

**MINUTES OF MEETING**  
**WEST COUNTY BOARD OF ZONING ADJUSTMENTS**  
**JULY 23, 2008**  
**(APPROVED AUGUST 27, 2008)**

The meeting was held at the hour of 1:30 p.m. in the Alameda County Building, 224 West Winton Avenue, Hayward, California.

**REGULAR MEETING: 1:30 p.m.**

**MEMBERS PRESENT:** Chair; Dawn Clark-Montenegro; Vice Chair; Kathy Gil; Members; Frank Peixoto, Jewell Spalding and Ineda Adesanya..

**MEMBERS EXCUSED:** None.

**OTHERS PRESENT:** Phil Sawrey-Kubicek, Senior Planner; County Counsel; Andrea Weddle; Recording Secretary, Yvonne Bea Grundy.

There were approximately 7 people in the audience.

**CALL TO ORDER:** The meeting was called to order by the Chair at 1:35 p.m.

**ANNOUNCEMENTS BY THE CHAIR:** The Chair made no special announcements.

**OPEN FORUM:** Open forum is provided for any members of the public wishing to speak on an item not listed on the agenda. Each speaker is limited to three (3) minutes.

No one requested to be heard under open forum.

**CONSENT CALENDAR:**

1. **RICHARD GOLD, CONDITIONAL USE PERMIT, C-8640** – Application to allow continued operation of a “B” Type Service Station, in an ACBD – BDI (Ashland and Cherryland Business District Specific Plan- Business Industrial) District, located at 594 East Lewelling Boulevard, north side, terminus, north of Boston Road, unincorporated San Lorenzo area of Alameda County, designated Assessor’s Parcel Number: 413-0027-058-02. (Continued from September 26, October 24, November 14 and December 5, 2007; January 9, February 27, April 23, July 9, 2008; to be continued to August 27, 2008. **Staff Planner: Pat Anekayuwat.**
2. **DHARAM SALWAN, VARIANCE, V-12098** - Application to allow expansion of a non-conforming parcel (reduced parking & excess building height) with the addition of one dwelling unit, in an R-S-D-20 (Suburban Residence, 2,000 square foot, Minimum Building Site Area per Dwelling Unit) District, located at 15814 Marcella Street, unincorporated Ashland area of Alameda County, designated Assessor’s Parcel Number: 080-0045-004-15. (Continued from June 25, 2008; to be continued to August 27, 2008). **Staff Planner: Donna Vingo.**
3. **BRIAN KHO, VARIANCE, V-12112** - Application to allow construction of an attached garage creating an average height of 32 feet where 25 feet is the maximum allowed, in an R-1 (Single Family Residence) District, located at

14625 Midland Road, west side approximately, 420 feet north of Altamont Road, unincorporated Hillcrest Knolls area of Alameda County, designated Assessor's Parcel Number: 079-0004-011-02. (Continued from June 11 and July 23, 2008; to be continued to August 27, 2008). **Staff Planner: Jeff Bonekemper.**

The Chair asked staff if the Applicant for V-12112 & 12113 was attempting to modify the applications to eliminate the necessity of a variance. Staff told the Board it was more likely that a lesser variance would be appropriate. Mr. Kho met with planning staff this week and submitted revised plans. A final determination will be made prior to the next meeting.

Member Spalding motioned to accept the Consent Calendar as submitted. Member Adesanya seconded the motion. Motion carried 5/0.

#### REGULAR CALENDAR

1. **XUAN DINH, CONDITIONAL USE PERMIT, C-8740** - Application to allow continued operation of an automotive repair facility in a C-1 (Retail Business) District, located at 957 West A Street, north side, approximately 108 feet, west of Hesperian Boulevard, unincorporated Cherryland area of Alameda County, designated Assessor's Parcel Number: 432-0020-026-02. (Continued from June 25, 2008). **Staff Planner: Richard Tarbell.**

Staff recommended approval of the application. Use Permit, C-8740 was reviewed by the BZA on June 25, 2008. The application was continued to obtain written comments from the City of Hayward. Staff received a written response on July 1, 2008. The City of Hayward had no comment. Member Spalding asked if the City of Hayward was aware that the permit would be granted for a period of 5 years. Staff confirmed the permit length was included in the referral. Public testimony was opened.

The Representative for the Applicant, Mr. Son Le was present. Mr. Le requested the permit length be extended to a period of 10 years, as opposed to 5 years. The Chair asked Mr. Le the following:

- What is the name of the property owner
- Are there any improvements and/or upgrades slated for the property
- Is Mr. Le aware that the property is within a re-development zone where surrounding businesses have already undergone improvement

Mr. Le said he was not the property owner. Mr. Xuan Dinh, the Applicant / Property owner was present at the June 25, 2008 Hearing. He would like a 10 year permit because he plans to retire in a few years. It will be easier to lease the property with a long term, use permit. At the present time the owner has no plans to improve the property. Public testimony was closed.

Member Peixoto was not in favor of the Applicant's request for a 10 year permit length.

Member Peixoto motioned to uphold the staff recommendation of approval with the following modification. Condition #4, the 1<sup>st</sup> sentence: Applicant shall not resist the annexation into the city limit, of City of Hayward; shall be omitted. Member Spalding asked for a modification to the motion. Condition #6 shall be modified to also require that the property be maintained in a graffiti free manner. Member Peixoto said the modification was more in keeping with Condition #9, and recommended the modification, as such.

The motion to approve Conditional Use Permit, C-8740 was carried 4/0/1. Member Adesanya abstained,

and did not participate in the vote.

