

## **Attachment 2**

**CDDP23-03024 BOS Appeal Letter**

## HARPER & ARMSTRONG, LLP

1634 Telegraph Ave., #3, Oakland, CA 94612

Phone: (510) 420-8455 • Fax: (510) 858-5953 • shona.armstrong@harperarmstrong.com

By E-MAIL

April 5, 2024

|                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                  |
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| Adrian Veliz, Senior Planner<br>Department of Conservation and Development<br>Contra Costa County<br>30 Muir Road<br>Martinez, CA 94553<br>1-925-655-2879<br><a href="mailto:Adrian.veliz@dcd.cccounty.us">Adrian.veliz@dcd.cccounty.us</a> | County Board of Supervisors<br>Clerk of the Board of Supervisors<br>1025 Escobar Street, 1st Floor<br>Martinez, CA 94553<br>925-655-2000<br><a href="mailto:clerkoftheboard@cob.cccounty.us">clerkoftheboard@cob.cccounty.us</a> |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

**Re: 40 Anson Way (CDDP23-03024)**  
**Appeal to Board of Supervisors**

To the Board of Supervisors:

I represent Kris McClain, the owner of 36 Anson Way, which is directly next door to 40 Anson Way. I write on behalf of Ms. McClain to appeal from the recent Planning Commission decision affirming the Zoning Administrator decision to approve a Kensington Design Review Development Plan, which proposes a 993 square-foot “two-story” addition to the northern side of an existing single-family residence at 40 Anson Way (CDDP23-03024) despite the fact that the proposed project is actually three-stories high and requires a variance according to the County Code; despite the project’s unreasonable impacts on the use, enjoyment, and value of Ms. McClain’s property; despite the project proponents’ failure to consult with Ms. McClain about any specific proposed design prior to submitting their plans for approval; and despite the project proponents’ refusal to compromise any of their goals in the interest of mitigating the impacts on Ms. McClain and her property values.

As Ms. McClain has made clear at each level of hearing, pursuant to Contra Costa County Code section 26-2.2406(c):

- (1) The proposed project does not comply with the general plan and adversely affects her property rights.
- (2) The proposed project does not meet required standards.
- (3) Specified findings for the planning division are not supported by the evidence.

The grounds for Ms. McClain's appeal are elucidated in my appeal letter dated February 14, 2024. Those arguments remain central to our arguments on appeal at this level, but I will not recapitulate them here in detail.

I trust the Board members will review our prior letters and evidence, but please also note that, at the hearing held on March 27, 2024, the Planning Commission members acknowledged the validity of Ms. McClain's grounds for appeal, even though the Commission nevertheless affirmed the Zoning Administrator's decision. This creates legal error. Specifically, the Commission explicitly acknowledged:

1. Ms. McClain's view of Emeryville is a view that should merit "reasonable protection" pursuant to General Plan policies #3-211, 3-212;
2. The definition of "story" in the County Code does prohibit approval of the current project without a variance; there is no such thing as a "half story"; and the County has ignored its own legal definitions to approve the instant project without a variance.

The Planning Commission thus acknowledged that the approval violates the County's own laws, which: (a) require an application for a variance for a three-story project; and (b) require reasonable protection of Ms. McClain's views, uses, enjoyment, and property values.

As the project proponents' testimony at the prior appeal hearing made clear, there exist alternative, more considerate, design possibilities that would add the additional indoor living space the project proponents crave, while providing reasonable protection for Ms. McClain as required by the general plan. But the project proponents did not explore these options with Ms. McClain. They have, instead, assiduously protected and promoted their own interests entirely at Ms. McClain's expense. They wish to have Ms. McClain's cake and eat it too. Among other things, the project proponents are:

1. Declining to sacrifice any of their own yard space (They insist on expanding their home upward into Ms. McClain's view rather than expanding along the ground level into their own yard, because they value and use their own yard space and do not wish to sacrifice any of it.)
2. Prioritizing their own interest in *creating* a new view over Ms. McClain's interest in *protecting an existing view* (They are adding new third story that takes away Ms. McClain's view in order to create one for themselves.)
3. Including unnecessary vaulted ceilings as part of their third-floor addition (They are unnecessarily increasing the height of their project and the impact on Ms. McClain's views and access to sun and air.)
4. Refusing to even move their third-floor addition away from Ms. McClain's property/view corridor. (They are refusing to locate their third-floor addition further to the west on their current home's footprint or further to the south over the "basement" story," which could reduce the impact on Ms. McClain, but which would increase the project proponent's costs.)
5. Failing to consider a lower plate height for the third story addition per R305.1, which, in rooms with sloped ceilings, allows the required floor area of the room to have a ceiling

height of not less than 5 feet (1524 mm) so long as not less than 50 percent of the required floor area shall have a ceiling height of not less than 7 feet (2134 mm).

In essence, the project proponents are arrogating Ms. McClain's property value to themselves. All of the project proponents' design decisions have come at the expense of Ms. McClain's *existing* views, uses, and property value. Without reasonable consultation with Ms. McClain, the project proponents have enlisted the County in their effort to force Ms. McClain to accept the project as proposed, though the application violates the law.

Ms. McClain scrimped and saved for years to purchase a home with stunning views, which she appreciates and enjoys, and which add value to her home. She made her purchase secure in the knowledge that any third-floor addition on a neighboring property would require a variance that would trigger in depth consideration of her interests. The project proponents now wish to add value to their own home by constructing an impermissible third-floor addition robs Ms. McClain of her value. Allowing this blatant transfer of value with no compromises or discussion<sup>1</sup> does not provide Ms. McClain with the reasonable protection she is entitled to under the General Plan.

In no sense does the County's approval of the proposed plans: (a) comply with the law, which requires a variance for what, pursuant to the code, is a three-story project; (b) reasonably protect Ms. McClain's views; (c) minimize impacts to Ms. McClain's enjoyment and use of her property; or (d) reasonably protect Ms. McClain's property value. Furthermore, and importantly, permitting approvals that violate the law promotes discord among neighbors. Clear laws accurately followed and enforced provide certainty and predictability that minimizes neighbor conflict. This approval does the opposite and should be reversed.

Regards,



Shona Armstrong

Encl: Appeal letter submitted to Planning Commission February 14, 2024 (with attachment

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<sup>1</sup> Testimony at the hearing below continued to mislead the Planning Commission about the nature and extent of discussions prior to the current application. It is true that prior to making their application, the project proponents informed Ms. McClain that they hoped she would approve an addition to their home, but at the time they approached Ms. McClain on January 12, 2023, per their own admission, they had only "conceptual" and "schematic" plans. As far as Ms. McClain could reasonably tell, these "plans" consisted of drawings of the existing home with verbal proposals about vague planned changes. There was no actual proposed plan for her to consider, review, comment on, or discuss. The applicants talked to Ms. McClain for a few minutes, did not offer any concrete proposal, and then departed when she refused to give them carte blanche approval to make additions to their home. Any design changes that occurred between Jan 12, 2023, and June 1, 2023, were entirely internally motivated. Though the applicants suggest these changes were for Ms. McClain's benefit, Ms. McClain had no input into or knowledge of the proposal or any changes thereto. In fact, the first time Ms. McClain was presented with any concrete plan to review was when she received a letter from the County informing her of the nature of the proposed project on June 1, 2023.

