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August 5, 2013

Ross Property Owners Association
Town of Ross

Re: Advisory Design Review

Dear Members of the Ross Property Owners Association:

I write to respond to your letter regarding "creeping F.A.R." and your suggestion that the advisory design review process be made a mandatory requirement for all Ross remodeling projects and be restructured as a design review board. I appreciate the thoughtfulness behind your letter and wish to respond in kind.

My initial view is that it may not be plausible to turn ADR into a mandatory design review board. Planning commissions are charged with approving or denying projects consistent with the objective standards described in the municipal code. They cannot, by law, make planning decisions based on personal design aesthetics.

If a planning body refuses to approve a project, notwithstanding that the project is consistent with the municipal code, they have act in an "arbitrary and capricious manner," and the resulting decision is subject to being overturned on appeal. When a planning body with authority to approve or deny projects attempts to impose its views of "excellence of design" on a planning application, the ruling may be subject to appeal and legal challenge because objective criteria is not being used.

I personally have some concerns about the "excellence of design" standard. After all, excellence of design is a subjective standard. My excellence of design may not be yours. Some residents may not be able to afford excellence of design depending on what that standard is interpreted to mean. As an attorney who has represented both homeowners/applicants and neighbors objecting to projects, I can tell you that this can be

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an elusive standard fraught with controversy and can subject municipalities to liabilities.

I also have been told that the Pritzker project is one that was approved under the "excellence of design" standard and it is my personal opinion that the home that was constructed looks like a commercial building and does not represent "excellence of design."

Our current ADR is a group of design professionals who make advisory suggestions to applicants to improve the design of a project. They do not perform the function of reviewing variances or, obviously, approving or denying projects. They are advisory and aim only to improve design. We are lucky to have such talented individuals willing to serve in this capacity. They perform a valuable service in helping projects consider alternative design options to meet the goals of the municipal code, but they aim mainly to improve design and, in some cases, overcome potential neighborhood objection to plans.

If we were to have a design review board (or a planning commission, as it is more typically called), it would be inappropriate to have design professionals perform this same function. They would have to limit their review to whether a project meets the requirements of the Municipal Code. They could no longer work to improve the design because that would not be a proper function of a planning commission with legal authority to approve or deny projects. The aim of improving the excellence of a design is appropriate and allowable for a voluntary process but not appropriate for a mandatory process as you propose. We would have to change the system and, in the process, we would lose the value added by this body, of improved design and responding to neighbor opposition by suggesting alternative designs.

In addition, in my opinion, it is not fair to applicants to pay their architect money to come up with a design, and then appear before a mandatory design board, with authority to approve or deny a project, which is comprised of people who think their job is to redesign the project. Even if this was allowed, and legal, I think it would be unfair.

I am also not sure that the current slate of ADR members would agree to serve in this capacity. As you know, the ADR is made up of design professionals and typically one non-design professional who all serve as volunteers. They can miss a meeting if work or other obligations require. Although I think

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they are all dedicated volunteers, requiring them to serve as public officials, would require them to treat the job differently. They could not miss meetings if not convenient. They would have to follow the Brown Act, which is a very challenging and serious requirement of official service. They would have to meet conflict requirements and they would have to file statements concerning their financial investments and income, which many people feel is extraordinarily invasive and has deterred a few people I know from pursuing a town council position. Given that we just had a town council election in which we initially had no residents interested in the position, I am not sure we would have a sufficient number of good, qualified people interested in serving in this capacity.

Also, as a municipal law attorney, I have observed that many municipalities, including some of those you mention, have had occasions where there is conflict or controversy between the town council with ultimate authority for appeals and the planning body. In addition, staff has the difficult job of trying to decide whether to recommend projects in line with the views of the planning body or the town council when their views diverge. Currently we have an ADR system that, to my knowledge, has had no conflict with Town Council. The two bodies have worked very well together and I believe that changing the authority of ADR to a planning commission body could create some of the conflict that exists in other towns.

In addition to the difficulties involving staff working with two separate public bodies, I believe staff time would significantly increase. If we had two bodies, our town planner would not only have to appear at both public meetings (she already does) but she would also have to prepare more formal staff reports for both bodies. I think this would be a big drain on staff time and I don't think our current staff could accommodate this change. This might be something to discuss with Elise Simonean, but I do believe that staff time would have to increase significantly.

You state that design professionals should be "the protector" of the general plan and that such bodies in other communities "protect and preserve" the respective communities' unique visual characteristics and to promote quality design much like ours would be. However, this is the same goals of the Town Council. I am not sure I agree that ADR would do a better job or approach the task differently than do Town Council Members. I do not think design professionals, even if that qualification were

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an appropriate requirement for a planning body, would necessarily have a bias or tendency to limit FAR any more than members of the Town Council. (If anything, design professionals in my experience, are in the business of making design changes, including increases in mass of buildings and residences.)

Your main concern motivating the suggestion appears to be the concern that FAR in Town is increasing. That is a point worthy of discussion and consideration. I think such a discussion, however, should not be coupled with the idea of creating a second planning body within our small town, for the reasons described above.

