or other entitlement for use by one or more public agencies." Cal. Pub. Res. Code § 21065.

7. "Class 1 consists of the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of existing or former use. The types of "existing facilities" itemized below are not intended to be all-inclusive of the types of projects which might fall within Class 1. The key consideration is whether the project involves negligible or no expansion of use."

Cal. Code Regs. tit. 14, § 15301.

B. There Is No Cumulative Impact of Successive Projects

As explained above, the City staff has already considered and rejected the notion that there is any cumulative impact of successive projects at the Property. As evidenced by the City staff's Powerpoint presentation for the April 22, 2021 BZA hearing and a review of the emails attached as Exhibit II to Objecting Neighbor's letter dated April 21, 2021, Applicant simply inquired about options with regard to the proposed project via e-mail correspondence with the City staff, and was advised by the City to comply with the HDP rules. The City staff found that there was no project segmentation or serial permits. Therefore, there is no merit to any allegation of improper piecemealing of projects at the Property.

C. There Are No Unusual Circumstances

One of the exceptions to the categorical exemptions arises "where there is a reasonable possibility the activity will have a significant environmental effect 'due to unusual circumstances.' (Guidelines, § 15300.2, subd. (c).)" *San Francisco Beautiful*, 226 Cal. App. 4th at 1023. The CEQA Guidelines do not define the term "unusual circumstances," nor what is required to prove it. *See, e.g., id.* In *Berkeley Hillside*, therefore, the California Supreme Court first clarified that a party must show an unusual circumstance by demonstrating that the project has some characteristic or feature that distinguishes it from others in the exempt class. *Berkeley Hillside Preservation v. City of Berkeley,* 60 Cal.4th 1086, 1105 (2015).[8]

In so doing, the Supreme Court held that the "unusual circumstances" exception can ***only*** be used to preclude the use of a categorical exemption if an "unusual circumstance" differentiates the project ***from the general class of similarly situated projects***, and, if so, when that unusual circumstance creates a "reasonable possibility" that the project may result in a "significant environmental impact." *Id.* at 1105 (emphasis added). The Supreme Court expressly rejected the appellate court's interpretation of the "unusual circumstances" test, finding that "the Court of Appeal erred by holding that a potentially significant environmental effect itself constitutes unusual circumstances." *Id.* at 1104.

Following the Supreme Court's decision, the First District Court of Appeal filed its opinion affirming the trial court's judgment, and later ordered its opinion to be published.

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7. In *Berkeley Hillside*, the applicant sought a hillside permit for a 6,478-square-foot house with an attached 3,394-square-foot 10-car garage, covering 16% of a steeply sloped (about 50% grade) lot in a heavily wooded area on Rose Street in Berkeley. *Berkeley* Hillside, 60 Cal. 4th at 1093. The trial court denied the petition for a writ of mandate by the neighborhood group holding there were no unusual circumstances, but the Court of Appeal reversed and granted it. *Id.* at 1096. The Supreme Court then took up the issue of how the unusual circumstances exception to categorical exemptions should be analyzed and applied by lead agencies such as the City. *Id.* at 1097.

Berkeley Hillside Preservation v. City of Berkeley, 241 Cal. App. 4th 943 (2015).[9] The later Court of Appeal opinion states that a party challenging a categorical exemption decision by seeking to establish the unusual circumstances exception cannot prevail merely by providing substantial evidence that the project may have a significant environmental effect. *Id.* at 952. Rather, such a party must first establish an unusual circumstance by distinguishing the project from others in the exempt class. *Id.*

Indeed, "a challenger must prove ***both*** unusual circumstances ***and*** a significant environmental effect ***that is due to those circumstances***. In this method of proof, the unusual circumstances relate to some feature of the project that distinguishes the project from other features in the exempt class." *Citizens for Envtl. Responsibility v. State ex rel. 14th Dist. Agric. Ass'n.*, 242 Cal. App. 4th 555, 574 (2015) (*citing to Berkeley Hillside*, 60 Cal. 4th at 1105) (emphasis added). "Once an unusual circumstance is proved under this method, then the 'party need only show a ***reasonable possibility*** of a significant effect ***due to that*** unusual circumstance.'" *Id.* (emphasis added). Anyone who claims the proposed project is not entitled to a categorical exemption, therefore, must prove both parts of this two-pronged test and cannot prevail simply by claiming that the project may have a significant environmental effect.