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By E-MAIL

February 14, 2024

Adrian Veliz  
Senior Planner  
Department of Conservation and Development  
Contra Costa County  
30 Muir Road  
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1-925-655-2879  
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**Re: 40 Anson Way (CDDP23-03024)**

Dear Mr. Veliz:

I represent Kris McClain, the owner of 36 Anson Way, which is directly next door to 40 Anson Way. I write on Ms. McClain's behalf to appeal from the recent Zoning Administrator decision to approve a Kensington Design Review Development Plan, which proposes a 993 square-foot "two-story" addition to the northern side of an existing single-family residence at 40 Anson Way (CDDP23-03024) despite Ms. McClain's protests.

As Ms. McClain has made clear at each level of hearing, pursuant to Contra Costa County Code section 26-2.2406(c):

- (1) The proposed project does not comply with the general plan and adversely affects her property rights.
- (2) The proposed project does not meet required standards.
- (3) Specified findings for the planning division are not supported by the evidence.

The negative impacts created by the proposed project warranted two meetings of the KMAC, which culminated in a split decision. In the face of clear law prohibiting the approval of this three-story project and in the face of clear general plan violations that harm the property value of one of Kensington's few Black homeowners at the expense of her neighbors, the Zoning Administrator erred by approving the application based on arbitrary, biased, uncodified grounds.

**I. The Design Review Approval Violates the General Plan and Disregards the loss of value to Ms. McClain's Home.**

**A. The proposed project violates the General Plan.**

The "General Plan Policies for the Kensington Area" appear at pages 3-98 to 3-100 of the General Plan:

Policy #3-211

Allow for the review of new residential development that provides *reasonable protection for existing residences in the Kensington community with regard to: views, design compatibility (including building bulk, size, and height), adequate parking, privacy, and access to sunlight.*

Policy #3-212.

*Preservation of views* of scenic natural features (e.g., Bay, mountains) and the developed environment (e.g., bridges, San Francisco skyline) should be incorporated into the review of development applications.

Policy #3-213.

*Review proposed residential development for design compatibility with nearby development* (e.g., building mass, height, mechanical devices) and provisions for adequate parking.

3-214.

New residential development will be reviewed against *realistic impacts of privacy and sunlight* on surrounding neighbors.

**1. The proposed project specifically fails to reasonably protect Ms. McClain's residence with regard to views, building bulk, size, height, privacy, and access to sunlight.**

**a. Views**

The photos Ms. McClain has provided at **Exhibit A and Exhibit B** show the story poles blocking the view from the south-facing window of her dining room out over the Emeryville skyline. The General Plan specifically requires protection and preservation of views of the developed environment. Policy 3-212 provides *examples* of the bridges and the San Francisco skyline, but these are examples; they do not constitute an exclusive list of the views that merit conservation. The County Zoning Administrator explicitly and completely discounted Ms. McClain's views of the Emeryville skyline, stating they simply do not count. The unnecessary

denigration of Emeryville is puzzling and betrays a condescending disregard for the views that Ms. McClain enjoys from her living space.

**b. Design compatibility/building mass unnecessarily impairs Kris McClain's property.**

As Heather Sanders-Jacob has already explained in her letter dated September 18, 2024, which is attached hereto as **Exhibit C** and incorporated herein, the proposed project creates an unnecessarily elevated mass that allows the owners of 40 Anson Way to expand *at the explicit and significant expense of Ms. McClain*. Both owners could achieve their aims were 40 Anson Way to build and expand downward along the hillside to create the additional square footage they desire or even were they to move the expansion to the other side of their house.

The owners at 40 Anson Way have never, however, sought input from or discussion about the impacts on Kris McClain. When they first approached Ms. McClain, they requested her before-the-fact approval of a project for which they had no drawings. They denied her permission to come into their home to discuss the options and impacts. The next time they approached Ms. McClain they presented her with a fait accompli.

The planning department makes much of the fact that the owners revised their plans to change the position of a balcony, but that change was motivated by the owners' own concerns. It was not a response to or an accommodation for the benefit of Ms. McClain, as they had never shown Ms. McClain the first round of drawings.

Even as modified, the proposed obstruction damages Ms. McClain's views and has tangible consequences for the value of her property. The diminished view significantly detracts from the appeal of the home to potential buyers or renters, thereby directly affecting its market value.

Furthermore, the presence of a blank wall resulting from the proposed project creates a sense of confinement and visual monotony, diminishing the overall livability and enjoyment of the property. This issue extends beyond mere inconvenience; it constitutes a tangible loss of value and an infringement upon Ms. McClain's rights as a homeowner to enjoy the full benefits of her property.

**c. The building height violates the clear language of the law.**

**i. The language of the law provides an unambiguous definition of "story."**

As previously explained, the proposed building exceeds the number of permissible stories. The proposal is within the SH zone of Kensington (Single Family Residential – High) Contra Costa County Code limits buildings to two stories in Kensington. Section 82-4.266 of the code defines a story as follows:

“Story” means that portion of a building included between the upper surface of any floor and the upper surface of the floor next above, except that the topmost story shall be that portion of a building included between the upper surface of the topmost floor and the ceiling or roof above. If the finished floor level directly above a basement or cellar is more than six feet above grade at any point, such basement or cellar shall be considered a story.

Per 84-4.802 of the County Code, building height maximums are set by the following criteria:

No single-family dwelling or other structure permitted in the R-6 [single family residential] district shall exceed two and one-half stories or thirty-five feet in height.

All single-family residential districts within Contra Costa County have the same building height restrictions. See Contra Costa County Code sections 84-6.802, 84-8.802, 84-10.802, 84-12.802, 84-14.802, 84-16.802, 84-18.802, 84-20.802.

Because the basement story at 40 Anson Way is a habitable space that includes an existing bedroom, bathroom, and office with full kitchen, the additional proposed level pursuant to the clear language of the Contra Costa County Code constitutes an impermissible third level. The diagram below is what was submitted to the Planning Department. This lower level was not omitted from the architect’s drawing, and it should have compelled the planners to reject the proposal or require a variance application.



**ii. Long pattern and practice and an ongoing informal agreement to disregard the law cannot change the meaning of the words written in the code.**

The staff asserts repeatedly in written recommendations that the proposed project is a two-story building. The applicant asserts that the staff assured them the project would be processed

as a two-story building. The Zoning Administrator likewise asserts that the planning department has the leeway to interpret its code however it likes, and that the planning department always considers a project like this to be a two-story project, because the separate stories are not stacked atop one another. This interpretation appears groundless.

The Zoning Administrator made comments arrogating to the planning department the power to enforce rules either beyond or in contradiction to the language of the law. These comments misconstrue and inflate the powers of the Planning and Conservation Department. The Department and its staff are to execute the laws, not to legislate by fiat. The code is clear. Where neither the language nor the statutory history of an ordinance is ambiguous, “there is no need to defer to [agency] interpretation.” *Riddick v. City of Malibu*, \_\_\_ Cal. App. \_\_\_, \_\_\_ (Feb 1, 2024) 2024 WL376305 (citing *Advanced Real Estate Services, Inc. v. Superior Court*, 196 Cal. App. 4th 338, 350 (2011); *Department of Industrial Relations v. Occupational Safety & Health Appeals Board*, 26 Cal. App. 5th 93, 106 (2018)).