2. **MIKE GUTIERRES, VARIANCE, V-12111** - Application to allow a 2 - story accessory building with a height of 31 feet and 4 inches where 1 – story with a height of 15 feet and zero inches is the maximum permitted, in an R-1-L-B-E (Single Family Residence, Limited Agricultural, 5 Acre, Minimum Building Site Area) District, located at 3914 Picea Court, northwest side at the terminus west of Oakes Drive, unincorporated Fairview area of Alameda County, designated Assessor's Parcel Number: 425-0500-001-00. (Continued from June 25, 2008).  
**Staff Planner: Andy Young.**

Variance, V-12111 was previously considered by the Board on June 25, 2008. The application was continued to allow Board Members and staff to review supplemental materials submitted on behalf of the Applicant. Staff recommended denial of the application. Representatives Russ Kansas and his supervisor, Mr. Ron Torres from Alameda County Environmental Health were also present to testify. Environmental Health also recommended denial. Public testimony was opened.

Member Spalding asked if Environmental Health had been in communication with the Applicant's septic engineer. Ron Kansas confirmed he spoke with the engineer representing the Applicant, and received a new septic proposal. Environmental Health staff had yet to prepare a written statement in response to Mr. Norm Hantzsche. However Mr. Kansas was prepared to give a presentation. Environmental Health was not in favor of approval. The critical issue is the roadway, directly over the septic system leach field. The County Ordinance requires a 10 foot setback from a leach field. Driving on top of a field is not permitted. The original proposal the Applicant submitted, was denied. The proposed livable area of the accessory structure was more than 30% of the existing home. The proposal did not meet several additional design criteria. The Applicant appealed the decision to the Director of Public Works. The denial was upheld in October 2007. In February of 2008, the Applicant went before a Land Use Review Panel. The panel is comprised of 3 experts that do not work for the County. Testimony was presented by the Applicant's engineer, and Environmental Health engineers. The outcome of the hearing was inconclusive. A few weeks prior to the BZA Hearing, Mr. Kansas received a message from the engineer representing the Applicant. Confirming the habitable living area of the accessory structure had been reduced to less than 30%. The reduced area would result in different requirements. However the critical issue of vehicle traffic crossing the roadway will remain. Vehicular traffic over a leach field, does not meet County Code. The 8 car garage is also an expansion of the original submission. Mr. Kansas said approval of an environmental health permit was unlikely. The Board asked Public Health staff the following questions:

- Is there a diagram of the existing leach field
- Is there technical data to verify the leach field depth required to prevent further compaction

Staff distributed a diagram of the existing leach field. Mr. Kansas said he reviewed engineering reports studies, analysis and opinions submitted by the Applicant. The material contends that the leach field will not be impacted by further vehicle traffic. The County requirement is that traffic be 10 feet from a leach field. Mr. Kansas further explained that the County Code is written to cover a variety of situations. In some situations additional traffic may not affect a field. In another situation, there may be an impact. It is difficult to make a judgment. That supports adherence to County Code. If the variance application is approved by the BZA, all evidence submitted will be reviewed. An official recommendation will then be made. The Applicant will then go through the Public Works process. Although the application has been modified, and reduced. That does not significantly change the environmental health requirements. The concept of driving over a leach field is that, the more soil is compacted there is a reduction of aeration and

aerobic activity. This in turn reduces micro biological activity in the sewage waste water, which is necessary to facilitate decomposition. The process allows the water to become cleaner. Increased compaction can reduce this process, and damage the leach field. There is an on-going debate among scientist as to what is the cut off depth in various soil types, to prevent compaction. The process of driving over a leach field may be safe in certain situations, and not others. Public testimony was opened.

The Consultant Planner representing the Applicant, Ms. Meunier was present. She acknowledged progress had occurred concerning the application process. She reviewed submitted materials which included the draft Conditions of Approval she developed. Further information was also included to support her belief that the project fell within the CEQA, Class #3 (new construction or conversion of small structures). In addition to an acknowledgement the septic system need not be resolved by the BZA. The BZA will make a determination regarding the variance. Leach field issues will be decided in a forum with Public Works, Environmental Health. Ms. Meunier did not want the Applicant's opportunity to work through the variables of soil conditions etc. preempted at this stage of the process, by denial of the variance. The Applicant can pursue that process and/or any appeal consideration, directly with Public Works. In response to the issue raised by Planning, as to the establishment the garage will be subordinate to the home. Ms. Meunier referenced her submitted letter. "In the definition of subordination, the Zoning Ordinance contains no language, based on size". The only reason a variance is necessary is as a result of property slope. If not for that slope, the proposal would not require planning review. The size would be acceptable. The only considerations would be setback, and coverage requirements. Her opinion was that the question of subordination is a consideration of, is the proposed use reasonable for a single family home. Given the lot size, character, and scale of structures in the surrounding area, the accessory structure is in keeping with neighboring properties. The project has also been further reduced in size since its inception. Ms. Meunier asked the Board to find the project categorically exempt from CEQA under Category #3 (new construction or conversion of small structures), subject to Conditions of Approval submitted by Ms. Meunier, and those contained in the staff report. Ms. Meunier then distributed photographs. Board questions for Ms. Meunier were as follows:

- Has the discrepancy regarding the actual size vs. the footprint of the project been resolved
- Is the Applicant willing to record a deed restriction, limiting the property to 1 dwelling unit
- Is the proposed accessory structure larger than the existing home
- Is the volume of the accessory structure used to compensate for slope
- Would a variance be necessary if the lot were level, as opposed to being sloped
- Is the present slope greater than 30%
- Does the Applicant agree with the planning staff height estimate, from ground to roof of 50'
- What percentage of the overall proposal is the accessory structure
- Has the Applicant prepared photo simulations of the project
- What is the estimated distance of the proposed structure to the existing driveway
- Would the proposed structure be visible from Oakes Drive or Durham Way
- Does the property border a H.A.R.D recreational trail, and a Riparian Canyon

