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Brisbane, 18 December 2013

Council of the City of Brisbane
50 Park Place
Brisbane, CA
94005

Comm. Dev. Dept. Brisbane

DP-1-13 appeal

Dear City of Brisbane Councilmembers

This letter pertains to the appeal process underway, on the decision by the planning commission to approve a design permit, DP-1-13, for the property located at 8 Thomas.

On 25 November 2013, Councilmember Terry O'Connell voiced her desire to appeal the decision taken by the planning commission on 14 November 2013. The reasons cited are:

1. *"concerns regarding the application of Brisbane Ridgeline ordinance 17.12.040.L.2 and how it applies and how it is measured"*
2. *"concerns about the FAR in regards to the open courtyard"*
3. *"[hearing] that there were some procedural inconsistenc[ies] with the inclusion to the record of public comments"*

Councilmember Raymond Miller co-signed the appeal form.

We would like to offer the following for consideration by City Council as this question is being reviewed.

On reason #1

The planning commission's purview includes the process by which any project situated on a ridgeline¹ must be subjected to a review where *"the planning commission shall find that the building's placement, height, bulk and landscaping will preserve those public views of the San Bruno Mountain State and County Park as seen from the community park and from the Bay Trail along the Brisbane Lagoon and Sierra Point shorelines that are found to be of community-wide value."*²

The BMC does not offer a **definition** of the public views that are of community-wide value, nor does it offer a guideline on how the planning commission is to find such views. More notably, the BMC does not offer a **test** by which the preservation (or lack thereof) of those views is to be found.

¹ as defined in BMC 17.02.695

² BMC 17.12.040.L.2. (Emphasis added here, not in the BMC).

The planning commission is thus left with two subjective judgment calls to make: of all the views from the community park, the bay trail along the Brisbane lagoon and Sierra Point shorelines:

- which are of community-wide value
- how to evaluate whether those views are preserved or spoiled by a particular project.

During the meeting, Senior Planner Kenneth Johnson presented some context on the applicable BMC provisions governing the issue. One element of the context is important: the application of BMC 17.12.040.L.2 is not based on an absolute threshold: "... *the ordinance does not establish a bright-line threshold as to what is permitted or not permitted on those parcels.*"³. In other words, there is not an objective, documented line which, if crossed, would constitute an automated finding of violation of BMC 17.12.040.L.2.

By contrast, Ms. Grossman and Mr. Hoen wrote in the conclusion of their 14 November letter that "*the images clearly show that the present design does not preserve views [of] ... the San Bruno Mountain State and County park*". We find, upon review of their letter, they make no case to demonstrate the community-wide value of the views they present. It appears to us that their conclusion is predicated on an "absolute threshold" interpretation of the so-called ridgeline ordinance, such interpretation being at odds with City staff and, in our opinion, common sense.

It is simply factual that should the proposed project's approval by the planning commission be upheld by City Council, the erected structure would, from a fraction of the vistas listed in BMC 17.12.040.L.2, be impeding some views of some portions the SBMSCP. We contend that the impeded views documented by Ms. Grossman and Mr. Hoen⁴ are not pervasive enough to be considered of community-wide value. In the views listed as C through F, the impedance consists of incremental obstruction to those views already affected by the pre-existing apartment building to the west of 8 Thomas, as well as power transmission towers and telecommunications transmission towers seen in the distance. In our opinion, these do not constitute "public views of community-wide value".

Further, we contend that the vantage points from which those views were taken offer *spectacular* views of the SBMSCP, views which remain un-affected by the proposed project, and go un-documented in the Grossman-Hoen letter. To literally zoom-in only those obstructed views is, in our opinion, again literally presenting a partial picture of what the true impact of the proposed project will be. It would no more be acceptable to present only an un-affected view than it is to only show the obstructed views. We contend that only a total view can offer a sense of relative

³ City of Brisbane; Planning Commission Agenda Report for the meeting of 11/14/2013, Ken Johnson, Senior Planner, via John A. Swiecki, Community Development Director, page 2, last paragraph.

⁴ And also documented in our letter of 14 November 2013.

impact of the obstructed views vis-à-vis the un-affected views. Let us again consider that this evaluation is not a so-called litmus test and that the subjectivity of it has been placed in the purview of the planning commission.

We contend that a view which approximates the total view available to a community member enjoying the lagoon trail⁵ is a better starting point for the subjective evaluation of the impact of the proposed project at 8 Thomas. In such panoramic views, we contend that the community-wide valuable views are preserved, in that the quasi-totality of the currently un-obstructed views of SBMSCP remain un-obstructed, and that their relative importance in the naked eye field of view simply dwarfs the incremental obstruction of SBMSCP that the projected building would produce. And though there is no definition of the public views of community-wide value, and no test to gauge the preservation of said views, we have never seen community members aggregate on the lagoon trail with a 12x telescope trained on the site of 8 Thomas!

The imperative to proceed with caution

The City attorney, along with the members of the planning commission, have discussed the need to balance the property rights of the applicant with the community-wide interest as expressed in BMC 17.12.040.L.2.