Here, there is no

***ambiguity*** concerning the meaning of the text, it is not composed of “ ‘technical, obscure, complex, open-ended’ ” language “ ‘entwined with issues of fact, policy, and discretion’ ” that would require resort to [the agency’s] ***specialized expertise***. (*Yamaha, supra*, 19 Cal. 4th at p. 12, 78 Cal.Rptr.2d 1, 960 P.2d 1031.) [***The agency] therefore “enjoy[s] no comparative advantage over a generalist court in interpreting the legal text at issue.”*** (*California Veterinary Medical Association v. City of West Hollywood*, (2007) 152 Cal. App. 4th 536, 556, 61 Cal.Rptr.3d 318.)

*Riddick v. City of Malibu* (Cal. Ct. App., Feb. 1, 2024, No. B323731) 2024 WL 376305, at \*5 (emphasis added).

Other jurisdictions that legitimately apply the standard the Contra Costa County Planning Department applied here do so based on a Code or other publicly available guidance. For instance, in some jurisdictions, in which following the hillside’s natural contour allows the approving agency to deem a story not a story when not stacked one atop the other, the examples and diagrams within the ordinances or regulations depict possible scenarios in detail and explain the exceptions to the rules. Attached hereto as **Exhibits D and E** are guidance documents from Berkeley and Los Angeles, which show that it is very easy to publish transparent detailed guidance that does not leave architects and homeowners to guess about when and why an approving agency might simply (and in violation of the law) disregard its own published ordinances.

Citizens rely on transparent, publicly available laws and regulations for setting their expectations about property purchases and making other important decisions. Publicly available, consistently enforced laws ensure that citizens cannot be ambushed by secret, unwritten rules that work to their detriment. Kris McClain bought her house secure in the fact that her views were protected, and she was entitled to set her expectations based on the clear language of the

law. If there is a law or regulation in Contra Costa County that provides an exception, no staff member or official has pointed it out.

Pursuant to the language of the code there can be no argument. This project comprises three stories. Decades of disregarding the clear language of the code in practice does not change the language of the code. If the County truly wishes to count stories only when they are stacked atop each other, then the County must re-write its code to actually say that.

#### **d. Access to Sunlight**

The initial solar access study at the winter solstice depicts the time of the year during which Ms. McClain is most highly impacted (and the time of year when sunlight is most valued). The impacts on Ms. McClain are significant.

From her upstairs living spaces, Ms. McClain will now be spending more time in the shadow of a blank wall rather than looking out over the skyline. The photos she has taken and attached as **Exhibit A and B**, particularly the photo taken in the evening when the sun is low (Exhibit B), along with the photos of the story poles, show the significant negative change she will experience due to loss of light. Evening light will be curtailed in Ms. McClain's dining room. On February 4, 2024, there was a power outage from 11:00 AM- 7:30 PM. The sun started to go down around 4:30-5PM. Ms. McClain was able to continue working up until the sun was gone. She had a deadline and was able to make it without losing a day due to loss in power. If 40 Anson was built up as proposed, much of the light she used for the last hours of the day would have been blocked because of the large shadow the third story would have created.

A corrected shadow study attached as **Exhibit F** is relabeled to depict more clearly that it is not only Ms. McClain's downstairs windows that are affected, but also her upstairs dining room windows that will suffer significant loss of light. The Zoning Administrator discounted the shadow study because he erroneously presumed it *only* affected the downstairs windows in Ms. McClain's garage (where, to be clear, she still uses and enjoys the light by growing many plants).

The proposed addition will therefore impair Ms. McClain's ability to nurture the collection of indoor plants she keeps in her dining room. In her own words:

I got into plants in 2021. I have researched plants, their light, water, and placement needs. Each plant that I have is in its ideal spot, which was determined by their specific light requirements. The ones who require the most light, i.e, succulents and cactus plants, are under grow lights. The others depend on the morning sun which isn't as harsh as the afternoon sun. They all rely on light to grow. I have a fiddle leaf fig that was in a 6 inch pot. She is now in a 20 inch pot. If you know anything about the fiddle leaf plant, you'll know that this is a big deal. We all rely on the light coming from the dining room window.

The Zoning Administrator Planner specifically stated the lower-level windows and accessory structures like the greenhouse aren't protected items where solar access is concerned, but the new addition will also impair Ms. McClain's ability to garden the space on the southern side of her house. She takes much joy and finds peace in her landscaping and gardening, and she is concerned about the limitations that the lack of sunlight will impose on her choice of plantings. She chose the spot for her greenhouse based on the rise and fall of the sun. It faces north and south to maximize the sunlight. She also uses her lower deck to read and barbeque. All of these activities will be impaired by the proposed addition's negative impact on her sunlight.

**B. The proposed project adversely affects Ms. McClain's property values.**

When members of the Kensington Municipal Advisory Council visited Ms. McClain's property, they were impressed with her view and one member joked that his colleague could have such a view if her were willing to pay the price. It is common knowledge that the views create significant value. Ms. McClain's view will be impaired, and her property value will suffer concomitant damage.

In addition to loss of a portion of her view, Ms. McClain's reduced access to sunlight and her new close proximity to a bulky new three-story building will affect her property value.

**II. The proposed project does not meet required standards.**

As explained above, the Contra Costa County Code is clear, and the proposed project violates that code with respect to building height, and with respect to considering access to sunlight, preservation of views of skylines, and design compatibility. See **Exhibit C** (Letter from Shelterwerk re McClain Appeals 2023-09-18.)

**III. Specified findings for the planning division are not supported by the evidence.**

As explained above, the County's findings are not supported by the evidence, because the approval does NOT: (1) minimize impacts upon surrounding neighbors; (2) protect the value and enjoyment of the neighbors' property; (3) maintain neighbors' property values; or (4) promote the general welfare, public health, and safety, inasmuch as approving a project that violates the law as written leads to public confusion, abuse, and arbitrary decision making.

**IV. Revised plans do not reflect sensitivity to or consideration of Ms. McClain's interests.**

The project applicant provided an initial design and then a revised design to the planning staff. The first proposed design had even more extreme impacts on Ms. McClain. The project applicant has misleadingly packaged this redesign as an accommodation to Ms. McClain. In reality, the project applicants redesigned their project without consultation with or input from Ms. McClain.

**V. 40 Anson Way could be developed in a manner that satisfies the applicants' goals without having such significant impacts on Ms. McClain and her property.**

The owners of 40 Anson could remedy this problem by locating the addition on the southern side of their property or by considering a horizontal addition that would keep the entire home on a single level.

Ms. McClain has been fighting for agency throughout this disempowering design review process. When neighbors can communicate and work together, the project can be improved and the neighborly relationship preserved without negatively impacting the end product. There is still a chance for this to happen here.

**VI. Conclusion**

The Kensington-specific section of the Contra Costa County Code provides that the purpose of the local ordinances is as follows:

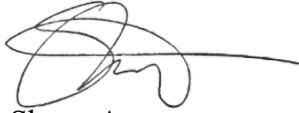
84-74.204 - Purpose and intent.

- (a) The purpose of this chapter is to provide specific regulation to fairly and efficiently implement the Contra Costa County general plan policies for the Kensington Area so that future development recognizes the rights of property owners to improve the value and enjoyment of their property while minimizing impacts upon surrounding neighbors and not substantially impairing the value and enjoyment of their neighbors' property; maintains the community's property values; and promotes the general welfare, public health and safety.
- (b) It is a further purpose of this chapter to promote the community's values of preservation of views, light and solar access, privacy, parking, residential noise levels and compatibility with the neighborhood with regard to bulk and scale
- (c) Features of a development that could influence these values include but are not limited to siting, size, bulk, building envelope, height, setbacks, relative scale, off-street parking spaces, window placement, artificial lighting and location of mechanical devices such as motors, fans and vents.