Ms. Meunier said based on her observation during site visits. The existing home is larger than the proposed accessory structure. Member Spalding responded to the reference in Ms. Meunier Draft Conditions, stating the accessory structure was larger. Ms. Meunier said the reference to size illustrated that multiple small accessory structures would be allowed on the site. In contrast to placing multiple small structures on the slope, Mr. Gutierrez would combine a garage and an accessory structure into one larger, single structure. This would reduce costs and slope disruption. Mr. Gutierrez would also be willing to accept a condition preventing additional accessory structures. Member Spalding asked Ms. Meunier to provide additional information, confirming the proposed accessory structure was not larger than the residence. Ms. Meunier referred to plans to verify the residence was larger. Member Spalding

said if that is the case. The word “larger” may not be necessary. A factual error in the staff report may need correction. To reflect the square footage of the accessory structure, as opposed to footprint. Ms. Meunier said that if the size of the accessory structure was to be criteria for consideration. She requested any notation be codified. If the lot were flat, there would be no discretionary review by the Planning Department required, in order for Mr. Guittiers to build his project. Member Spalding pointed out that the variance was as a result of the 30% slope. The BZA was only considering height due to the fact the property has a slope. Ms. Meunier was in agreement with staff that from the down slope portion to the roof ridge is approximately 50 feet. The structure itself is 42 ½ feet. There are 2 retaining walls below. She then distributed elevations of the proposed structure. The footprint of the accessory structure will be stepped. Ms. Meunier was unsure of the specific names of the roads, behind the property. Mr. Guittieres has parked his work vehicles at the rear of the site, for years. There has never been an issue. There is extensive tree cover at the bottom of the slope. Member Spalding added that she lived in the same neighborhood. She confirmed the property adjoined the H.A.R.D trail, and a riparian canyon. The slope is very steep. The existing home is not very visible from Oakes Drive or Durham Way.

The Applicant, Mr. Guttieres was present. Board questions for the Applicant were as follows:

- Is it possible to access the proposed garage without driving over the leach field
- Would Mr. Guttieres accept a Condition requiring full compliance with Environmental Health
- What is the status of the PD Application submitted for the property

Mr. Guttieres explained that he obtained approval from Environmental Health in 1990 to install the leech fields. The dirt roadway with a leach line was clearly marked on the plans. The dirt roadway was always there. Mr. Guttieres submitted a copy of the Environmental Health approval, which documented they were aware of the dirt road. Mr. Guttieres purchased the property in 1986. There has been vehicular traffic over the roadway and leach field for 19 years. No problems have arisen. Although septic was a separate Environmental Health issue. He would accept a Condition of Approval there be compliance with Environmental Health. Mr. Guttieres said at the February, Land Use Review Hearing. Staff seemed to be willing to accept the project if he removed the shower stall on the plans. Russ Hanson then raised the point that Planning considered the project a dwelling unit. After the point was raised, the panel seemed to change their position. An application for a PD Zone was submitted per the recommendation of the former project planner. They said it would, prevent the misconception the space would be used a second unit. Mr. Guttieres realized the project had gotten misdirected on the wrong path. He withdrew the PD application.

Mr. Norm Hantzsche the septic consultant for Mr. Guttieres confirmed he had talked with Russ Kansas of Environmental Health. He did submit revised plans. The structure is now less than 30% of the existing residence. The project will comply with County Ordinance standards for a minimal septic system. A letter accompanied the revised plans which discussed points raised at the prior meeting, and compaction. The road was in existence, prior to the installation of the septic system. The Ordinance requirement of a 10 foot setback separating a leach field from a roadway, and restricted traffic was in effect at issuance in 1991. A decision was made by Environmental Health that the installation was appropriate for the use. The line was buried deep underground. Compaction deteriorates rapidly under the ground surface. It is believed that at a level of 2 feet. There is no impact. Companies that make compaction equipment, claim that 30 inches is the point at which there is no compaction. Mr. Hantzsche showed excavation photographs of system. Mr. Guittieres has driven his vehicles over the road for 19 years, and the system has not been affected. The established history supports the fact. The proposal will not impact the leach field. Member Spalding asked if additional landscaping could be added near the foundation. Mr. Hantzsche said plants would not affect the leach field, if they are kept at a distance to prevent the roots from encroaching. The septic system is 7 feet deep. A distance of 6 of 7 feet should be sufficient. The

foundation is not adjacent to the leach field, and is out of the area of influence. Water would move laterally at the site. It is actually beneficial for plants when water percolates upward.

Environmental Health staff returned to testify. Mr. Kansas acknowledged the dirt road was there in 1991. The present staff did not work for the County, at that time. The persons on staff probably did make what they thought was best at the time, considering the lot and circumstances. There is no way to determine how much traffic has gone over the road. However the garage is now located just off the street. It would be reasonable to concur that sometimes cars were parked in the garage, other times on the dirt road. Present staff is concerned that the addition of an 8 car garage will increase traffic over the leach field. To access the proposed garage you must drive over the leach field. That was not the case with the present garage. Member Spalding asked if the depth of the leach field would mitigate any concerns of increased traffic. Mr. Kansas responded that the County Environmental Health Code does not specify acceptable corresponding depths and/or soil conditions, or reports. To determine what would allow you to drive over a leach field. Member Spalding noted that a Code update might be in order. Mr. Kansas said update of the County Code to that specificity, would require extensive academic research, and site testing over a period of years. Member Spalding suggested using Santa Cruz County as an example for language and practices regarding septic systems. As they have a higher incidence of septic use. Mr. Hantzsche then showed additional photographs of the septic system.