Turning to your list of projects where FAR has increased, and to get some historical perspective, I asked my father if he recalls whether these changes in FAR were out of line with what he recalls during his 16 years on Council. He states that it is very unusual for a property owner to purchase property and embark on a remodel without requesting additional FAR. He agrees that incremental creeping up of FAR did occur and was approved during his time on Council. He says that he believes his perspective and the perspective of many of the people on Council during the years he served was that our municipal code is very restrictive and more restrictive than most municipalities and that the Town relied a little more on variances than perhaps it should, to grant exceptions to the restrictive code and allow additional FAR notwithstanding the restrictions. He said his general view was that if a project proposed to increase FAR in some small amount, but did not impact the neighbors or appear like too much for the site, he was inclined to grant it. If, on the other hand, the project seemed too big for the site or the proposed remodel and additional FAR would seriously impact other neighbors and was not allowed under the Code, it was not granted.

Peter says he recalls that Charlie Goodman often said that mathematical formulas were no way to analyze a project and tended to share his view of a more balanced approach.

I am not familiar with all of the projects you list, given my limited time on Town Council. Some of the projects I voted on, but others I did not either because they came before my time or I was recused. Some came under the basement and attics ordinance, which were specifically authorized under that provision of the Ross Municipal Code. It would be interesting to go back and look at what ADR recommended with respect to these various projects. In the case of the properties I reviewed, I do

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not recall that to be the case.

Looking through the projects that you cite, I have ruled on the 6/13 Ross Common Holding Company, the 83 Bolinas project, which Council declined to approve and instead continued so that the property owner could come back because the proposed FAR was not acceptable. I was recused on the Raskin/March 55 Winship project. I voted in favor of the Pickart 33 Wellington project, which I believe appropriately involved a variance because the property is pie-shaped. I believe that the variance was absolutely justifiable given the unique shape of the property and the fact that the property has no parking in front of it, and so most of the added FAR went to a garage, which would help the neighbors because the Pickarts could not park their cars in front of their own house and the garage made it less likely cars for the Packarts would park down the street, in front of other neighbors' houses.

I voted against the initial project at 6 Woodside that increased FAR and subsequently was in favor of a revised smaller project with respect to that project. That project was very challenging, but ultimately came under the attics and basement allowances and therefore had an specific exception to FAR requirements.

The Manning project contained a very small incremental FAR and I voted in favor of it. I was exempted on the Reilly 92 Shady Lane project. The Earl 10 Hill project, which I supported, involved a very modest FAR increase. The Hodges 48 Loma Linda project involved an attic and basement project and again, I think the increased FAR was authorized under the Code. I was recused on the Cook 83 Shady Lane project.

I was in favor of the Woodring 53 Poplar project which involved an incremental increase in FAR and added no additional floor space but simply a dormer above a window.

I voted in favor of 15 Woodside, which was a very unique property in that it was the smallest residence in Ross as a one bedroom cottage. This property proposed an initial FAR that was not acceptable and the ultimate approval of a revised plan was to allow a small existing deck to be made into a bedroom. The deck, which at the time had a hot tub on it, was placed where the family would entertain and so it seemed that allowing the owners to cover it, would actually minimize the noise and intrusion of neighbors, who themselves had built very close to the property

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line, as is typical with Woodside properties.

The Chendo property at 30 Wellington was a basement and attic project, and authorized under that specific Code section, although a 54 square foot shed was also allowed to remain on site and did add a small amount of FAR.

The only other project that I personally reviewed was the McLaughlin Burgis 24 Woodside property, which again, was approved under the basement and attic ordinance and you simply cannot compare an FAR increase on basement and attic allowance because it is specifically authorized under the Code.

I think if you set aside the basement and attic projects (Rosenthal, Hodges, Cook, Chendo, Neumann and McLaughlin Burgis) from the rest of the projects, the only property that represents a significant increase in FAR is the Pickart project that I recall authorizing and considering. Again, that property was granted a variance and I believe it was a justified variance.

More recently, there was a project I voted against because I felt it increased the mass of the existing building on the site, albeit within allowable FAR for the site, and allowed an expansion of non-confirming features on the site requiring new variances.

Council member Carla Small has opined, and I have to agree, that if you buy a home in Ross and you seek to remodel it and are forced to comply with set-backs, notwithstanding that your property is non-conforming, than we are devaluing residents' properties because people will not buy such homes in Ross.

I would also point out that most of the people I have spoken with who have gone through the design review process do not state that they believe "more review" is required to improve the process.


I believe that adding an additional governmental body in such a small town is not advisable and to the extent the real concern is "creeping up FAR" and given how many of these projects involve attics and basement allowances, the Ross Property Owners Association may want to divorce the discussion of a planning body from its concern about creeping up FAR and focus its attention mainly on creeping up FAR as a result of the basement and attics ordinance. I do have some concerns about that ordinance, as it has resulted in the approval at least one project that I would

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not have necessarily approved if the Code did not provide for it. I do, however, feel that a mathematical approach to zoning is not warranted.

Since joining the Town Council, I have come to really appreciate the work and the dedication of the RPOA. I value your organization's input and commitment to the esthetic beauty of our Town. You act as valuable stewards of our Town and I do not mean to dismiss your thoughtful concerns regarding the creation of a planning body and FAR. I do want to respond, as you requested, with my thoughts, but I welcome your response and look forward to a dialogue with you and your members on this important issue.

Very truly yours,

A handwritten signature in black ink, appearing to read "Elizabeth A. Brekhuis". The signature is written in a cursive style with a large initial "E".

Elizabeth A. Brekhuis