Part (a) recognizes the right of homeowners to develop their properties, while minimizing any impacts on their neighbors' property value, and while protecting the ability of their neighbors to enjoy their land. Parts (b) and (c) provide criteria for evaluating the impacts of development on neighboring properties. The proposed development at 40 Anson Way fails to minimize impacts as required by the code, violates the General Plan, and unnecessarily robs Ms. McClain of her cherished property values.

We invite you to arrange a visit to my client's property to view the impact the project will have. I can be reached at [shona.armstrong@harperarmstrong.com](mailto:shona.armstrong@harperarmstrong.com) and 510-508-5017.

Regards,

A handwritten signature in black ink, consisting of a large, stylized 'S' followed by a horizontal line extending to the right.

Shona Armstrong

## **EXHIBITS**

- Exhibit A: Photos from Ms. McClain's dining area, deck, and garage, showing story pole impact on views from her dining room and deck during October 18-29, 2023
- Exhibit B: Photo from Ms. McClain's dining room window Feb 6, 2024, at 6:56 pm
- Exhibit C: LTR from Shelterwerk re 40 Anson Way 2023-09-18
- Exhibit D: Excerpts from Los Angeles Basin Hillside Ordinance
- Exhibit E: Berkeley Municipal Code section 23.106.060
- Exhibit F: Corrected shadow study pointing out affected upper windows

## **EXHIBIT A**

(Photos from Ms. McClain's dining area, deck, and garage, showing story pole impact on views from her dining room and deck during October 18-29, 2023)















**EXHIBIT B**

(Photo from dining room February 6, 2024 at 6:56 pm)



**EXHIBIT C**

(Letter from Shelterwerk)

**September 18, 2023**

Kris McClain  
36 Anson Way  
Kensington, CA 94707



**Re: McClain Appeals**

Dear Kris,

We have researched the proposed addition at 40 Anson Way, Kensington, CA, and made determinations about its impacts in consideration of Chapter 84-74 of the Contra Costa County Code, which lays the guidelines for building in Kensington, as well as 84-4 of the Contra Costa County Code, which lays out additional guidelines for residential building not necessarily covered within the Kensington section of the code.

To lay the foundation of our research on the impacts proposed construction at 40 Anson Way, we look at the purposes of the Kensington specific section of the Contra Costa County Code:

84-74.204 - Purpose and intent.

(a) The purpose of this chapter is to provide specific regulation to fairly and efficiently implement the Contra Costa County general plan policies for the Kensington Area so that future development recognizes the rights of property owners to improve the value and enjoyment of their property while minimizing impacts upon surrounding neighbors and not substantially impairing the value and enjoyment of their neighbors' property; maintains the community's property values; and promotes the general welfare, public health and safety.

(b) It is a further purpose of this chapter to promote the community's values of preservation of views, light and solar access, privacy, parking, residential noise levels and compatibility with the neighborhood with regard to bulk and scale

(c) Features of a development that could influence these values include but are not limited to siting, size, bulk, building envelope, height, setbacks, relative scale, off-street parking spaces, window placement, artificial lighting and location of mechanical devices such as motors, fans and vents.

Part (a) recognizes the right of homeowners to develop their properties, while minimizing any impacts on their neighbors' property value, and while protecting the ability of their neighbors to enjoy their land. Parts (b) and (c) provide criteria for evaluating the impacts of development on neighboring properties. The proposed development at 40 Anson Way fails to minimize impacts as required by the code.

# SHELTERWERK

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## The Building Exceeds the Number of Permissible Stories:

Contra Costa County Code limits buildings to two stories in Kensington. Section 82-4.266 of the code defines a story as follows:

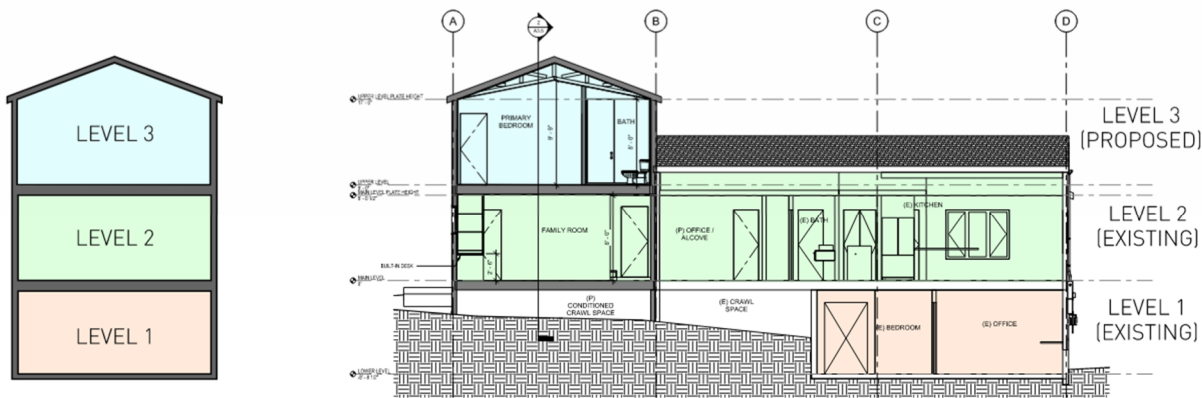
"Story" means that portion of a building included between the upper surface of any floor and the upper surface of the floor next above, except that the topmost story shall be that portion of a building included between the upper surface of the topmost floor and the ceiling or roof above. If the finished floor level directly above a basement or cellar is more than six feet above grade at any point, such basement or cellar shall be considered a story.

Per 84-4.802 of the municipal code, building height maximums are set by the following criteria:

No single-family dwelling or other structure permitted in the R-6 district shall exceed two and one-half stories or thirty-five feet in height.

Due to the existing habitable basement at 40 Anson Way - which includes an existing a bedroom, bathroom, and "office" with full kitchen -the additional proposed level constitutes an impermissible third level. The diagram on the right is what was submitted to the Planning Department. This lower level wasn't omitted from the architect's drawings, and it didn't receive a comment, so maybe it slipped through the cracks, but it should compel the planners to reject the proposal or require a variance application.

BUILDING HEIGHT/STORY DIAGRAMS



(a) standard story stacking

(b) proposed story stacking at 40 Anson Way

## The Proposed Building Unreasonably Impairs Views:

The proposed addition adds a large mass adjacent to the dining room window at 36 Anson Way. Panoramic views of the surrounding landscape are negatively impacted. The proposal submitted to the Planning Department provides an image noting views that will be impacted, but the vantage point from which the image was taken is a misrepresentation of reality. It appears to be zoomed in and possibly at a lower vantage point than what one would experience standing in front of the window. The following photo, looking from the backmost windows of 36 Anson Way show more

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accurately the significant negative impact on views caused by the proposed addition at 40 Anson Way.

