



Hermosa Beach Office
Phone: (310) 798-2400

San Diego Office
Phone: (858) 999-0070
Phone: (619) 940-4522

Chatten-Brown, Carstens & Minter LLP

2200 Pacific Coast Highway, Suite 318
Hermosa Beach, CA 90254
www.cbcearthlaw.com

Michelle Black
Email Address:
mnb@cbcearthlaw.com
Direct Dial:
310-798-2400 Ext. 5

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Via Email jmurillo@newportbeachca.gov
 sjurjis@newportbeachca.gov
 citycouncil@newportbeachca.gov

Jaime Murillo, Principal Planner
Seimone Jurjis, Community Development Director
City of Newport Beach
100 Civic Center Drive
Newport Beach, CA 92660

Re: September 10, 2019 City Council Agenda, Public Hearing Item # 20.
 Appeal of Variance No. VA2019-002 for 1113 Kings Road

Honorable Councilmembers:

Stop Polluting Our Newport (SPON) submits these comments in support of its appeal of the Planning Commission's May 23, 2019 decision to approve Variance No. VA2019-002 for the property located at 1113 Kings Road. The Applicant requested the variance to enable the demolition of the existing, 3,013 square foot residence and replacement of that home with a building nearly three times larger. Although touted as a single-family home, the new building would be 10,803 square feet with a 1,508-square foot garage, itself the size of a 3-bedroom home. The variance is specifically requested to enable the building to exceed the applicable 29-foot height limit for sloped roofs and the 24-foot height limit for flat roofs and decks.

The Applicant could easily construct a large, luxurious home on the site, within the permitted building envelope, without the variance. The property is already in parity with others in the vicinity, despite its topographical challenges. Accordingly, the City cannot find that "the strict application of the [height limit] denies the property owner privileges enjoyed by other property owners in the vicinity" as required by Newport Beach Municipal Code section 20.52.090. Additionally, the proposed building is demonstrably incompatible with the neighborhood's other residences located on Kings Road and would eliminate treasured public views of the ocean. Finally, SPON is concerned about the precedent set by permitting unnecessary variances from the City's carefully-crafted planning standards. If the City permits the variance at 1113 Kings Road, where does it end?

SPON respectfully requests that the City Council sustain its appeal and reverse the Planning Commission's approval.

I. The City Cannot Make the Findings Required for a Variance.

Newport Beach Municipal Code section 20.52.090 A provides that the purpose of a variance is to “waive or modify certain standards of the Zoning Code when, because of special circumstances applicable to the property...the strict application of the development standards otherwise applicable to the property denies the property owner privileges enjoyed by other property owners in the vicinity and in the same zoning district.” California Government Code section 65906, authorizing variances, is nearly identical and emphasizes that variances “shall not constitute a grant of special privileges.”

On the contrary, variances exist to ensure *equity* in an area, not to grant special privileges inconsistent with the limitations applicable to all properties in an area. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 511 [“effort to achieve substantial parity”].)

Pursuant to State law and the City's municipal code, the City must make six (6) findings to lawfully approve a variance:

- 1) There are special or unique circumstances or conditions applicable to the subject property (e.g., location, shape, size, surroundings, topography, or other physical features) that do not apply generally to other properties in the vicinity under an identical zoning classification;
- 2) Strict compliance with Zoning Code requirements would deprive the subject property of privileges enjoyed by other properties in the vicinity and under an identical zoning classification;
- 3) Granting of the variance is necessary for the preservation and enjoyment of substantial property rights of the applicant;
- 4) Granting of the variance will not constitute a grant of special privilege inconsistent with the limitations on other properties in the vicinity and in the same zoning district;
- 5) Granting of the variance will not be detrimental to the harmonious and orderly growth of the City, nor endanger, jeopardize, or otherwise constitute a hazard to the public convenience, health, interest, safety, or general welfare of persons residing or working in the neighborhood; and

- 6) Granting of the variance will not be in conflict with the intent and purpose of this section, this Zoning Code, the General Plan, or any applicable specific plan.

(Newport Beach Municipal Code section 20.52.090 F.)