Member Adesanya asked Environmental Health staff if septic was governed by Policy, or by Code. Also if there had been updates since the 1990's. Staff confirmed there is a County Health Code. It has been updated since the 1990's. The former Code did not specifically state you could not drive over a leach field. A 10 foot setback was required between leach lines, buildings, and other structures. At that time, the language did not include driveways. The current Code updated in 2007 states, placing a driveway over a leach field is not permitted. Public testimony was closed.

Member Peixoto believed the variance request was strictly for height, as a result of property slope. It did not appear there would be further compaction on the driveway. Since buildings would not be placed on top of the driveway. The classic cars will be parked most of the time, while undergoing restoration. Environmental Health would make the determination regarding septic. Based on the photographs, the leach field was sufficiently buried. There should not be additional affects. The Applicant did not have many options available. The front area of the parcel did not offer sufficient space to expand.

Member Spalding agreed the variance was restricted to height. If not for the slope of the parcel, a variance would not be necessary. If the same project were undertaken on a flat lot, permits would not be required. The slope is such. There are no alternate locations on the site. The Applicant will work with Environmental Health regarding septic issues. The Applicant will comply with Conditions of Approval. He has a vested interest in protecting the leach field. Member Spalding did not believe granting the variance would provide special privilege.

Member Adesanya asked staff how the Board should address the issue of the leach field. Counsel said the application can be conditioned as such that, the appropriate Regulatory Body and Agency will take responsibility for making a determination and setting appropriate Conditions. For any issues related to such entities. The Applicant would then comply with the Conditions set by Environmental Health. The BZA is responsible for making the required findings for the variance. Member Adesanya also asked the following:

- Does the Applicant plan to make improvements to the road
- What if any, are the Planning Department's requirements for the road

Staff was not aware of any improvements planned for the existing roadway. The Zoning Ordinance

requires that the road must be an all-weather surface. The Fire Department must also find the surface acceptable for emergency vehicles.

The Chair was concerned that the requested height was 50 feet. The variance request was twice the 15 feet, the Zoning Ordinance allowed. She asked staff the following:

- Is there a provision that prevents requests, which exceed a certain percentage of the Ordinance
- Are there any circumstances under which construction can occur over a leach field
- Was the estimated height of the structure determined by averaging
- What is the volume of the structure
- Is there an established ratio limit when a use is subordinate

Staff explained there was no provision that limited a variance request. However findings must be made to support, or deny a variance request. Ms. Meunier was correct. There is no defined limit regarding volume and subordinate use. The height of the proposed structure was obtained by averaging. Member Spalding again pointed out that although the Environmental Health Code had been updated in 2007. The Applicant is the last person who wants the septic system to fail. Public testimony was opened again to gain further clarification from the Applicant. Board Members asked:

- Can the proposed ceiling height of the project be lowered
- Can the Applicant work on vehicles, other than his own
- Would the neighbors see into the accessory structure
- Can the applicant access the proposed garage without using the driveway
- Would the property owner be amenable to adding landscaping
- Are the plant types shown on the landscaping plan submitted
- What is the distance of the septic system to the home

Public testimony was re-opened. Mr. Gutierrez told the Board that a 12 foot ceiling was the necessary clearance to operate a mechanic's crane. Work will be limited solely to his personal vehicles. The visual impact of the driveway will be softened with the assistance of well placed plants. There are no other homes behind his property. The Ward Creek Trail and a canyon are located at the rear perimeter. The area is also heavily wooded. His home cannot be seen from the trail or Oakes Drive. What can be seen from Oakes Drive are the 3<sup>rd</sup> and 4<sup>th</sup> floors of a neighbor's home. The neighboring home is actually located in the City of Hayward. The home is 3 stories tall as a result of the stepped design. There is no sanitary district line that Mr. Gutierrez can tap into. One property was allowed to connect a single line into the City of Hayward sewage system. This was allowed because the original owner was Mr. George Oaks. The line crossed over property he owned. The City of Hayward Sanitary District is not accepting new customers. Other residents on Picea Court attempted but were unsuccessful. The City did allow one customer into the system. Because their septic failed, and waste was going into the creek. The line was connected via the back yard. Most of the homes on Picea Court are located below that system. A pump would be required. The sewer man hole is approximately 250 feet from his home, and the elevation is approximately 300 feet. There is another private sewer system used specifically for a single subdivision. The Oro Loma Sanitary District is not located close enough to his property either. Member Spalding said she lives in the area. She confirmed the depth of the City sewer line is 300 feet. She has a septic system at her home, and is familiar with septic issues. Public testimony was closed.

Counsel instructed the Board that a motion would be required as to CEQA classification, and exemption status. The motion must also include findings.

Member Spalding said Ms. Meunier's recommendation of CEQA, Class #3 appeared to be consistent with the staff report discussion on page #6. Member Adesanya asked how the BZA could find the septic issues

exempt under CEQA, Class #3 given the BZA would not make the septic determination. Staff confirmed that the septic determination was a separate process. The Public Works Environmental Health Division will oversee that aspect. Counsel further explained. She referred to staff report discussion on page#7. There are scenarios where a CEQA exemption would not be applicable. One qualification is a uniquely sensitive environment. Each situation requires individual analysis. In this case it appears that CEQA exemption is applicable. The BZA is basing their consideration on the building / garage, and not the leach field itself. From a CEQA perspective, the driveway is considered an existing condition.

The Madison Area Specific Plan was adopted with an exemption to CEQA using a "General Rule", which exempts projects that are seen with certainty, that the project has no possibility of having a significant effect on the environment (Section 15061). If the Board can find that the project is within Class #3, and there is no undue impact on the environment. The Board must specify as to what aspect of Class #3, the project qualifies.

