April 27, 2004

Marin County Board of Supervisors
3501 Civic Center Drive
San Rafael, California 94903

SUBJECT: Popal Appeal of the Planning Commission Decision to Deny the Ghazi Design Review
49 Bret Harte Road, San Rafael
Assessor’s Parcel 018-123-08

Dear Board Members:

Staff recommends that your Board deny the Popal appeal and sustain the Planning Commission’s decision to deny the Ghazi Design Review application. Design Review is for the changes to the horizontal and vertical location of the substantially completed residence. These changes include: front yard setback from the approved 33 feet to 30 feet, (the front yard Variance encroachment already having been denied by the Board at your February 24, 2004, public hearing), a 6 to 8 foot increase in the vertical elevation of the house, lighter color tones for the building and retaining walls, additional landscaping, and new fencing. The proposal is located on a previously developed lot in the Bret Harte neighborhood in San Rafael.

Staff also recommends that your Board consider adopting findings that the original, December 28, 2001, Design Review approval has not been properly vested since the house that has been constructed differs substantially with respect to both horizontal and vertical locations from what was approved in Design Review.

A resolution reflecting both the Board’s decision of February 24, 2004, to deny the Ghazi Variance for the encroaching portion of the variance, and to deny the Ghazi Design Review for other changes from the approved plans, is attached for consideration.

SUMMARY:

A building permit was originally approved on January 18, 2001, to construct a new, 3,950 square foot house with 545 square feet of garages. The residence did not require discretionary Planning approval because the property is located in a conventional (R-1:B-3) zoning district and the plans for the project did not trigger the County’s thresholds for Design Review. In the course of construction, the County received a complaint that the house being built was considerably larger than what was represented and authorized in the approved building permit. Construction on the project was halted on September 27, 2001, and because the house was found to be larger than the 4,000 square foot limit for triggering Design Review, the applicant was given the option of abating the violation or applying for Design Review. The house at this time was framed and closed in. The applicant subsequently submitted a Design Review application seeking approval for the expanded house, in substantially the same location as the residence for which the building permit was originally issued.
On December 28, 2001, Design Review approval was granted for a 6,542 square foot single-family residence with 674 square feet of attached garages and a 280 square foot pool house on a 52,000 square foot lot. (Note: approximately 1600 square feet of area was an increase in actual building size over the original plans, and approximately 990 square feet of area resulted from a planning determination that the area of the approximately 25-foot tall, open great room should be counted as two stories for design review square footage calculation purposes.) Excluding 540 square feet of garage space and 250 square feet of detached accessory structures, the total floor area of 6,706 square feet results in a 13% floor area ratio. The residence was approved for a maximum height of approximately 29 feet above grade. The December 28, 2001, Design Review approvals were for a finished floor elevation of 389.5 feet at the first floor, changed from 391.0 feet shown in the original building permit plans. Approved roof elevations were shown on the December, 2001 Design Review plans at 414.8 feet, 416.1 feet, and 414.3 feet at the east ridge, center peak, and west ridge, a minor change from the original building permit approved elevations of 416.4 feet, 416.1 feet, and 415.0 feet for the east ridge, center peak, and west ridge, respectively. A building permit for the approved Design Review project, including the revised elevations shown above, was issued on March 5, 2002.

In the summer of 2003, staff investigated a public complaint and discovered discrepancies between the setbacks shown in the Design Review and building permit approved plans and the actual location of the house. The County conducted surveys to accurately determine the location and height above grade of the residence constructed to date. The surveys revealed that while the height of the house above finished grade appeared to be consistent with the Design Review approved maximum height of 29 feet, the setbacks were inconsistent with the Design Review approvals, as follows:

<table>
<thead>
<tr>
<th>Setback</th>
<th>Zoning minimum</th>
<th>Approved</th>
<th>Constructed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Front yard</td>
<td>30 feet</td>
<td>33 feet</td>
<td>22.8 feet</td>
</tr>
<tr>
<td>Side yard (east)</td>
<td>15 feet</td>
<td>31 feet</td>
<td>39.2 feet</td>
</tr>
<tr>
<td>Side yard (west)</td>
<td>15 feet</td>
<td>104 feet</td>
<td>94 feet</td>
</tr>
<tr>
<td>Rear yard</td>
<td>25 feet</td>
<td>128 feet</td>
<td>128.8 feet</td>
</tr>
</tbody>
</table>

(Refer also to Attachment 4)

The County survey revealed that the north corner of the house had a 22.8-foot front yard setback, considerably less than the original Design Review approval of 33 feet, and encroaching into the minimum required front yard setback of 30 feet. Discrepancies were also discovered between the Design Review approved building and retaining wall colors and the colors that were actually applied. Accordingly, construction on the project was halted again on September 24, 2003, and the applicant was given the option of abating the non-conformities or applying for a Variance and Design Review. The applicant subsequently applied for a Variance and Design Review on October 17, 2003.