The Staff Report relies on the site's steep topography and the presence of a gully at the eastern property line to determine that the site has "special or unique circumstances or conditions applicable to the subject property... that do not apply generally to other properties." (Staff Report, p. 4.) While the property is topographically unique, the City's inquiry does not end with the first required finding. The City is required to find that the unique topography prevents the construction of a single-family home similar to others in the vicinity to the detriment of the Applicant. The City must support these findings with substantial evidence. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514-515; *Cow Hollow Imp. Club v. DiBene* (1966) 245 Cal.App.2d 160, 171.) Yet, the evidence in this case does not support the required findings. Instead, it is clear that the property can (and does) support a single-family home without the variance, and that the Applicant seeks the variance to maximize the scale and future value of the proposed building.

A. Strict Compliance with Zoning Code Requirements Would Not Deprive the Subject Property of Privilege Enjoyed by Other Properties in the Vicinity and Under an Identical Zoning Classification.

Strict compliance with the Zoning Code requirements merely limits the Applicant to a building height of 29 feet and a deck height of 24 feet. It does not prevent construction of a single-family home on the site. This is illustrated by the existence of a 3,013-square foot single-family home on the property today. Thus, a variance is not needed to bring parity when the property's potential uses are compared to others in the vicinity. Nor do the existing height limits prevent the construction of the largest residence in the neighborhood. (City Council Staff Report, p. 5 [indicating locations of planned height exceedence].)

The Planning Commission Staff Report states that eliminating the variance requires:

Modifying the proposed design to eliminate the height variance for enclosed living spaces would require eliminating an office on the main level...and eliminating or significantly reducing the size of an upper level closet, bathroom, and teen room. Modifying the design to eliminate the height variance for the outdoor living areas would require eliminating the roof cover over the deck ...and reducing the size of

the upper level deck.

(Planning Commission, May 2019 Staff Report, p. 11.) Other homes in the area average 4,500 square feet – less than half the size of what is proposed at 1113 Kings Road. Thus, the elimination of luxuries such as additional closets, larger bathrooms, and a teen room in a nearly 11,000-square foot house, would not deprive the Applicant’s property of privileges enjoyed by other identically-zoned properties in the vicinity. If anything, the denial would preserve neighborhood parity.

The City proposes to find hardship in not having the “privilege of designing a two-level terraced design across the buildable width of the lot” and “the privilege of building a residence of uniform height.” (Proposed Findings, p. 3.) Neither of these constraints prevents the construction of a fine and luxurious home. In *Broadway, Laguna, Vallejo Assn. v. Board of Permit Appeals* (1967), the California Supreme Court found that a difference between the sizes of buildings that can be built due to unique conditions is an insufficient ground for a variance. There, the applicant sought a variance from the applicable floor to area ratio due to challenging soil conditions that made construction more expensive. The Court found the city lacked authority to issue the variance, holding:

If the “adversity” to which the board referred were such that enforcement of the floor area regulations would effectively deprive the developer of the ability to construct a reasonably profitable multi-unit structure in an area zoned for multi-unit construction, then the requisite disparity of treatment might be established. As we have seen, however, that is not this case. At most, the developer here has suggested that, unless code requirements are relaxed, multi-unit development will prove somewhat less profitable on his lot than on other lots in the same zone. *The short answer to the developer’s argument is that zoning variances were never meant to insure against financial disappointments.*

(*Broadway, Laguna, Vallejo Ass’n v. Board of Permit Appeals of City and County of San Francisco* (1967) 66 Cal.2d 767, 780–781, emphasis added.). No less than the Supreme Court of California would find a lack of substantial evidence supporting the City’s finding that the existing height limits “deprive the homeowner privileges of a residence burdened by the cost, inconvenience, and loss of functionality enjoyed by other properties in the vicinity.” (Proposed Findings, p. 3.) Here, the Applicant claims that the gully and steep topography will merely prevent it from constructing a larger office, teen room, bathroom, and covered deck than it could without a variance. The City could not, and should not, insure the Applicant against the mild financial disappointment of constructing “only” a large, ocean view luxury home, with a 4-car garage, in Newport Beach.

B. Granting of the Variance is Not Necessary for the Preservation and Enjoyment of Substantial Property Rights of the Applicant.