Member Peixoto asked for clarification of the staff report reference. CEQA exemption was applicable when the project was in compliance with the Zoning Ordinance, and no variance was required. Counsel pointed out the revised staff report distinguishes between CEQA Class #15, which would require Ordinance compliance. CEQA Class #3 Exemption has no slope limitations. Therefore there is no prohibition, of seeking a variance.

Board Members discussed appropriate language for a motion regarding CEQA Classification, and exemption. Counsel said possible language may be as follows: Approve this project exempt under CEQA Class #3 Exemption which includes, accessory, appurtenance structures, including garages, pursuant to Section 15303 (e).

Member Adesanya said she was struggling with the Class #3 CEQA Exemption. Although she was inclined to approve the project, further information was needed. Public testimony was re-opened. The Applicant's representative, Ms. Meunier returned to answer questions. Member Adesanya said because the garage requires access. That access could be a cumulative affect on the septic system, because of increased traffic over a period of time. Approval could allow more traffic. She asked Ms. Meunier to provide additional analysis, as to why that would not be the case. Ms. Meunier referred to the notes of the December 2007, Hearing. The notes contained comments by Mr. Norm Hantzche, and the 3 outside experts. Compaction did not extend down past 24 inches. The original septic engineer from QUESTA also compiled a report that is part of the record. The test showed the field is functioning well, and further compaction would not occur. The application would also require a permit from Environmental Health. Member Adesanya responded she was clear the septic permit would be issued by Environmental Health. However for the BZA to find the garage was exempt from CEQA using Category #3. The language states there must be no cumulative impact on the environment. Member Adesanya wanted to ensure there was documentation in the Record, from an environmental professional. Confirming there was no impact. Member Spalding asked that the test of the septic system conducted in 2007 also be submitted to the Record. Ms. Meunier then distributed complete language for CEQA, Classification #3. Language states that environmentally sensitive areas would not be eligible for exemption. These sensitive areas must be mapped and adopted as such. That is not the case with this project. Regarding cumulative affects there must be successive projects of the same type, in the same place, over a period of time. This is a singular project, at one location. Ms. Meunier felt the next example was the most relevant to the proposed project, any activity with a reasonable possibility of harm due to unusual circumstances. That is not the case here. Testimony from Norm Hantzche confirms the septic system is functioning, and compaction would not extend down to the 7 foot level.

Environmental Health staff did not testify that compaction would extend down to the leach field. Only

that they prefer to follow the County Ordinance. Member Spalding asked Ms. Meunier if her position was that the CEQA, Category #3 exemption could be made, because there is no reasonable possibility of a significant impact. Ms. Meunier confirmed that was the case. This is based on the letter from Norm Hantzche and Van Lynden Associates Geotechnical Consultants, who conducted the excavation and inspection. The inspection is also stamped by a licensed geotechnical engineer. Counsel said that if the BZA does make a finding that the project fits within CEQA, Class #3 Categorical Exception. The finding would be implicit in that the project is not one that would be excluded from exemption. The issue would be considered resolved. Member Spalding noted the staff report posed an option for the Board to use its discretion, to find the project exempt under CEQA, Class #3. Counsel responded that consideration would be part of the Boards analysis. Ms. Meunier presented the geotechnical report for review. Public testimony was closed.

Environmental Health staff returned to testify. Member Adesanya asked staff if they were aware of the letter from the geotechnical consultants. Also if they had addition information they wanted to provide to the Board. Mr. Kansas said he was aware of the letter from Jensen Van Lynden. However he wanted to provide counter point. He respects other industry professionals like Mr. Hantzche. Often times he relies on industry professionals to provide direction. However Public Works must look at the project in whole, and come to a decision that makes sense. Many times, everyone is in agreement. Mr. Kansas wanted to raise a red flag. He gave an example. A future application request may be for a creek set back that is less than the 100 feet required. The Applicant may have a respected engineer state it is their opinion. The creek set back can be 60 feet from the creek, or closer to ground water than County Code allows. This can be a slippery slope. Although most engineers are good, staff must rely on the County Ordinance. Mr. Kansas said he could not defend the County Code as far as the back ground research used to compile the Code. However for purposes of comparison, no other Counties allow vehicle traffic over a leach field. It may seem bureaucratic, but the Code is there for a reason. Another engineer may have a different opinion, but that does not release County staff from upholding the Code. If the Board does choose to approve the project, it will then go through the Public Works variance process. Further discussion will take place. Member Spalding told Mr. Kansas the leach field issue was separate from what the Board would consider. The BZA would make a determination on the height variance. The Applicant has already stated they will accept a Condition of Approval that requires them to obtain approval from Public Works. Leach fields vary. Each property in the area presents unique geology and soil variations. The Applicant has an existing leach field. He is the last person who wants the septic system to fail. If the application is approved, the Board will condition the application to provide Environmental Health the ability impose the appropriate solution. This solution would have the least possible affect on the existing leach field. Mr. Kansas acknowledged the weight of the evidence presented by the Applicant's engineers, was very persuasive.

Member Adesanya asked planning staff if an initial study were to be done for the project on variance height. Under the CEQA Code Compliance, would potential impacts of the leach field be part of the analysis. Also if the lot were flat, would CEQA be an issue. Staff responded that in this case the accessory structure and the height issue would be considered. The project would be analyzed for impacts under the Zoning Code. The leach field would not be part of the Planning Department consideration. That aspect of the application would be analyzed by Environmental Health. If the lot were flat, and did not require Board consideration. Staff would require the Applicant to obtain approval from Environmental Health for septic permits. Member Adesanya said based on the response from staff. She would move approval, of the variance.