We must again stress that since the “ridgeline ordinance” does not offer a definition of “community-wide value”, nor does it offer a test to establish the preservation (or lack thereof) of the views, any project denial could be legally challenged by the applicant, and we contend, with cause. The applicant’s property rights are protected in no less than the American Constitution, and the state’s taking of any rights cannot come without clear, objectively established cause. Our city should not create a situation tantamount to a regulatory taking.

City council should consider that:

- The applicant owns the lot.
- The applicant’s lot was declared “legally buildable” in 1970 by the BMC.
- The applicant’s project respects all applicable requirements: no variance is being sought in connection with the proposed structure.
- The allowable lot coverage, height, setbacks, etc... are objectively documented and measurable, and the proposed project respects them all.
- The applicant is not proposing a structure at the limit of the allowable height envelope for the zoning district; it stands at ~20ft, well short of the allowable maximum of 30ft.
- The currently-proposed project is more modest than the preceding, approved project on the same site. A legally-significant precedent for the same lot in the same applicable jurisdiction thus exists, one which was approved by City.

⁵ We offer such views in our letter from 14 November, in appendix 1.

- BMC 17.12.040.L.2 is found to be vague and difficult to evaluate by the city's own planning commission members. In particular, Commissioner Munir's comments on the matter are part of the public record via the recordings of the planning commission available on the city's website.
- It could be argued that **any** structure built on the site would block views of SBMSCP, no matter how minimal the structure's height would be (as allowed by applicable standards).
- City Staff's report recommended the conditional approval of the project. This includes the City Engineer as well as Senior Planner Johnson.
- The planning commission unanimously approved the project.

To be clear: we contend that the planning commission's approval of the project should stand primarily because the public views of community-wide interest **are preserved** and that it is the right thing to do, not because there could be a legal challenge should the decision be made to overturn the planning commission's finding.

On reason #2

During the planning commission meeting of 14 November 2013, Brisbane Resident Michele Salmon did publicly ask City staff whether the "atrium" located at the center of the proposed structure should be considered as floor area counting toward the calculation of the lot coverage. Senior Planner Johnson answered that since the "atrium" is an un-covered part of the project, it does not count toward the calculation of lot coverage. We believe that Senior Planner Johnson's answer is based on BMC 17.02.495 - Lot coverage, which reads:

*"Lot coverage" means that percentage of a lot that is covered or occupied by structures. Lot coverage includes any finished surface, such as a slab or deck, **which is covered by a roof** or other solid covering with at least seven (7) feet of clearance, other than an eave or overhang, and includes also cantilevered bays and other enclosed architectural projections which contain floor or seating area."*

Note that the emphasis is ours.

Absent evidence that City Staff's answer was incorrect as per Brisbane Municipal Code, we contend that this issue is orthogonal to the current question at hand, and should be dismissed. If an argument is to be made that un-covered areas *should* be considered when calculating lot coverage, the argument should be brought up as a code modification. Such a modification being only *potential*, and therefore *in the future*, it should not be considered for this project. Only currently applicable BMC requirements should be applied to this project. This is a matter of logic and of legal principle.

On reason #3

Councilmember O'Connel is making mention of inconsistencies on the inclusion of public comments in the record of the planning commission hearing of 25 November 2013. We presume this may pertain to letters from the public which may only have been read in private by the planning commission members, and not read aloud for inclusion into the public record. If this is the case, then we offer that the planning commissioners had awareness of those letters when they took their decision, and that remedy should be to read these letters into the record. Note that one of these letters not read into the public record came from us.

Considering this issue in its entirety, we contend that the decision of the planning commission should stand.

It should stand not based on procedural context, or some possibility, however real, that another decision could be legally challenged; rather, we contend that a member of our community has patiently waited long enough, at great cost of time and treasure, to make his home, indeed his extended family's home, in our city. This man has engaged a professional architect and other professionals to design a home suitable to his needs as well as all community needs expressed in the applicable sections of the Brisbane Municipal Code. This man has made a choice to join us; this man has a name: Manh Quach. It is the right thing to do to welcome the Quach family into our city. They view our City as a desirable place to live. This, it seems, is a view of community-wide interest worth preserving!

With kind regards,

Luc Bouchard
Brisbane Resident

Brisbane, 14 November 2013.

To the members of the Brisbane Planning Commission

Re: 8 Thomas Avenue; Design Permit DP-1-13

The endeavor to evaluate the visual impact of a construction project on public views is inherently a subjective matter. In the case at hand, the applicant's *legal and buildable* lot is situated on a ridge line as per BMC_section 17.12.040.L. This does not violate anything; it merely *triggers* the application of a portion of the bylaws that govern our City. Namely: "the planning commission shall find that the building's placement, height, bulk and landscaping **will preserve those public views of the San Bruno Mountain State and County Park as seen from the community park and from the Bay Trail along the Brisbane Lagoon and Sierra Point shorelines that are found to be of community-wide value.**" *Emphasis not in BMC code.*

One topic of considerable discussion during the planning commission's meeting of 10 October 2013 pertains to the photographic representation of the visual impact of the proposed structure on those public views. Senior Planner Johnson, as well as Brisbane residents Grossman and Hoen offered photographs taken at various points alongside the lagoon trail, in an effort to share the visual impact of the proposed structure at 8 Thomas street.