The City cannot support the finding required by Municipal Code section 20.52.90 F(3). In fact, a single-family home currently occupies the site. While the Applicant desires to demolish the existing home, the demolition is the Applicant's choice. Thus, the City need not grant the variance to preserve the Applicant's property rights or their enjoyment of those rights. The Applicant's preferences for a larger home, an ocean view office, a large teen room, or a covered patio do not endanger the Applicant's preservation or enjoyment of substantial property rights. (*Nollan v. California Coastal Com'n* (1987) 483 U.S. 825, 834 ["We have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land'."])

The Staff Report claims, "denial of the variance would significantly impact the functionality of the home design." (Staff Report, p. 9.) Again, it was the Applicant's choice to design a residence that requires a variance from the City's land use regulations in the first place. The need to redesign a luxury home to comply with existing and well-known regulations applicable to the Project site should not be considered a burden, much less a deprivation of property rights. The Supreme Court is clear: "[S]elf-imposed burdens cannot legally justify the granting of a variance." (*Broadway, Laguna, Vallejo Ass'n v. Board of Permit Appeals of City and County of San Francisco* (1967) 66 Cal.2d 767, 778.)

The Staff Report further claims that modification to the design to build without a variance "would effectively reduce the buildable width from approximately 90 percent of the lot width to 72 percent of the lot width at those locations." (Staff Report, p. 9.) A regulation preventing development of a mere 28 percent of a lot hardly denies the Applicant an economically viable use of their land. The Applicant's lot is larger than most in the neighborhood, and they can build a very large home even using 72 percent of the frontage.

Of the approximately 100 homes on Kings Road, four have been granted variances. Variances were granted for 1113 Kings Road to build the existing 3,013-square foot home. Variances were also granted for homes of 3,767 square feet (1201 Kings Road) and 3,649 square feet (1101 Kings Road). With the exception of the home located at 1821 Kings Road (8,801 square feet), the variances were sought to construct residences that are compatible with neighborhood scale.

The California Supreme Court has held that, so long as the property can be put to effective use consistent with the existing zoning without the variance sought, an agency's grant of a variance exceeds its authority. (*Broadway, Laguna Assn. v. Board of Permit*

Appeals (1967) 66 Cal.2d 767, 775.) A variance cannot be granted just to increase the value of an Applicant's property or to relieve an applicant from undesired costs to comply with existing regulations. (*Ibid.*) As a community member asked, "how would not having an office on the main level...eliminating or significantly reducing the size of an upper level close, bathroom and teen room...prevent the property from being put to effective use consistent with existing zoning without the variance sought?" The City cannot make this finding.

C. Granting of the Variance Will Constitute a Grant of Special Privilege Inconsistent with the Limitations on Other Properties in the Vicinity.

As described above, the purpose of a variance is to relieve a property owner of land use regulations that, due to the unique characteristics of that piece of property, prevent the landowner from using their property in the same manner as surrounding property owners. The goal is equity with surrounding landowners. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 511.) Here, however, the variance is not needed to construct a comfortable single-family home. There is already one located on the property. Instead, the variance is required so that the Applicant need not undergo the inconvenience of eliminating an office, reducing the size of a closet, bathroom, or teen room, or reducing the shading over of an outdoor deck. (City Council Staff Report, p. 5.) The modified building would still be much, much larger than the average, 4,500-square foot home on the bluff. Even if the entire upper floor needed removal to avoid a variance, which it does not, the building would still exceed 7,500 square feet (bottom two levels are 4,177 and 3,361 square feet). The garage, alone, would remain the size of a typical three-bedroom home.

Instead of helping to achieve parity, granting a variance from the height requirement to enable larger closets, bathrooms, a teen room, and larger outdoor decks constitutes a grant of special privilege. Most single-family homes do not have teen rooms or multiple outdoor decks. Granting a variance on these grounds turns the purpose of a variance on its head and is unfair. As the Supreme Court found with the denial of another variance, where the land was already being used as the Applicant sought, "When the [city] denied petitioners' application for a variance it did not take away a property right, but merely refused to grant a favor." (*Rubin v. Board of Directors of City of Pasadena* (1940) 16 Cal.2d 119, 126.) It is the same here. The City cannot support the finding required by Municipal Code section 20.52.090 F(4).