The Variance requested approval of the encroachment of the house into the required front yard setback. The Design Review application requested other modifications from the December, 2001 Design Review approved plans, including other setback changes for the residence, exterior colors for the house siding, trim, and retaining walls that are a lighter shade than what were approved, modified landscaping, and a proposed wooden fence on the north property line. Finished floor elevation on the first floor, as well as roof ridge and peak heights, was shown as remaining unchanged from the December, 2001 approved plans.

On January 12, 2004, the Planning Commission conducted a public hearing to consider the Variance and amended Design Review applications. After public testimony and review, the Commission unanimously denied both applications, and directed staff to return with an amended resolution containing the findings.
supporting their decision. The amended resolution was considered and adopted, with revisions, by the Planning Commission at their January 26, 2004 meeting (see Attachment 11). The Planning Commission also offered their opinion that the original December, 2001, Design Review approval had not been properly vested since the house was constructed in a different location than shown on the applicant’s submitted and approved plans.

The appellant, Fakoor Popal, filed a timely appeal of the Planning Commission decision on February 5, 2004, with supplemental materials submitted by his attorney, Mary McEachron, on February 18 (see Attachments 2 and 3).

On February 24, 2004, the Board reviewed the Popal appeal of the Planning Commission decision. After hearing the staff presentation and taking public testimony, the Board voted unanimously to uphold the Planning Commission’s decision to deny the Variance portion of the appeal. This decision directs the removal of the portion of the second story that encroaches into the front yard setback. The first floor portion would not require a variance, because it contains a garage and the County zoning requirements allow garages to encroach to within 3 feet of the front property line if the front half of the lot contains greater than a 20 foot vertical drop (which this property does). The Board continued the Design Review portion of the appeal and directed staff to gather more information pertaining to the appellants’ Design Review appeal, and to research the issue about whether the project has been properly vested.

Staff subsequently hired a visual simulation consultant, Visual Impact Analysis, to prepare a visual simulation (photo montage) comparing the Design Review-approved project to the project that was actually constructed. The County also utilized a surveyor, Linda Carruthers & Associates, to provide horizontal and vertical locational data to use as the basis for the photo montage comparisons. Information used by the surveyor came from various sources, including the appellants’ plan records and topographic survey on file at the County, as well as data confirmed by appellants’ surveyor. The visual simulation consultant then located, using the new survey data, the approved house relative to the existing house on the selected viewpoint photographs from the uphill (53 Bret Harte Road) and downhill (47 Bret Harte Road) neighbors. The approved house location was graphically depicted versus the outline of the actually constructed house (see attached photo montage comparisons).

A comparison of the actual, field surveyed vertical elevations of the existing residence versus the vertical elevations for the residence approved by Design Review reveals substantial discrepancies. The existing house is a minimum of approximately 6 - 8½ feet higher than the Design Review approved house at all elevations. This increase results from the house being move uphill from the approved location, and from additional soil being place under the building envelope. For example, the west roof ridge elevation of the existing house is at 422.8 feet, an increase of 8.5 feet from the Design Review approved elevation of 414.3 feet. The east roof ridge elevation of the existing house is 421.1 feet, an increase of 6.3 feet from the Design Review approved elevation of 414.8 feet. And the elevation of the slab directly in front of the house is 395.3 feet, an increase of 5.8 feet from the Design Review approved elevation of 389.5 feet.

Staff recommends that your Board deny the Popal (McEachron) appeal and uphold the Planning Commission’s decision for the following reasons:

1. The appellant asserts that the house that is built is exactly the same house the County permitted on December 28, 2001.