Commissioner Cuningham did note that the photographs as presented did not do justice to the visual impact of the proposed structure that would be experienced by a human standing on the trail, observing the view with *the naked eye*. She herself took some photographs, which I understand will be made available at some point.

I believe that all parties who provided photographs had a common intent: to support the discussion inherent to the process of reaching a decision in the matter at hand.

I would like to offer, below, the method I used to photographically represent the visual impact of the proposed structure. I would contend that any photograph is by nature a mere facsimile of the reality of what it means to look at the awesome sight that is San Bruno Mountain when viewed from across the lagoon or the shoreline trails, but I think that by following the following guidelines, one can approach a *fair* and *representative* photographic record of the in situ experience.

- The total Field of View for the human naked eye(s) (FOV) affords simultaneous visual perception in an area of about $160^{\circ} \times 175^{\circ}$.⁶ The stereoscopic portion of the field of view where both eyes are seeing is about 90° .
- By using a DSLR camera, adjusted the magnification factor of the lens such that an object viewed by the naked eye appeared to be the same size as when viewed from the DSLR's optical view finder.
- Understanding that a single photograph cannot capture the field of view of 175° , multiple photographs were taken to cover at least 175° in "width". These multiple snapshots were then be "stitched" together to approach the panoramic "single view" experience of the naked eye.
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This approach offers an important aspect that, respectfully, was lacking in the photographic documents offered during the meeting of 10 October, namely a relative sense of scale of what proportion of the *total* view the proposed project of 8 Thomas has an impact on.

The Google Earth included below illustrates the location of a few points from which I took photographs. A tight group of points, located on the property at 8 Thomas, mark the location of each of the story poles erected by the applicant as per BMC 17.12.040.L.1.

Pt 1 is the point at which any portion of the proposed structure comes into view when traveling along the lagoon trail, on the west side of the road, in a southerly direction. In other words, north of that point, the structure can simply not be seen from the lagoon trail.

Pts 2 through 5 indicate where various pictures were taken, with the proposed structure visible to the naked eye.

Pts 7 through 9 indicate points from which pictures were taken along the shoreline.

Points AAA and BBB mark the southern and northern points, respectively, between which the proposed structure's outline would be in front of San Bruno Mountain State and County park. Outside of those two points, the proposed structure does not block the park.

For each one of the points 1 through 9, I have produced a composite picture assembled from the cylindrical projection of all the pictures taken from the same point. This offers a wide field of view approximating the maximum naked eye field of view of a human being looking towards the proposed structure.

⁶ Wandell, B. (1995). "Foundations of Vision." Sinauer, Sunderland, MA as cited in Neurobiology of Attention. (2005). Eds. Laurent Itti, Geraint Rees, and John K., Tsotos. Chapter 102, Elder, J.H. et al. Elsevier, Inc.

These composite pictures are best experienced on a computer with the ability to zoom in/out on a large screen. They each offer a good view of what portion of the naked eye field of view is occupied by the proposed structure *in relation* to the other visual elements such as San Bruno Mountain State and County park.

These photographs are available for anyone to see at:

<https://www.dropbox.com/sh/u8kue1d013kfy6v/0R0VuQfFlr>

Note that it is best to download the pictures and then view them with a photo preview program such as preview (mac OS) or Windows Photo Viewer (Windows)

The test to be applied by the Planning Commission is a subjective one: “the planning commission shall find that the building’s placement, height, bulk and landscaping will preserve those public views of the San Bruno Mountain State and County Park as seen from the community park and from the Bay Trail along the Brisbane Lagoon and Sierra Point shorelines that are found to be of community-wide value”.

From the community park, the views of the mountain are un-affected by the proposed structure as it is not visible.

From the shoreline, the views presented by photographs taken at points 7,8 and 9 show that the new proposed structure would not obstruct San Bruno Mountain significantly more than the apartment building located to the west of the site. Also, the photographs show that when taken in total, with particular respect paid to the naked eye field of view, there is a great portion of the total view occupied by San Bruno mountain with no encumbrance caused by the proposed structure. In other words, the visual impact is minor.

From the Bay Trail along the Brisbane Lagoon, we can see views where the proposed structure would partially obstruct some part of the naked eye view of San Bruno Mountain; it must be noted that the obstruction is incremental to the obstruction from the apartment building located to the west of the proposed structure, and that in relation to the total unencumbered views of San Bruno mountain, the total obstruction is minimal.

In the end, this question is a matter of subjectivity; by any other measure than an absolute interdiction of any obstruction of any view of San Bruno mountain, the subjective evaluation of the planning commission *must* take into account the portion of the naked eye field of view NOT affected at all by the proposed structure. This unaffected portion is far more visually present in the total view than any structure built within the applicable allowable maxima of height, width, coverage, etc.. ever could.

I respectfully submit that the planning commission has all the information it needs to render a decision, and offer but one resident's opinion in the matter: the applicant's project should be conditionally approved to go forward pursuant to the recommendation of City Staff.

With kind regards,

Luc Bouchard
Brisbane resident