AREA OF IMPACTED VIEWS  
(Image taken from window at 36 Anson Way)



IMAGE OF AREA OF IMPACTED VIEWS SUBMITTED  
TO PLANNING DEPARTMENT  
(Development Plan Drawing Set dated 07/10/23)



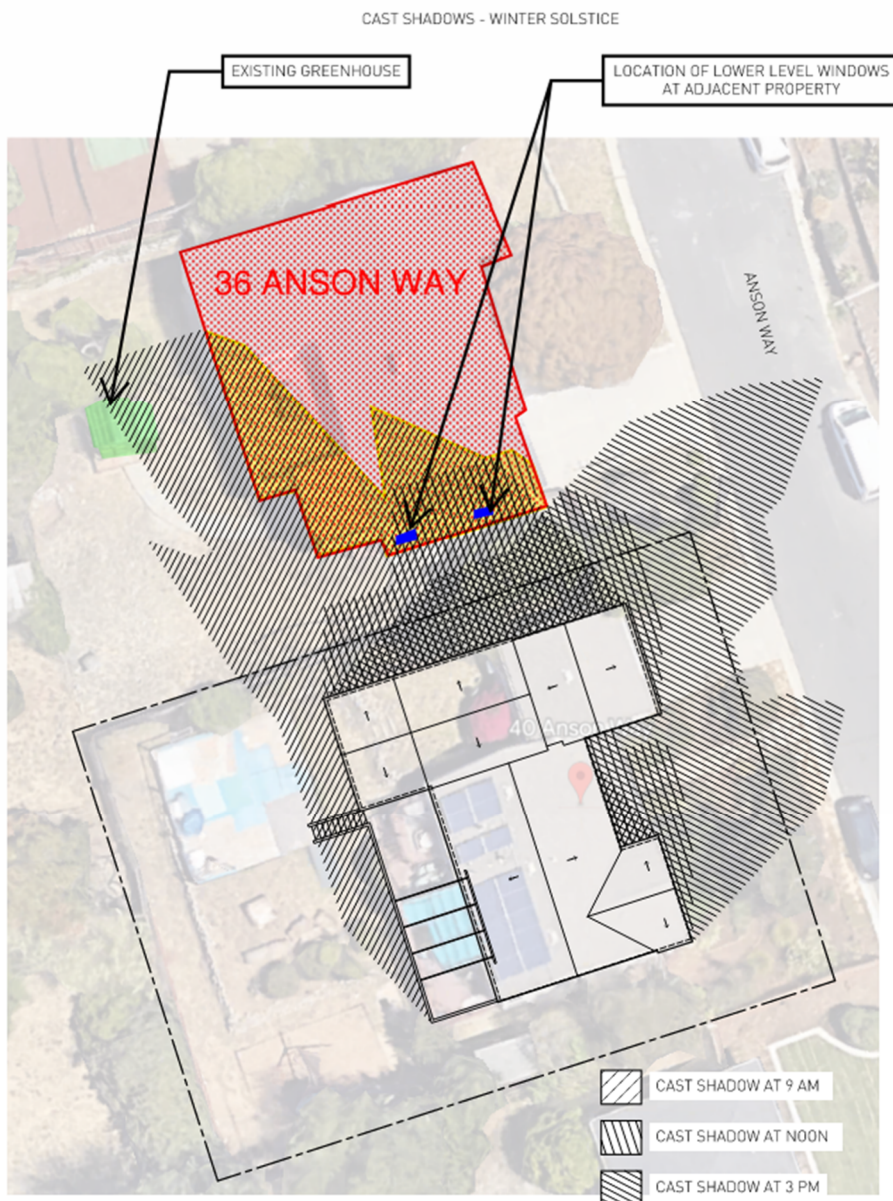
APPROXIMATE NEIGHBOR VIEW TO SOUTHWEST (IMPACTED)

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## The Proposed Building Unreasonably Impairs Access to Daylight:

The addition at 40 Anson Way will cast shadows towards and past its northern property line and onto the lot of 36 Anson Way due to its proximity to a shared property line. A study of cast shadows during the Winter Solstice shows that the lower level South-facing windows at 36 Anson Way will be shaded out from 9 am through noon, greatly diminishing solar access during the period of the year where access to the sun is at its greatest premium. Additionally, shadows will be cast through a large part of the rear yard, including over an existing greenhouse and the garden area leading up to it. The excessive height of the proposed building is unnecessary, impermissible, and creates significant problems for the residents of 36 Anson Way that the county should be taking into consideration.



# SHELTERWERK

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## Large Size of the Home/Location of Addition/Utilization of Existing:

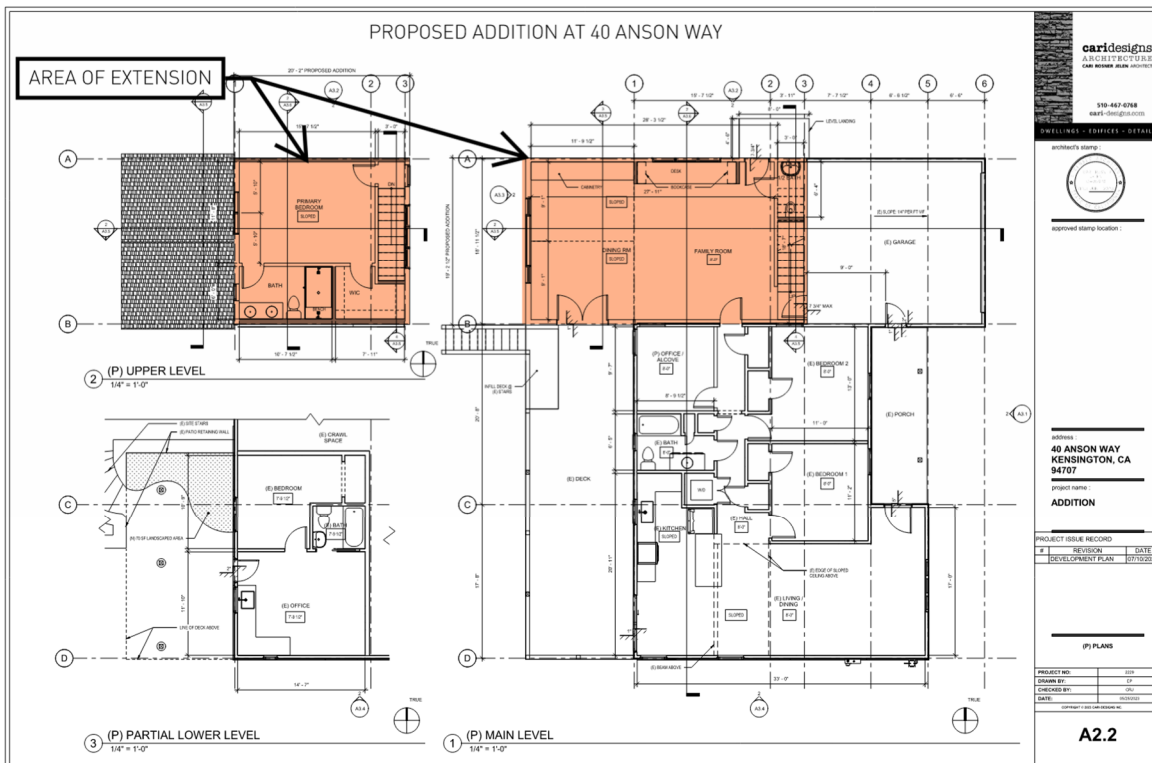
The proposed addition at 40 Anson Way creates a home with the following amenities:

- 5 bedrooms
- 2 kitchens
- 3 living spaces
- 3.5 baths
- 1 parking space

The existing habitable lower level currently has a full bathroom, kitchen, a bedroom, and space that can be used for living. By connecting the main house to the basement, many of the same rooms in the proposed design can be accessed from the main level without the need for extensive new construction.