   Response: The County’s December 28, 2001 Design Review approval was based upon the project plans submitted by the applicant. Those plans provide in graphic form details about the location, size, height, elevation, architecture, landscape and hardscape of the proposed project, details that were incorporated into the County’s conditional project approval. The conditions of
the County’s Design Review approval require that the constructed residence substantially
conform to the approved Design Review plans (see Condition 2 of the Community Development
Agency Notice of Decision dated December 28, 2001). The Conditions of Approval further
require that any changes to the project be submitted to the Community Development Agency for
review and approval before the changes are initiated (see Condition 17 of the December 28, 2001
decision). The house existing at the time of the December, 2001 Design Review approval did not
substantially conform to the plans. The location of the house differs 10 feet horizontally and 5-8
feet vertically from the approved plans. While the actual physical location and architectural
design of the house has not changed since the original building permit application, the applicants
have never submitted a set of plans that completely and accurately show the house that was
constructed. The County still does not have a set of plans from the applicants that accurately
shows the vertical location of what was built.

The County relied on the applicants’ plans in approving the December, 2001 Design Review.
The house that was approved was not the house that was built. The misrepresentations in those
plans make it incumbent on the applicants to now re-apply for Design Review.

2. The neighbor’s who now complain supported the completion of the house when the County
still had the power to tear it down.

Response: It is not for the County to interpret the motivation of the neighbors’ prior and current
positions regarding the merits of a house. Construction on the residence has also progressed since
the neighbor’s petition was submitted to the County, however, and adjacent neighbors are better
able to judge the project in close to its final form.

3. A slight inconsistency between the written site plan and the house itself resulted from
medical conditions, prior to red-tagging and subsequent building permit issuance.

Response: The appellant’s prior or current medical condition are not germane to the mandatory
findings for Variance and Design Review. Staff does not share the appellant’s characterization of
the front yard encroachment as “slight” insofar as the encroachment represents approximately 25
percent of the minimum required setback.

Furthermore, the evidence does not appear to support the assertion that an inadvertent error
resulted in the location of the project being misrepresented to the County. The appeal claims that
the civil engineer “made a unilateral decision to rotate the house slightly from the building plans
in order to locate the house on more stable soils.” However, the appeal documents also
emphasize that the work on the house, done contrary to approved plans, was completed prior to
the violations ever being discovered by the County and the applicant subsequently reapplying for
Design Review and the follow-up building permit. The foundation, including all 270 piers, was
changed to line up with and support the larger, relocated, unapproved structure prior to County
review or its December, 2001 approval, and contrary to State law. The civil engineer is
responsible for the design and installation of pier holes and other foundation details.
Unauthorized work on the foundation portion of the house was therefore authorized and directed
by the applicant’s soils engineer. The illegal work on the above- and below-ground portions of
this house was inextricably linked from the beginning and throughout the process.

4. Too much of the current discussion is being driven by attitudes which have no role in
County decisionmaking.
Response: The attitudes alluded to have not been a determinant in the County’s decisionmaking process for this project. The County is compelled to respond to complaints, such as those received on this project. The resulting investigation, staff’s recommendations, and the Planning Commission’s decision, are based on applicable County codes and findings of fact pertaining to the physical circumstances of the applicant’s proposal.

5. No Design Review for setbacks is required at this point.

Response: The appellant writes “Current setbacks require no Design Review: they underwent Design Review and were approved in December of 2001.” The Design Review decision issued by the Community Development Agency in December of 2001 specified the approved location of the house. The decision also referenced the approved Design Review plan set, which on Sheets A1.1 and A 3.1 describe in some detail the vertical elevation of various site and house features, including the roof ridges and peak. Condition 1 of the December 28, 2001 Notice of Decision requires a front yard setback of 33 feet. Condition 2 of the Notice of Decision further requires that the Building Permit plans substantially conform to the approved Design Review plans. Approved Design Review plans form the fundamental basis for the County’s authorization of the horizontal and vertical location, height, size, design, and other physical characteristics of a project. Regardless of whether the applicants had already partially constructed the house in a location that differed both horizontally and vertically from the approved plans, and that this fact evaded the County’s discovery for some time, the applicant is legally required to provide the County with complete and accurate plans upon which to base its review and decision. The County application form specifically requires the applicant to sign and attest to the accuracy of the information submitted. The applicant submitted plans that did not accurately reflect the location of the house that had been constructed, and failed to comply with both the setbacks required in the Conditions of Approval and the vertical elevations referenced in the approved plans. Therefore the existing house is the proper subject of an amended Design Review application.

6. Design Review of Paint Color

Response: The appellant concedes that a mistake was made and the house was painted the wrong color. The appellant is willing to accede to the Board’s desire regarding the necessity of repainting the house an appropriate color. If the Board accepts some version of the existing house, staff recommends the paint be modified per staff recommended Conditions of Approval.

