

January 7, 2022

VIA E-MAIL

Mayor Fineman and Town Councilmembers E-Mail: towncouncil@townofsananselmo.org
Town of San Anselmo
525 San Anselmo Avenue
San Anselmo, CA 94960

**Re: January 11, 2022 Town Council Meeting
 Response to Appeal Regarding 75 Jones Street Conversion Project**

Dear Mayor Fineman and Town Councilmembers:

We submit this letter on behalf of the owners of 75 Jones Street, Erin Heath and James Rivera (“Applicants”) in advance of the January 11, 2022 Town Council meeting. Erin and Jim have been deeply involved in the San Anselmo community for more than a decade. They lived in San Anselmo, raised their daughter Georgia there, own property in the Town and have worked closely with Town staff on multiple successful projects on the former Seminary property that includes 75 Jones.

On the subject project, as well as all previous projects, Erin and Jim have worked in an open, collaborative and productive way with the Town and neighbors to execute successful improvements that benefit the community. Their commitment, reputation and integrity is well-known.

This letter is in response to the appeal filed by their neighbors Kaliel Roberts and Michael Greer (“Appellants”) – who bought a neighboring property (101 Ross) from the Applicants in October 2020. Appellants challenge the Town Planning Commission’s action approving an amendment to the Specific Planned Development Use Permit pertaining to the conversion of the former preschool building at 75 Jones Street to a single family residence.

I. Background

The genesis of this action is that on February 2, 2020, the Planning Commission (“Commission”) approved the Applicants’ design review, use permit and subdivision to divide a lot and to approve a Specific Planned Development to redevelop the preschool into a single-family residence with a second story.¹ This approval was not appealed or challenged.

¹ The February 2020 meeting materials were accessible via the City’s website to any member of the public, including Appellants (who purchased 101 Ross in October 2020).

Construction of the residence at 75 Jones commenced in May 2021. Unanticipated dry rot was discovered during demolition – a commonplace occurrence – and required additional wall material to be removed. The Town’s building department conducted inspections of the site in July 2021 and did not flag any issues. Framing work commenced and was largely completed by August 2021. On August 23, a city inspector (Lisa Sarto) inspected the plans, spoke with the contractor and concluded the work was in conformance with the approved plans and discovered site conditions which included areas of dry rot and substandard framing of the preschool building and left the site. She returned the same day with a stop work order and the Town indicated that an updated demolition plan was required.

The Applicants’ contractor immediately met with Town building and public works officials to review the conditions and – as the staff report acknowledges – the Town’s Director of Public Works and Building and the Building Official agreed that the demolition work done was “unavoidable,” and that the structure “is constructed over the original building slab foundation and the location of the structure had not changed.” (11/15/21 PC Staff report at p. 4.) At that point, Town planning staff required the Applicant to return to the Planning Commission with a revised demo plan to continue and complete the work of the same project approved in February 2020. No changes in the approved project or design were proposed.

At its November 15, 2021 meeting, the Commission unanimously approved the amendment to the Specific Planned Development Use Permit and to allow demolition of the structure to the slab foundation. That approval by the Commission was based on its prior unchallenged approval and design review findings from its February 3, 2020 meeting and the flexibility provided by the Specific Planned Development (SPD) zoning designation of the property.

II. Appeal

Appellants challenge the Commission’s November 15th decision, essentially arguing that the Commission should have conducted a de novo review of the entire project because of the additional unanticipated demolition required during the conversion of the preschool building, and that the Commission erred in making several design review findings.

However, because this property is zoned “SPD,” and for the further reasons set forth below, de novo review is not required, and the design review findings made at the February 3, 2020 Commission meeting remain valid for what is the exact same project proposed and approved by the Commission nearly two years ago. Additionally, these are the identical design review findings that would have been required had the project been considered as new construction, as opposed to a remodel of an existing structure.

In other words, there is no purpose to be served by the appeal or de novo review: the project is unchanged and the design review findings (and support for them) remain the same as in February 2020. The only things that changed are that (1) more material required demolition than anticipated (not an uncommon occurrence), and (2) a new neighbor moved in who wants to belatedly object to a project approved nearly two years ago and well under construction.

For the Council's information, Appellants have filed a separate civil suit against the Applicants. This appeal is a thinly-veiled attempt to gain leverage in that private civil proceeding. The Council need not be drawn in. Furthermore, the Appellants have made multiple inaccurate and inflammatory statements in a January 3, 2022 comment letter attacking the Applicants' character. The facts tell a different story and do not support Appellants' baseless allegations.