**Member Adesanya then put forth a motion regarding the CEQA status of Variance, V-12111.**

*Member Adesanya moved to classify Variance, V-12111, a Class #3, Categorical Exemption for a new small structure under guidelines from CEQA, Section 15303 (e) for an accessory structure. Member*

*Spalding seconded the motion. Member Adesanya clarified the motion to reflect there are no Exceptions to CEQA Exemptions contained in Section 15300.2 (c), Exceptions to CEQA Exemptions contained in Section 15300.2 (c) apply solely to the variance, height request. Member Spalding accepted the clarification.*

*The CEQA motion carried 5/0.*

**Member Spalding put forth a motion regarding variance request, V-12111.**

*Member Spalding motioned to grant Variance, V-12111: to allow a two story accessory structure with a height of 31'-4" where 1 story and 15' is the maximum permitted, at 3914 Picea Court, Unincorporated Hayward, CA. Regarding Tentative Finding #1, There are special circumstances applicable to the property as described by staff in the report dated, July 23, 2008. Regarding Tentative Finding #2, The granting of the application will not constitute a grant of special privilege. If not for the slope present on the property there would be no necessity for the application. Regarding Tentative Finding #3, Granting the application will not be detrimental to the surrounding neighborhood or to the public welfare. The project will not adversely affect the neighbors in the area. Due to the landscaping that will be provided to mitigate any possible visual impact. Public testimony supports the case that the rear of the home cannot be seen from the street or the recreational trail, as a result of the wooded area behind the parcel. Member Peixoto seconded the motion.*

Board discussion took place as to possible modifications to the proposed Conditions of Approval.

Member Spalding said approval of the variance should be conditioned upon obtaining a permit from Environmental Health regarding the leach field. Fellow Board Members pointed out that Environmental Health compliance was contained in Condition #3.

Staff requested Alameda County Fire be added.

Condition #1. Further discussion took place as to if the indemnity clause was necessary. Counsel pointed out that the clause related mostly to CEQA. Member Spalding said that if the indemnity clause related to CEQA. The CEQA issues had already been addressed, in the CEQA motion. Most other variance applications do not include an indemnity clause. Member Adesanya believed the clause should remain because, staff recommended denial of the application. Staff explained the indemnity clause was standard language used for rezoning, parcel, and tract map applications. Staff acknowledged the BZA did not use the clause often. Member Spalding said she could not ever recall using the clause in relation to a height variance. Use of the clause could cause odd situation to arise between the Applicant, and the County. The Chair said she did recall use of the clause in a variance, granted in Castro Valley. Member Adesanya asserted that she would feel more comfortable supporting the application with the indemnity clause intact. If there was no legal reason that precluded use of the clause. She would like to retain, Condition #1.

Condition #2. Staff clarified that revised plans submitted by the Applicant are considered Exhibit "B". Ms. Menunier agreed with the designation. Member Spalding asked for a modification. Exhibit "B" shall also include the identification of plant types for landscaping purposes.

Condition #3. Shall remain unchanged.

Condition #4. Member Spalding pointed out. A proposed deed restriction is out of the ordinary. Perhaps public testimony should be re-opened to confirm the Applicant is in agreement with Condition #4. The Chair declined to re-open public testimony, as an active motion was on the

floor. The Applicant has read the staff report, and should be aware of the proposed conditions. Ms. Meuner interjected and confirmed a deed restriction was acceptable. Written conformation had already been submitted for the record.

*Member Adesanya asked the Chair to call for the question. Member Spalding restated her motion to approve Variance, V-12111 with the modification of Condition #2 to include the identification of plant types on Exhibit #B. Member Adesanya accepted the modification.*

***The motion to approve Variance, V-12111 passed 4/1. The Chair was not in favor of approval of Variance, V-12111.***

3. **JOE SILVA, VARIANCE, V-12117** - Application to allow construction of an attached addition with a five foot side yard where 10 feet is required, in an R-S-SU (Suburban Residential, Secondary Unit) District, located at 339 Medford Avenue, approximately 220 feet east of Lowell Avenue, and 300 feet west of Haviland Avenue, unincorporated Cherryland area of Alameda County, designated Assessor's Parcel Number: 429-0014-010-00. (Continued from July 9, 2008). **Staff Planner: Damien Curry.**

Staff gave a brief history of the application. Variance, V-12117, was heard by the Board on July 9, 2008. The application was continued to allow the staff to further discuss design alternatives, and a possible landscaping plan. Staff recommended denial. Public testimony was opened.

Mr. Joe Silva re-introduced the project. There is a duplex at the front of the property, and a second duplex at the rear of the property. He would like to add 2 small additions to the front of the property. One would be approximately 5 feet wide by 13 feet long, the other 15 feet long. This would create an interior laundry room and storage area for the duplex. Currently there is a common laundry area shared by 2 tenants which has outside access. There are existing aluminum storage sheds. The storage sheds are not very attractive. Mr. Silva would like to remove them from the property. At the prior hearing Board Members requested a landscape plan. The project planner spoke with Mr. Silva a number of times. He expressed that landscape screening at the front of the site was an important component of the project. The landscape plan Mr. Silva prepared reflects that recommendation. The English Laurel is one tree recommended for the project. It has a broad leaf, and will gain height. Trees will be set back approximately 20 feet from the sidewalk. Additional greenery will be added to complement. The area will also provide a place for children to play. Mr. Silva acknowledged that the Zoning Ordinance does not allow 5 foot side yards. However there is a smaller property with 2 units located across the street that has been granted a variance for a 5 foot setback. He would like to implement the proposal at his site. The design would be practical to retain a view of the street, retain the on-site parking, and play area for the tenants. The property is already in existence, and was designed with a deep front yard, and narrow side yards. Mr. Silva then noted the dual recommendation in the staff report of denial; or Conditions, if the application were approved. Mr. Silva was in agreement with the proposed Conditions that require the removal of dead trees, and the metal storage sheds. This will actually improve the appearance of the site. A variance was granted for the property in the 1960's for an 8 ½ foot set back. The findings for the driveway and the reduced side yard setbacks were met for the 1960 variance submission. The application was granted but the variance was never implemented. The current variance request is for a 5 foot setback. Mr. Silva asked the Board to approve the application for the following reasons: The request would improve the site for the residents, and add a more contemporary look. The Silva Family has owned the property for almost 40 years. Mr. Silva is the 3<sup>rd</sup> generation Cherryland Resident. The property will not be sold. The Cherryland Association had no objection to the project. There will be no impact to the neighboring property. The addition will face the driveway and 6 units at the rear of the property next door. The roof design has a low profile so as not to cast shadows on the neighboring site. The roof