D. Granting of the Variance Will Be Detrimental to the Harmonious and Orderly Growth of the City and Constitute a Hazard to the Public Convenience, Interest, and General Welfare of Persons Residing and Working in the Neighborhood.

Members of the community have presented evidence that the residence enabled by the variance would block public views of the ocean from Kings Road. The City is correct that it does not protect private views, but it does prioritize public views for the pedestrians, bikers and others on Kings Road. The variance's contributions to these lost public views are a hazard to the public convenience and interest of those in the neighborhood. The lost views further prevent the City from making the variance findings required by the Municipal Code.

Moreover, it is clear that the controversy over this variance has rocked the neighborhood and damaged notions of neighborhood harmony. Given that a very large and luxurious home may be designed and constructed at the subject property without the variance, the grant of this variance is detrimental to the *harmonious* and orderly growth of the City. As discussed further below, the grant of this unnecessary variance sets up a situation where property owners will feel entitled to seek a variance from the City's height limits, setbacks, and other regulations imposed for neighborhood compatibility and harmony. Privacy will be lost. Conflicts about views will continue. The potential precedent the City is setting by finding a hardship when a mansion's extra bathrooms, teen room, closet, office, and deck must be downsized because an applicant chose to design outside the permissible building envelope jeopardizes future harmonious and orderly growth. The variance is also incompatible with policies of the General Plan and Zoning Code promoting orderly development and neighborhood compatibility. The City cannot make the finding required by 20.52.090 F(5).

E. Granting of the Variance Conflicts with the Intent and Purpose of the Zoning Code and the General Plan.

By enabling development of a gully in a coastal bluff, the variance conflicts with the General Plan. All projects approved in a city must be consistent with the general plan and its elements. "The general plan is atop the hierarchy of local government law regulating land use." (*Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176, 1183.) The General Plan has been described "the constitution for future development." (*DeVita v. Napa* (1995) 9 Cal.4th 763, 773, internal citations omitted.) Goal Natural Resources 23 of the General Plan's Natural Resources Element includes policies directed at preserving Newport Beach's natural coastal bluffs. Policy Natural Resources 23.1 directs the City to "Preserve cliffs, canyons, bluffs, and site buildings to minimize alteration of the site's natural topography." The City Council Staff Report acknowledges this policy applies to the site. (Staff Report p. 7.) However, the

Staff Report claims, without evidence, that the Zoning Code allows “by-right, development down the entire slope” of the property because “the hillside has been significantly altered throughout the years.” (*Ibid.*) The Staff Report cites nothing in the General Plan that exempts the entire neighborhood from the operation of the General Plan due to development of Pacific Coast Highway that occurred prior to the General Plan’s adoption. Moreover, the coastal bluff gully on the property at issue has not been removed through years of development. Approval of the variance conflicts with the General Plan’s intent and purpose of protecting coastal bluffs and canyons. The City cannot support the finding required by Municipal Code section 20.52.090 F(6).

Additionally, the General Plan and Zoning Code were implemented to promote harmony and neighborhood compatibility through orderly development. The Project that would be authorized by the variance is incompatible with the neighborhood. Construction of the variance-enabled Project would conflict with the City’s planning goals related to promoting land use compatibility. Land Use Element Policy 5.1.1 requires the City to, “Establish property development regulations for residential projects *to create compatible* and high-quality development that contributes to neighborhood character.” This use of the variance diminishes compatibility and does not promote it. Land Use Policy 5.1.5 specifically promotes “Compatibility with neighborhood development in density, *scale*, and street facing elevations.” This residence is out of scale with the neighborhood. The variance should be denied.

II. The Building Proposed for 1113 Kings Road is Incompatible with the Neighborhood.

At nearly 11,000 square feet, excluding the 1,508 square foot garage, the proposed residence is significantly larger than surrounding homes, even when compared to other large homes on the bluff side of Kings Road. Currently, the largest home on the bluff side of Kings Road is approximately 8,800 square feet. The average home on the bluff is 4,500 square feet. By comparison, the proposed residence would include 10,803 square feet and an additional 1,508-square foot, four-car garage. The residence would include three large levels: a 4,177 square foot lower level, a 3,361 square foot main level, and a 3,265 square foot upper level. The building is clearly incompatible with others in the neighborhood. The construction permissible on the lot without a variance could still produce one of the largest homes in the neighborhood.