Therefore, the Council should follow the Commission's unanimous decision to approve the project and the amendment to the Use Permit, and dismiss the appeal in its entirety. To address the Appellants' specific contentions, we provide the following.

A. The removal of rotted exterior walls, as reviewed and supported by the Town's Building Department, does not alter this project.

Regardless of the terminology used and the linear feet of exterior walls remaining from the former preschool, the project has not changed in any material way since it was proposed by the Applicants and approved by the Commission in February 2020. As acknowledged by the Commission at its November 2021 meeting, the project remains identical to, and in full conformance with, the plans submitted and approved in February 2020, with the exception of the additional wall demolition. The footprint of the proposed and partially-constructed single family home remains the same as that of the former preschool, with the addition of a small porch on the front of the home facing Jones Street.

The structure, layout, and design of the home remains identical to that which was proposed and approved by the Town in February 2020. The only change was the extent of existing exterior walls that required removal when dry rot was discovered within those walls. Removal of those rotted walls exceeded the extent of the originally-proposed demolition, so the project was brought back to the Commission for review of that solitary issue. The final residence will not look identical to what was considered and approved by the Commission in February 2020. Thus, at its November 15th meeting, the Commission properly approved the amendment to the Use Permit and correctly acknowledged the ongoing applicability of its earlier – unchallenged – design review findings and conditions of approval.

B. San Anselmo Municipal Code section 10-3.908 does not require a de novo review of this previously-approved project application.

SAMC section 10-3.908 states in its entirety: "*Use permits within a PDP or SPD District. All development within a Planned Development District shall be preceded by the approval of a use permit and design review, as set forth in Articles 13 and 15 of this chapter of the San Anselmo Municipal Code.*"

At its February 3, 2020 meeting, the Commission properly approved a use permit and made the necessary design review findings to allow for the conversion of the former preschool to a single family residence. That is all that is required by SAMC section 10-3.908. No appeal was filed with regard to the February 2020 project approval. There was no opposition to the design of

the proposed project lodged or voiced by any member of the public for more than 18 months following the Commission's approval of the project.

As detailed below, the Applicants relied on the approval in good faith and obtained a building permit and commenced construction establishing vested rights to complete the project in accordance with those approvals.

At the Commission's November 15, 2021 meeting, the sole issue before the Commission was whether an amendment to the approved development and Use Permit should be approved to allow for the additional demolition of the remaining exterior walls of the former preschool after they were found to be structurally deficient and contained dry rot. This was not a proposed new development, but simply a request for a minor amendment to the previously-approved Use Permit due to unforeseen circumstances occurring during the construction of the approved project. At the meeting, when asked if a de novo design review was required, the Town Attorney confirmed that the Commission had the flexibility under the SPD zoning to determine that the findings from their February 2020 meeting still apply and could rely on those original findings in approving the requested amendment and additional demolition.

After finding that there were "no material changes" to the project that had been approved in February 2020, the Commission unanimously approved the amendment to allow the additional requested demolition and reiterated the applicability of the conditions of approval and design review findings from its February 2020 approval, while adding a single additional condition regarding a landscape plan to increase privacy screening. As discussed by both the Commissioners and the Town Attorney, the Town's municipal code does not require a de novo review to approve such an amendment to a previously-approved and, in this case, under construction, project.

C. The Planning Commission properly adopted and approved the necessary design review findings at its February 2020 meeting.

This appeal should be limited to the scope of the action taken by the Commission on November 15, 2021, specifically the approval of an amendment to the Use Permit to allow for additional demolition. The design review findings made by the Commission in February 2020 were not challenged or appealed. In reaching that decision, the Commission properly adopted those findings based on the flexibility allowed by the SPD zoning district. Moreover, in November 2021, the Commission acknowledged and recognized that those design review findings remain valid when approving the amendment. The Commission properly approved the requested amendment without revisiting those specific design review findings because the Commission correctly found that no material change to the project was proposed as part of the requested amendment to the Use Permit.