Alternatively, if the owners of 40 Anson Way are intent on building a third level, then moving the extension to the opposite side of the house would eliminate any shadowing and view impacts on 36 Anson Way, while having a much more limited impact on the neighbors at 44 Anson Way.

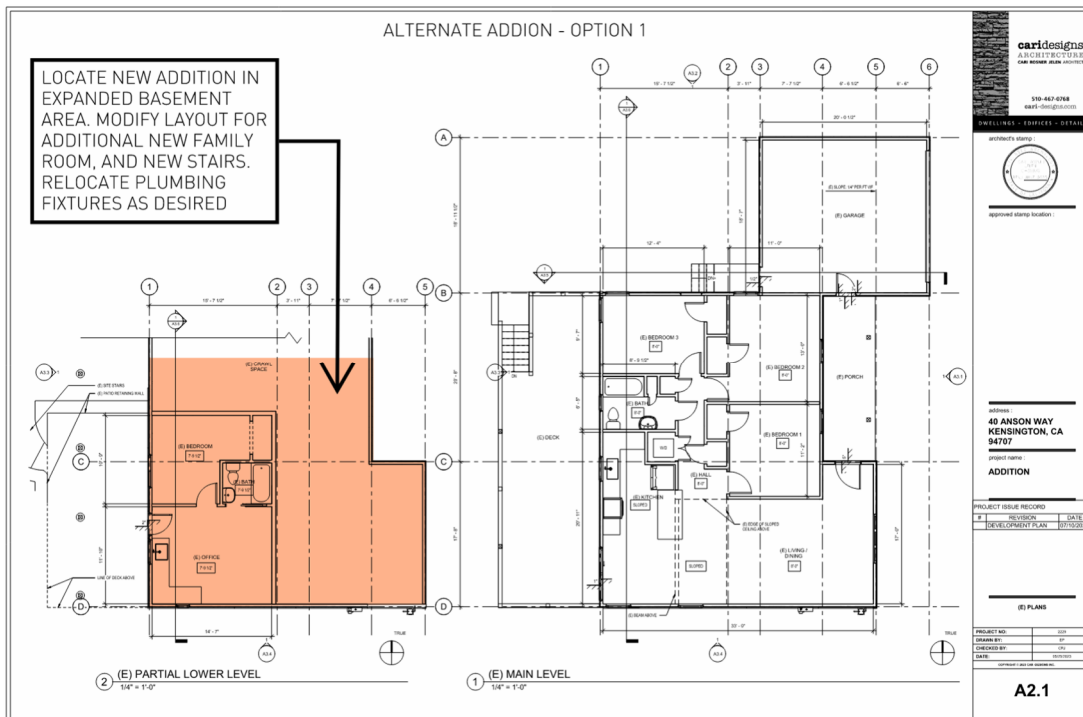
## PROPOSED PROJECT WITH 3<sup>RD</sup> FLOOR ADDITION THAT CREATES SHADOWS AND BLOCKS VIEWS



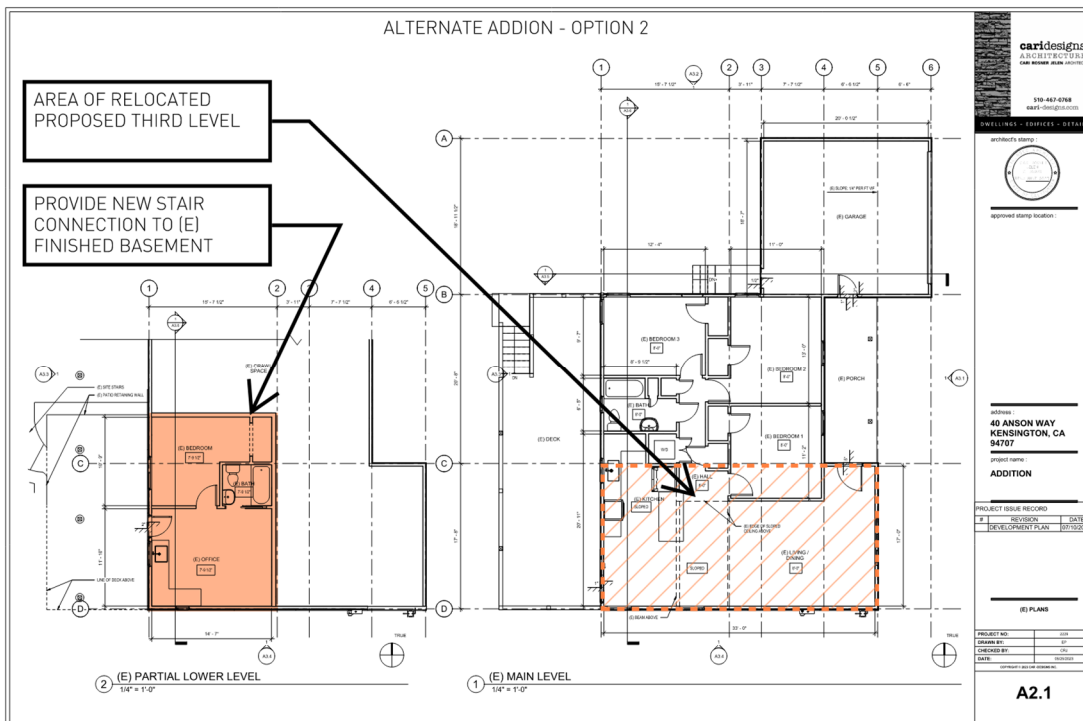
# SHELTERWERK

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## PROPOSED PROJECT WITH 3<sup>RD</sup> FLOOR ADDITION MOVED TO OTHER SIDE - OPTION 1



## PROPOSED PROJECT WITH 3<sup>RD</sup> FLOOR ADDITION MOVED TO OTHER SIDE - OPTION 2



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Sincerely,

Heather Sanders-Jacob  
Ashwin Biln

**EXHIBIT D**

(Excerpts from Los Angeles Basin Hillside Ordinance)

#### 4. Height Limits. [§ 12.21 C.10.(d) of the LAMC]

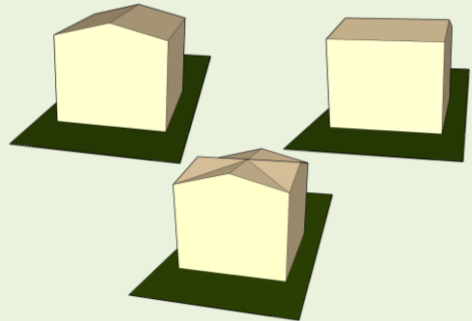
No portion of a Building or Structure shall be erected or enlarged which exceeds the envelope height limits as outlined in [Table 5 – Maximum Height of Structures](#), or as otherwise stated in the paragraphs below. For the provisions below, whenever Grade is mentioned, it shall mean Hillside Area Grade as defined in the Definitions Section of this document (or [Section 12.03 of the LAMC](#)).