height also allows light circulation. Mr. Silva also believed the existing structures constituted special circumstance. If the duplex was new construction the laundry and storage could have been built directly into the units. Since the footprint is existing. The only available space, is the side yard. Mr. Silva said he hoped the Board would find the project acceptable. Board questions for Mr. Silva were as follows:

- Have other lots in the area been similarly developed
- Can the laundry and/or storage units be placed in the rear garage
- Where are the water heater and laundry for Units #A and #B located
- What is the minimum space required between the front and rear duplexes on the site
- Is the studio unit considered “legal”
- Is the prior variance granted for the property still in effect
- What are the total number of structures on the property

Mr. Silva explained the lot was 305 feet deep. The fact that the lot was deep and narrow should not be held against the Applicant. The front residents would have to walk 250 feet to get to a laundry facility. He did not believe that was a sensible solution. There was no power or water access at the rear of the lot. The storage area at the rear of the property does not have lighting either. Another goal is to retain the vegetable garden at the rear of the lot. The water heater for Unit #A is currently located in the kitchen. Units, #A and #B currently share the exterior existing laundry facility next to Unit #B. Mr. Silva would like to use this laundry facility solely for Unit #B, and create a separate laundry for Unit #A. Storage space would be added to each of the laundry areas. Another reason for the design is to accommodate an older gentleman that has been a longtime tenant. It would also be an imposition due to the tenant's age to open the walls. At some point in the future, if he moves. The walls can be opened, and the laundry changed to an interior design. The laundry for Unit #A will have an interior location from the onset. The rear studio unit is 550 to 600 square feet. The front unit of the duplex has 2 bedrooms, 1 bath roughly estimated at 900 square feet. There are 3 total structures on the property. The laundry / storage additions will only be built for use by the front duplex. Mr. Silva believed that Unit #B is legal. Since the Silva Family has owned the property. There has never been a question about legality. The unit has been rented for the duration. He believes the unit was originally built as an owners unit with a mother-in-law unit. Perhaps it was considered as single family home. Mr. Silva then showed a copy of the original variance for the site. He told the Board the property next to his was similar in size and depth. One single family home is located at the front of the parcel, with six two story units in the rear. The original parcel was divided. The front house was sold off, and an easement granted to the separated rear portion. After the parcel split, six two story units were then built at the rear. The property may be zoned PD since the density did not comply with the Zoning. Member Gil agreed that was likely. Had the project been reviewed by the Cherryland Association, approval would not have been likely. Mr. Silva agreed with staff that all of the units on his site were likely built in the 1960's. His Family purchased the property in 1971. The distance between the duplexes was 43 feet. This existing parking is located within the 43 foot area.

Staff said the 4 total units on the site are within Zoning Density requirements, and in compliance with the Zoning Ordinance. Building permits for the site show approval to build a rumpus room. The unit looks to be constructed around 1966. At some point perhaps the configuration was altered. Variance, V-3347 for the reduction of the side yard and driveway width was never enacted, because the Conditions were never exercised. Per the Zoning Ordinance the variance must be implemented within 3 years of issuance; or it shall be of no force or effect. The Applicant must activate the variance to gain the implied rights. If this did not happen, there are no vested rights. Staff was not familiar with the project next door to the Silva property. They did confirm there were properties with PD Zoning in the area. However the Ordinance requires that a variance be considered with the current Zoning. The Silva property is presently Zoned R-S-SU. The space required between primary buildings is 20 feet. A laundry room could be

placed at the rear of the property. The location of current parking would have to be relocated, elsewhere on the site. Interior laundry facilities or internal remodeling is another option available to the Applicant.

Mr. Silva pointed out that a bedroom window faces the rear of the site. If a laundry room were placed there, it could interfere with light and air flow. It would also eliminate a path for fire escape. The interior space of the rear unit is limited to 550 square feet. The other units on site are approximately 950 square feet. The limited interior space precipitated the exterior design proposal. Public testimony was closed.

Member Adesanya did not believe special circumstances were present. She agreed with staff that the parcel was not completely built out.

The Chair commented there was no sewer hook-up or plumbing toward the rear of the property. The project would not impact the neighboring site due to the easement/driveway located on the property next door. However this variance is not for living space, in comparison to other variances granted in the area. The Chair acknowledged this variance request is a setback consideration that would not impact internal living space, although such living space is limited. In consideration of Tentative Finding #3 the proposal would not impact the neighbors.

Member Peixoto observed there was limited interior living space, and it would be difficult to re-model with such limited space. He agreed the proposal would not impact the neighbors.