Community members analyzed the approximately 100 homes located on Kings Road and the City’s history of granting variances. They determined that 96 percent of homes on Kings Road have been constructed within the allowable building envelope. Only 4 homes were granted a variance, and most of those homes maintained a low profile and articulated their design to preserve views and surrounding property values. Drone footage demonstrates that many of the homes on the bluffs have hills and gullies, yet few

of those homes requested variances. Why? They were not necessary. Nor is the variance requested here necessary to build a house with the amenities or advantages of other homes on Kings Road.

The City's grant of a variance to enable a home three times the size of neighboring homes to exceed height limits promotes neighborhood incompatibility in conflict with the City's zoning regulations and General Plan. (See LU Policy 5.1.5.)

III. The City's Grant of this Unnecessary Variance Endangers the Integrity of Newport Beach's Planning Decisions.

The City established height limits of 29 feet for sloped roofs and 24 feet for decks and flat roofs on Kings Road in order to promote neighborhood compatibility and harmony. This uniformity maintains community character and prevents the conflicts that invariably arise when a residence's excessive height invades a neighbor's privacy, blocks sunlight, or impedes views. For the most part, homes on the bluff side of Kings Road are low-rise to permit ocean views from homes on the inland side of Kings Road. The City's failure to grant SPON's appeal will set a precedent for other property owners that do not wish to comply with the City's land use controls. In the residential context, such a precedent could effectively result in the relaxation of height limits and prohibitions of oversized development throughout Newport Beach's treasured single-family neighborhoods. Variances exist to "minimize the acknowledged evils of 'spot zoning' by amendment of the zoning ordinance." (*Rubin v. Board of Directors of City of Pasadena* (1940) 16 Cal.2d 119, 124.). But this variance promotes spot-zoning-like results and would negatively affect the quality of life of many Newport Beach residents.

Additionally, oversized residences could result in significant new growth, mass, bulk and height inconsistent with surrounding neighborhoods that has never been analyzed under the California Environmental Quality Act (CEQA) or in connection with the City's Land Use Element or other planning documents. The Project claims a CEQA Class 3 exemption for conversion of small structures, but a Class 3 exemption is unavailable for wholesale changes to Newport's residential neighborhoods. SPON urges the City to carefully consider the substantial likelihood that the Project's proposal to use a variance to enable an ocean view office and larger decks will set a precedent for ignoring the City's well-considered land use plans.

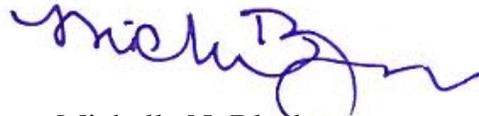
Conclusion

SPON respectfully requests that the City Council reverse the Planning Commission's grant of Variance No. VA2019-002 because it is not necessary to construct a single-family home at 1113 Kings Road with the privileges of other homes on the street. The City's grant of this variance would set an unwelcome precedent that

Honorable City Council
City of Newport Beach
September 6, 2019
Page 10

undermines all past efforts to protect the City's single-family neighborhoods and the integrity of its long-range planning documents, standards, and regulations. Thank you for your consideration of these comments. We look forward to Tuesday's hearing on the appeal.

Sincerely,

A handwritten signature in blue ink, appearing to read "Michelle N. Black". The signature is fluid and cursive, with a large loop at the end.

Michelle N. Black

cc: Councilmember Diane B. Dixon, ddixon@newportbeachca.gov
Councilmember Brad Avery, bavery@newportbeachca.gov
Councilmember Duffy Duffield, dduffield@newportbeachca.gov
Councilmember Kevin Muldoon, kmuldoon@newportbeachca.gov
Councilmember Jeff Herdman, jherdman@newportbeachca.gov
Councilmember Joy Brenner, joy@newportbeachca.gov
Councilmember Will O'Neill, woneill@newportbeachca.gov