| Table 5<br>Maximum Height of Structures (in feet)                                                                                                                                                           |    |    |     |      |      |      |      |    |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|----|-----|------|------|------|------|----|
| Height Districts                                                                                                                                                                                            | R1 | RS | RE9 | RE11 | RE15 | RE20 | RE40 | RA |
| When the roof of the uppermost story of a building or structure or portion thereof has a slope of 25% or greater, the maximum height for said portion of building or structure thereof shall be as follows: |    |    |     |      |      |      |      |    |
| <b>1, 1L, &amp; 1VL</b>                                                                                                                                                                                     | 33 | 33 | 33  | 36   | 36   | 36   | 36   | 36 |
| <b>1XL</b>                                                                                                                                                                                                  | 30 | 30 | 30  | 30   | 30   | 30   | 30   | 30 |
| <b>1SS</b>                                                                                                                                                                                                  | 22 | 22 | 22  | 22   | 22   | 22   | 22   | 22 |
| When the roof of the uppermost story of a building or structure or portion thereof has a slope of less than 25%, the maximum height for said portion of building or structure thereof shall be as follows:  |    |    |     |      |      |      |      |    |
| <b>1, 1L, &amp; 1VL</b>                                                                                                                                                                                     | 28 | 28 | 28  | 30   | 30   | 30   | 30   | 30 |
| <b>1XL</b>                                                                                                                                                                                                  | 28 | 28 | 28  | 30   | 30   | 30   | 30   | 30 |
| <b>1SS</b>                                                                                                                                                                                                  | 18 | 18 | 18  | 18   | 18   | 18   | 18   | 18 |

##### 25% Roof Slope

The 25% roof slope is a Southern California standard which is also commonly referred to as the 3:12 slope. This slope can be expressed as a ratio of 1 foot of vertical rise for every 4 feet of horizontal distance. In order to determine what the minimum height of the standard gabled roof, as measured from the top-plate of the building wall, simply divide the horizontal distance of the wall by 8.

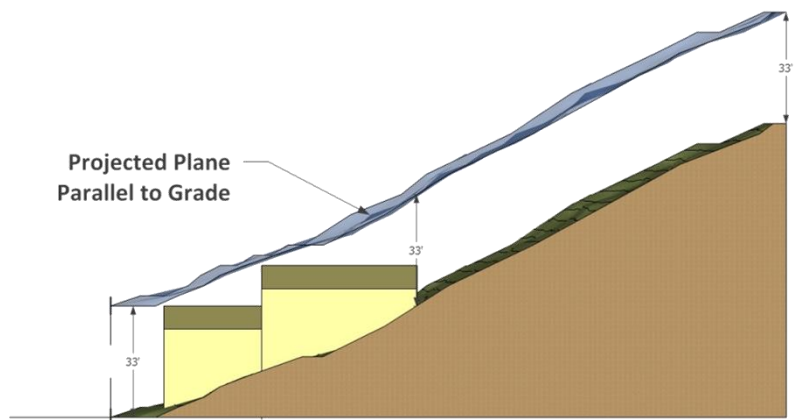
When a roof is made up of a combination of roof slopes, the portions of the structure with a roof slope less than 25% will be considered flat and as a result be required to comply with the lower height.



##### **a. Measurement of Height. [§ 12.21 C.10.(d)(1) of the LAMC]**

Notwithstanding any other provision in [the Code](#), the height limits in [Table 5 – Maximum Height of Structures](#) above shall be measured as set forth below.

- (1) **Maximum Envelope Height.** Envelope height (otherwise known as vertical height or “plumb line” height) shall be the vertical distance from the Grade of the site to a projected plane at the roof Structure or parapet wall located directly above and parallel to the Grade. Measurement of the envelope height shall originate at the lowest Grade within 5 horizontal feet of the exterior walls of a Building or Structure.



## BASELINE HILLSIDE ORDINANCE – COMPREHENSIVE GUIDE

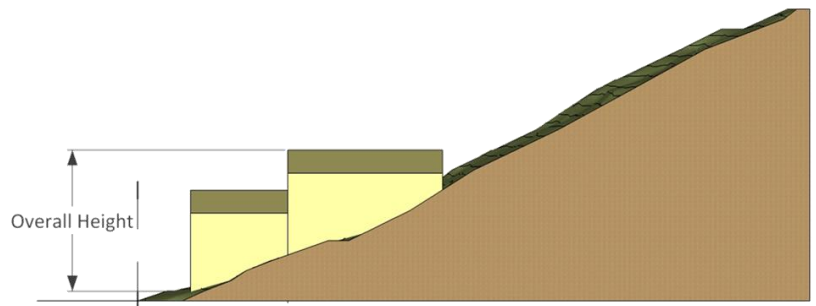
At no point shall any given section of any part of the proposed Building or Structure exceed the maximum envelope height.

A topographic map shall be submitted as a separate plan sheet or as part of the site plan identifying the 5-foot perimeter of the exterior walls, or any other information which the Department of Building and Safety deems necessary to determine compliance with [this provision](#).

**b. Zoning Administrator's Authority. [§ 12.21 C.10.(d)(2) of the LAMC]**

A Zoning Administrator may allow Structures which exceed the maximum envelope height requirements of [Table 5 – Maximum Height of Structures](#); however, the increase in height may not result in a Building or Structure which exceeds an overall height of 45 feet, pursuant to the authority and procedures established in [Section 12.24 X.28 of the LAMC](#).

The overall height shall be measured from the lowest Elevation point within 5 horizontal feet of the exterior walls of a Building or Structure to the highest Elevation point of the roof Structure or parapet wall.



**c. Prevailing Height. [§ 12.21 C.10.(d)(3) of the LAMC]**

Notwithstanding the height limits in [Table 5 – Maximum Height of Structures](#), when 40% or more of the existing One-Family Dwellings with Frontage on both sides of the block have Building heights exceeding these limits, the maximum envelope height for any Building on that block may be the average height of the Dwellings exceeding these limits.

**d. Lots in a Single-Story Height District. [§ 12.21 C.10.(d)(4) of the LAMC]**

As enabled by [Section 12.21.1 A.1 of the LAMC](#), on Lots in a “SS” Single Story Height District, shown as “1SS” on a Zoning Map, no Building or Structure shall be erected or enlarged which exceeds one Story.

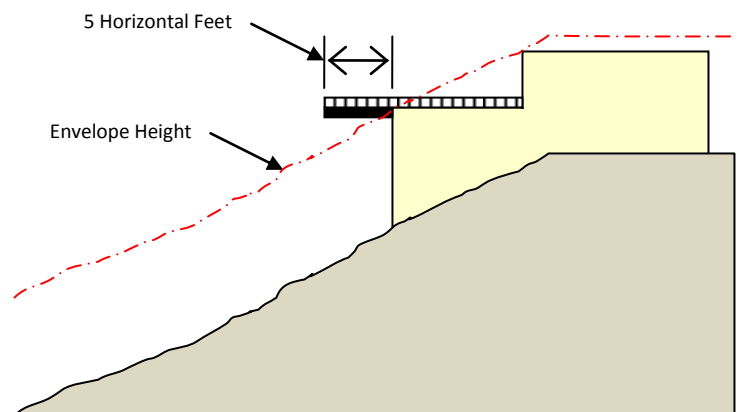
Notwithstanding the provision in [Section 12.21.1 A.8 of the LAMC](#), in determining the number of Stories, any Basement which is exempt from the Residential Floor Area calculation, as outlined in [Section 12.03 of the LAMC](#), shall not be considered a Story.

**e. Lots Fronting on Substandard Hillside Limited Streets. [§ 12.21 C.10.(d)(5) of the LAMC]**

For any Lot fronting onto a Substandard Hillside Limited Street and subject to the 5-foot Front Yard setback, no portion of a Building or Structure within 20 feet of the Front Lot Line shall exceed 24 feet in height. The 24 foot maximum Building and Structure height shall be measured from the Elevation at the centerline or midpoint of the Street on which the Lot fronts.