With regard to some of the specific contentions in the Appellants' appeal, the Applicants wish to clarify that the living area on the second floor of the addition is set at least 17 feet back from the windows that will be facing the Appellants' property and approximately 30 feet from the property line. Any contention that someone looking from the living area of the second floor

will be able to “peer” into the home at 101 Ross Avenue is absurd. (Several planning commissioners noted this as a nonissue.) Further, the Applicants specifically planted trees that will grow to be at least 30 feet in height along the border of the two properties and have been required by the Commission to develop a landscaping plan, with Appellants’ participation and input, to further screen the windows and any vantage points looking toward 101 Ross Avenue from the home at 75 Jones Street, providing even more privacy to Appellants. With regard to the deck on that same side of the Applicants’ residence, the direction in which the deck faces corresponds with a deck on Appellants’ property that is actually *above* the height of the proposed deck at 75 Jones.

The Appellants’ remaining contentions with regard to the design review of this project were again discussed by the Commission at its November 15th meeting. The SPD zoning designation and related Town municipal code sections allow for significant flexibility in approving projects, and do not require any specific design standards to be strictly followed in the SPD district. The Commission found that the proposed amendment made no material change to the previously-approved project and, as such, it was reasonable and appropriate to rely on the findings from its February 2020 meeting to approve the requested Use Permit amendment.

Moreover, at the November 15th meeting, several commissioners acknowledged that the placement and design of the project, utilizing the existing location of the former preschool, will be a benefit to Appellants’ property. Commissioner Tunny stated, “I think the neighbor at 101 Ross really benefits from the way this project was done. It minimizes impacts ... and [the impacts] don’t rise to the level we see from other projects.... This configuration maximizes the light and air to both properties.” (11/15/21 PC meeting at 1:48:40.) Commissioner Asselstine explained that it will allow more sunlight onto 101 Ross Avenue, and the two homes will not be in as close proximity as they would have been had the rear setback been imposed and the proposed home at 75 Jones Street was moved to the front of the property. (See 11/15/21 PC meeting at 1:36:50 [“There is a benefit to 101 Ross from the current placement of the new structure... it makes sense not just for one property but for both actually.” (1:37:35)])

In summary, with guidance from the Town Attorney (11/15/21 PC meeting at 2:00:00-2:00:36 [outlining the structure of the motion re additional demolition, and reaffirming the conditions and findings]), the Commission took a pragmatic, common-sense and legally-supported approach in reaching its unanimous decision to approve the use permit amendment at its November 15th meeting. (11/15/21 PC meeting at 2:01:00-2:03.15.)²

III. Conclusion

To date, the Applicants have spent years of time and hundreds of thousands of dollars beginning the construction of their home at 75 Jones Street in reliance on the Town’s approval of their project application in February 2020, as well as the Town’s inspections in July 2021, to

² We encourage the Council to review the Planning Commissions’ comments from the November 15, 2022 meeting (11/15/22 PC meeting starting at 1:30:00.)

proceed in good faith with construction.³ The Applicants have complied with all inspections by the Town and strictly followed all instructions by the Town's Building and Planning Departments in moving forward with the project, pausing construction, and seeking the amendment to the Use Permit requested by the Town given the necessary additional demolition based on unforeseen dry rot conditions discovered during construction.

The statements by Appellants implying otherwise are unwarranted, disingenuous and disparaging personal attacks on the Applicants. The design of the home was approved nearly two years ago. Framing is nearly complete and the project construction is considerably far along, as acknowledged by one Commissioner at the November 15th meeting. It would be fundamentally unfair to the Applicants to be forced to make any major, costly changes to the project at this stage, after vested rights have been established, and given their responsive and collaborative work with the Town staff. Nor would any purpose be served to require repetitive design review after the Commission properly considered and adopted necessary design review findings at its February 2020 meeting and acknowledged the ongoing applicability of those unchallenged findings on November 15, 2021.

Therefore, for the reasons set forth herein, and in consideration of the Planning Commission's reasoned review and approval of this project application and Use Permit, we respectfully request that the Council follow the Commission's unanimous decision to approve the amendment to the Use Permit, and dismiss the appeal in its entirety so that Ms. Heath and Mr. Rivera may finally complete the construction of their home.

Sincerely,

WENDEL ROSEN LLP



Todd A. Williams

cc: Elise Semonian, Planning Director
James Rivera
Erin Heath

³ As the California Supreme Court established over 45 years ago, a party acquires a vested right in a building permit if the party "has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government." (*Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 791; *see also* *Congregation Etz Chaim v. City of Los Angeles* (9th Cir. 2004) 371, F3d 1122, 1125 [city estopped from revoking building permits after reviewed and approved the plans and after applicant performed substantial work and incurred liabilities in reliance].)