7. The new fence and landscaping are being sought for the exclusive benefit of the neighbors.

Response: This is correct. If the Board accepts some version of the existing house, staff recommends that the fence be approved as proposed, and the landscaping be approved with the modifications recommended in Conditions of Approval for the January 12, 2004, staff report to the Planning Commission.

CONCLUSION:

Staff concludes that the information provided in the record, including the photo montages comparing the visual impacts of the approved versus existing house, supports the Planning Commission’s decision to deny the appellants’ Design Review request for retroactive approval of the existing house. The existing house blocks a large portion of San Quentin Bay from the deck of the uphill neighbor at 53 Bret Harte
Road. The existing house, with its easterly upstairs structure, deck, and windows, also significantly adversely impacts the sense of openness and privacy from the deck/spa area of the downhill neighbor at 47 Bret Harte Road. Although the Planning Commission did not have the visual simulation information before them in their deliberations, given that the vertical gain of the house emphasizes the negative impacts and resultant inability to make Design Review findings, the Planning Commission’s decision would continue to be for denial.

Staff believes that, given the significant difference in the level of impacts between the approved Design Review plans and the house as constructed, much of the adverse visual impact of the project could be mitigated by lowering the elevations so that they are consistent with what was shown on the Design Review application that was approved on the December 28, 2001. For example, changing the project in compliance with the approved elevations would reduce the visual mass and bulk of the project from public viewpoints and mitigate neighbors’ privacy and view impacts. Given these improvements, staff recommends that a revised Design Review application be submitted and that the house be built according to the elevations approved on December 28, 2001, which could bring the project into substantial compliance with the Design Review findings approved in December, 2001.

A third alternative involves a design option that the appellants have submitted since the last Board hearing on this application on February 24, 2004. At staff’s request, the appellants have submitted for the Board’s consideration a design option modifying the house to eliminate the portion of the house at variance with the front yard setback requirements. The plans provide an alternative design eliminating the variance per the Board’s previous decision, but otherwise keeping the house in its present design and location.

RECOMMENDED ACTION: On behalf of the Planning Commission, staff recommends that your Board deny the Popal (McEachron) appeal and sustain the Planning Commission’s decision by taking the following actions:

1. Review the administrative record;
2. Conduct a public hearing; and,
3. Adopt the attached resolution denying the Popal (McEachron) Appeal and sustaining the Planning Commission’s decision to deny the Popal/McEachron Design Review.

Vesting issue The Board may also consider and include in their decision a determination regarding whether the December 8, 2001 Design Review approval was properly vested in accordance with the vesting provisions set forth in the Notice of Decision. These provisions state that the Design Review approval must be vested by securing a building permit and substantially completing the approved work no later than May 28, 2002. In conjunction with their decision, the Planning Commission opined that because the house had been constructed in a location that is inconsistent with the conditions of Design Review approval and approved plans, the project had not been properly vested in accordance with the terms of the Design Review approval. Adopting this determination as part of the recommended action would result in the property owner being required to seek reauthorization for development of a house on the project site and could involve the removal or modification of the existing house which is the subject of the Design Review proposal.

Based in part on the photo montage provided by the County’s consultant, staff is of the opinion that the house is substantially and significantly different than the approved Design Review plans, has significant adverse impacts on the neighborhood, and therefore has not been properly vested. As an aside, in staff’s opinion the photo montage suggests that if a house were actually constructed in keeping with the original December 28, 2001, Design Review plans, the extent of visual impacts, specifically blockage of views and impacts on privacy, would be largely be avoided.
If the Board chooses to make a determination that the project has not been properly vested, the Board resolution should be amended prior to its adoption to incorporate appropriate findings.

REVIEWED BY: [ ] Auditor Controller [X] N/A
[X] County Counsel [ ] N/A
[ ] Human Resources [X] N/A

Respectfully submitted,

Ben Berto
Principal Planner

Alex Hinds
Agency Director

Attachments:
1. Resolution sustaining the Planning Commission’s decision and denying the Popal/McEachron Appeal.
2. Popal Petition for Appeal
3. McEachron Appeal letter and attachments provided with February 24, 2004 Board letter (Board only)
4. Site Plan and elevations
5. Revised site plan and elevations dated Received April 5, 2004
8. Board of Supervisor Board letter, dated February 18, 2004
9. Board of Supervisor meeting minutes, dated February 24, 2004
10. Planning Commission Staff Report, dated January 12, 2004