**f. Unenclosed/Uncovered Rooftop Decks and Cantilevered Balconies. [§ 12.21 C.10.(d)(6) of the LAMC]**

Unenclosed/uncovered rooftop decks, cantilevered balconies and “visually permeable railing” (no more than 42 inches in height), may project beyond the maximum envelope height no more than 5 horizontal feet.



For the purposes of [this provision](#), “visually

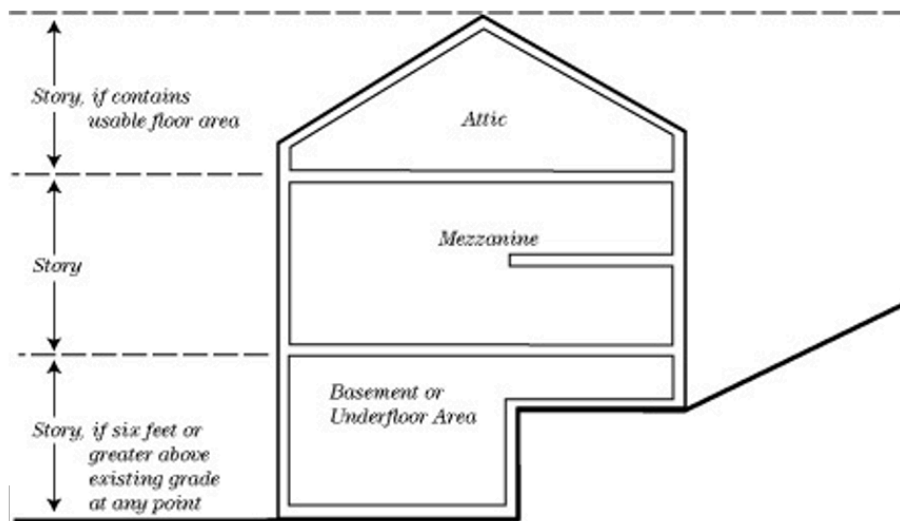
**EXHIBIT E**

(Berkeley Municipal Code section 23.106.060)

## 23.106.060 Story.

A. *Story Defined.* A story means the portion of a building included between the upper surface of any floor and the upper surface of the floor next above. See Figure 23.106-2: Story.

**Figure 23.106-2. STORY**



B. *Topmost Story.* The topmost story of a building is the portion of a building between the floor of the topmost floor and the ceiling or roof above.

C. *Below Grade Spaces.* If the finished floor level directly above the ceiling of a basement, garage structure, cellar, or unused underfloor space is more than 6 feet above existing grade at any point, such basement, cellar, or unused underfloor space is considered a story.

D. *Penthouses.* A penthouse used for purposes other than shelter of mechanical equipment or shelter of vertical shaft openings in the roof is considered a story.

E. *Mezzanines.* When the total floor area of a mezzanine exceeds 33.3 percent of the total floor area in that room, it constitutes an additional story. (Ord. 7787-NS § 2 (Exh. A), 2021)

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**The Berkeley Municipal Code is current through Ordinance 7891-NS, passed December 12, 2023.**

Disclaimer: The City Clerk's Office has the official version of the Berkeley Municipal Code. Users should contact the City Clerk's Office for ordinances passed subsequent to the ordinance cited above.

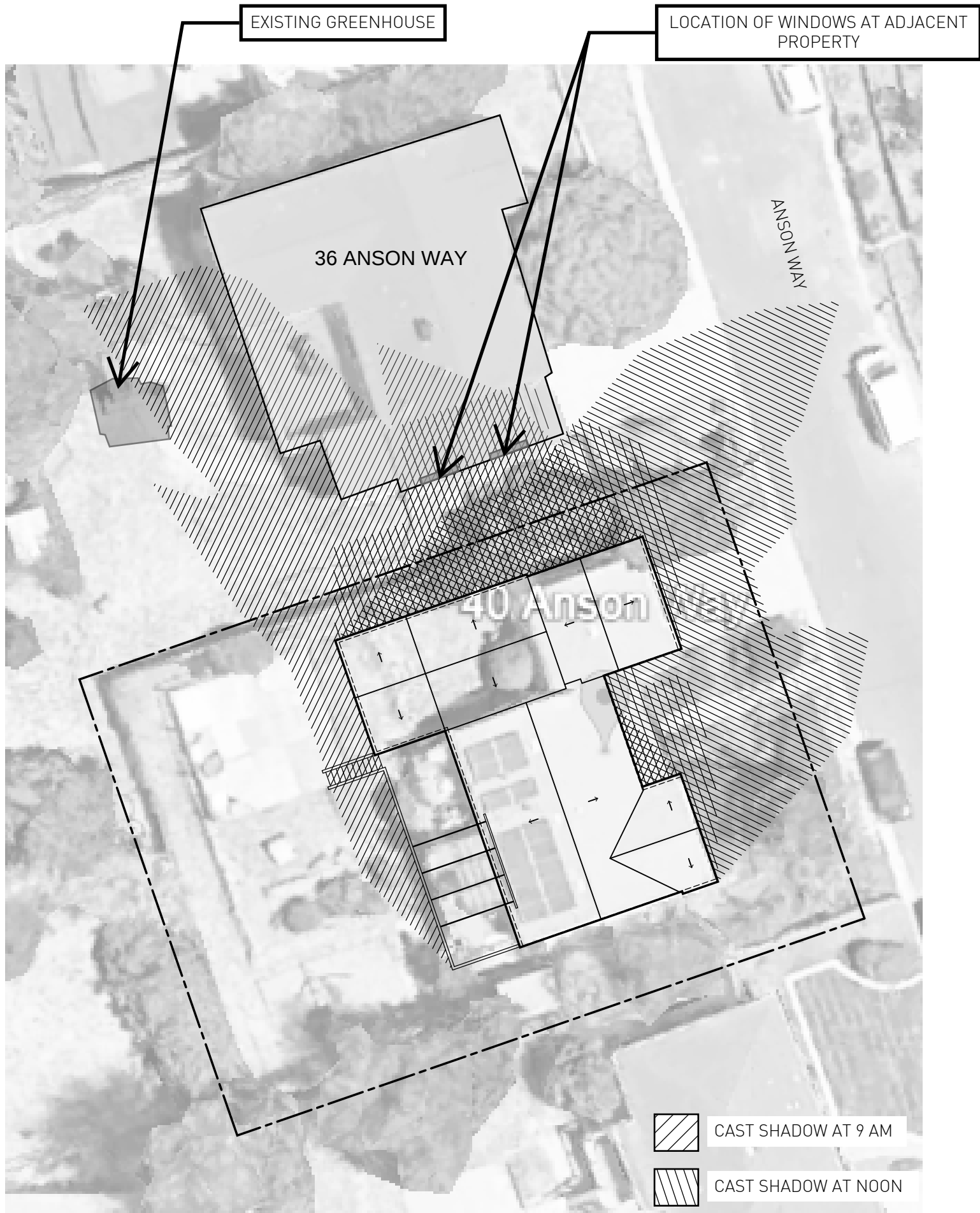
[City Website: www.berkeleyca.gov](http://www.berkeleyca.gov)

[Hosted by Code Publishing Company, A General Code Company.](#)

## **EXHIBIT E**

(Corrected shadow study pointing out affected upper windows)

CAST SHADOWS - WINTER SOLSTICE



February 12, 2024