Member Spalding said the landscaping plan that was submitted was well thought out. Regarding Tentative Finding #1, the parcel is deep and there are other properties with similar depth in the area. However she recalled other variances that had been granted with a finding of special circumstance, as a result of a long narrow lot depth. Staff responded that the parcel was not completely built-out, as a result of the long narrow shape. Member Spalding reminded staff that the Applicant had made the point; the portion of the lot that had not been built out, would not serve the proposed purpose. The residents of the front structure would have to go 250 feet to access a laundry area. Staff said there is nothing in the Ordinance that requires units to have an on-site laundry. Presently there is an existing laundry that has exterior access, at the front of the site. Member Spalding thought the current setup was somewhat awkward. She asked if the Applicant and staff had developed other design alternatives. She agreed with Tentative Finding #3. The proposed additions would not be detrimental to persons, property or public welfare. Public testimony was re-opened to speak with Mr. Silva.

Public testimony was re-opened. Mr. Joe Silva said the current application request was almost identical to the application that was approved in 1965. The variance findings were upheld 43 years ago. Therefore the application should be approved. The present request is for 5 feet. The 1965 request was for 8 ½ feet. Mr. Silva reiterated that the special circumstance present on the property was the long narrow lot, with existing structures. He also wanted to retain the open space / garden at the rear of the property to benefit the residents. In addition the design considers a long term resident. The present density also meets the Ordinance. The solution is practical for all of the proposed purposes, and utilization of the residents. Member Spalding asked if Mr. Silva had the original plans that were submitted for the 1965 variance request. Mr. Silva responded that the original plans were not retained. Public testimony was closed.

The Chair asked if staff had additional information regarding the 1965 variance. Staff did not have copies at the hearing. However there was a plot plan on file with the Building Department. The plot plan was similar. It appears that a kit home was to be put into the space within the setback of 8 ½ feet. Member Peixoto asked if it was possible to put a laundry and storage behind Unit #A. Staff clarified that it could be done. Parking would be displaced as a result. This parking would then need to be re-located at the rear of the site. Staff said although they would not make a specific recommendation. One alternative is to

build a laundry unit at the rear of the garage. This could be placed adjacent to the rear parking space.

Member Spalding commented that staff's recommendation highlighted the fact there were limited placement options. Member Adesanya thought that all of the available options had been reviewed. The Board Members appeared to be spinning their wheels. Although it was laudable the applicant wanted to save the tenant garden. The Applicant's land use desires can be achieved. Development is possible on the site. Although Members may sympathize, the findings to support the variance cannot be made. With respect, she asked the Chair to call for the question.

Member Adesanya moved to uphold the staff recommendation of denial. The Applicant could not make the necessary findings to support the variance request. Member Peixoto seconded the motion.

Vice Chair Gil and Member Spalding abstained. The motion to deny Variance, V-12117, passed 3/0/2.

**APPROVAL OF MINUTES:** Member Peixoto motioned to approve the June 25, 2008 Minutes with submitted corrections. Member Adesanya seconded the motion. Motion carried 4/1. Member Spalding did not accept the Minutes submitted for June 25, 2008.

Member Gil motioned to approve the Minutes of July 9, 2008 with submitted corrections. Member Adesanya seconded the motion. Motion carried 4/0/1. Member Peixoto abstained as he was not present at the July 9, 2008 Meeting.

**STAFF COMMENTS & CORRESPONDENCE:** County Counsel distributed a draft amendment to the West County Board of Zoning Adjustments, Rules and Procedures. Proposed changes: Correction to meeting location; and Article III, removal of Secret Ballot to an open election of Chair and Vice Chair to comply with the Brown Act. The proposed changes will be placed on the August Agenda for discussion.

Staff reminded the Board the August 13, 2008 Meeting was cancelled. The next Hearing will be on August 27, 2008 at 1:30 p.m.

The Mobile Outdoor Business Ordinance is now in effect. The use will require a CUP, and be allowed within Industrial (M), Highway Frontage (H), and Administrative Office (CO) Districts.

**BOARD'S ANNOUNCEMENTS, COMMENTS AND REPORTS:** The Chair asked if the informational statement on the Agenda could be modified to include information regarding appeals. Counsel will provide sample language at the next meeting.

Member Spalding asked that Minutes with lengthy speaker testimony be prefaced with "the speaker stated the following" followed by a colon. This will provide clarity. The Board makes determination of facts. The Minutes can be used as evidence. Fellow Board Members asked staff for clarification as to if persons testifying, were considered witnesses. County Counsel responded that the Statute which governs the Board of Zoning Adjustments is not subject to formal Rules of Evidence. If the Board wanted to establish a formal policy, the issue could be agenda item at future hearing. This would allow the public to comment, as well.

Member Spalding asked Counsel if further clarity could be provided to the Board Members. The BZA is a semi adjudicatory body that makes factual findings. Evidence provided by persons is a basis upon which the Board makes their decisions. The Board of Zoning Adjustments Articles provide for that. Counsel acknowledged that was the case. In addition the Statute that allows the BZA to exist as well as the supporting Ordinances does not hold BZA subject to formal Rules of Evidence. Member Spalding

responded that although the BZA was not subject to formal Rules of Evidence. They are still required to make factual findings. Member Adesanya said the BZA did make factual findings. However those finding did not mean that testimony proved by each person was in actuality "fact". Member Spalding was in agreement. However a preface statement would clarify that this is the opinion, of the person testifying. Fellow Board Members posed the option of placing an introductory preface statement on each Agenda or set of Minutes. County Counsel may be able to suggest language, to add clarity. Board Members also asked Counsel to include information regarding appeals, also to the fact that testimony is recorded. Counsel said she would do research as to what constitutes the establishment of standing, and a procedural statement.

**ADJOURNMENT:** There being no further business, the hearing adjourned at 4:35 p.m.

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**ALBERT LOPEZ - SECRETARY**  
**WEST COUNTY BOARD OF ZONING ADJUSTMENTS**