Whether a project presents unusual circumstances is thus a factual inquiry subject to the traditional substantial evidence standard of review. *Berkeley Hillside*, 60 Cal. 4th at 1114. Under CEQA, "[s]ubstantial evidence includes facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts. [Citations]. ***It does not*** include '[a]rgument, speculation, unsubstantiated opinion or narrative, [or] evidence which is clearly inaccurate or erroneous. . . .' [Citations.]" *Joshua Tree Downtown Bus. All. v. Cnty. of San Bernardino*, 1 Cal. App. 5th 677, 690 (2016) (emphasis added). "Complaints, fears, and suspicions about a project's potential environmental impact likewise do not constitute substantial evidence." *Id.* "Members of the public may . . . provide opinion evidence where special expertise is not required. . . . However, "[i]nterpretation of technical or scientific information requires an expert evaluation. Testimony by members of the public on such issues does not qualify as substantial evidence. . . ."[I]n the absence of a specific factual foundation in the record, dire predictions by nonexperts regarding the consequences of a project do not constitute substantial evidence." *Id.* at 690-91 (citations omitted).

To preclude the use of the categorical exemptions, any opponent of a project must show that the "unusual circumstances exception" to the exemption somehow applies, which Objecting Neighbor cannot do under California law. As the record reflects, there is no evidence, let alone substantial evidence, of any unusual circumstance because there are no features that distinguish the Project from the general class of similarly situated projects. April 22 Staff Report, at 15, 17, 20. The proposed addition to the existing single-story residence complies with all the development standards set-forth in the City's Zoning Code, as stated by the HO and the City staff. HO January 11 Letter, at 3. The full scope of the work and the modification to the existing

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9 On February 3, 2016, the California Supreme Court denied further review of the case, thus letting the Court of Appeal's decision stand, *i.e.*, there were no unusual circumstances that precluded the use of the categorical exemption for the proposed residence in *Berkeley Hillside*.

residence were considered and were determined to meet the standards of the Class 1 Categorical Exemption. April 22 Staff Report, at 16.

In addition, "several homes have been safely built, and safely expanded, on the east side of Linda Vista Avenue, going back several decades." *Id.* at 17; HO March 20 Addendum, at 2. None of the purported "unusual circumstances" identified by Objecting Neighbor was actually "unusual, unique, or specific to" the subject Property. HO March 20 Addendum, at 2. "Most, if not all of these 'unusual circumstances' apply, as well, to [Objecting Neighbor's] existing home." *Id.* Indeed, there is no evidence documenting how the existence of the liquefaction zone adjacent to the Property is "in any way, unique or unusual." HO March 20 Addendum, at 2.

As such, because there is no evidence of any unusual circumstance based on the features of the project, let alone substantial evidence, the City Council does need not to address the second prong of the test, *i.e.*, whether there is a reasonable possibility of a significant environmental impact as a result of unusual circumstances. *Citizens,* 242 Cal. App. 4th at 588, n.24. ("A negative answer as to the question of whether there are unusual circumstances means the exception does not apply" and the use of the categorical exemption is affirmed). Even if the City Council chose to address it, there is no showing that any purported unusual circumstances create a "reasonable possibility" that the Project may result in a "significant environmental impact." This is true because the HO imposed conditions of approval which address safety concerns raised by the Objecting Neighbor. April 22 Staff Report, at 17-18; HO January 11 Letter, Attachment B. The City enforces municipal codes that "ensure the safety of new development; as verified through the City's grading permit, demolition permit, and building permit plan-check review process; and through a series of on-site inspections by city staff during site grading, demolition and construction." April 21 Staff Report, at 17. Indeed, any purported environmental impact relating to soil displacement, stress on the hillside and liquefaction zones, is not only speculative and unsupported by expert opinion, but the "merits of the claim are questionable." HO March 20 Addendum, at 2.

D. <u>There Is No Historical Resource on the Property</u>

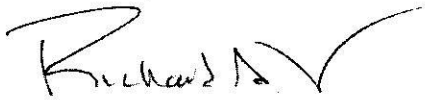
The City's Design & Historic Preservation Section determined that the Property was substantially altered with an addition of enclosed floor area, an open courtyard, and a carport, in 1965 and was not eligible for historical designation. April 22 Staff Report, at 17. There is no evidence to support Objecting Neighbor's claim that the house currently on the Property has existed since 1948 in its present form. HO March 20 Addendum, at 2. As a result, no historical resource is at issue that would make a categorical exemption under CEQA inapplicable.

V. CONCLUSION

All of the requisite findings for the HDP can be made and none of the issues that prompted the BZA to disapprove the HDP remain. Further, the Class 1 Categorical Exemption under the CEQA Guidelines applies and there are no cumulative impact, unusual circumstances, or historical resource exceptions to it. Accordingly, the Project is exempt from environmental review and the Applicant requests that the City Council reverse the BZA's decision and approve

the HDP. Alternatively, as permitted under 17.72.070.B.3, should you want the BZA to consider the Applicant's revisions before considering this appeal, we would ask that you remand it accordingly.

Sincerely,



Richard A. McDonald, Esq.