David C. Fainer, Jr.
Attorney at Law

1114 State Street, Suite 200 • Santa Barbara, CA 93101
phone 805-899-1300 • fax 805-963-5988 • dfainer@aol.com

May 11, 2010

Mayor Helene Schneider and
Members of the City Council,
City of Santa Barbara
c/o Clerk's Office, City Hall
Santa Barbara, CA 93101

Re: McCosker Appeal of Single Family Design Board Denial of Proposed Retaining Walls and Gravel Patio Areas; City Council Hearing Date: May 18, 2010

Dear Mayor Schneider and Members of the City Council:

I represent Scott McCosker, the owner of the single family residence at 1464 La Cima Road and applicant for the Proposed Project.

Mr. McCosker has appealed to the City Council from the denial by the Single Family Design Board ("SFDB"), on Monday, March 1, 2009, of his Proposed Project. Mr. McCosker's appeal attaches a Statement of Significant Issues and Facts, which is incorporated by reference.

The Proposed Project is for construction of three relatively short retaining walls, with two small gravel patio areas and landscaping, in the back yard of the McCosker property. *See attached Exhibit A*.

The Proposed Project would not be visible to the public, and would have no impact on neighbors.

The Proposed Project leaves most of the McCosker back yard in a natural condition, and creates two small, tasteful, useable outdoor areas in the transition from the residence to the natural areas of the backyard. Oak trees and the hillside would be protected.

1. Evolution of Proposal and Scale of the Proposed Project

The Proposed Project on appeal to the City Council is considerably smaller and much lower in impact than Mr. McCosker's prior proposals, and represents an evolution of the proposed project in response to comments of the SFDB.

The Proposed Project is *not* an effort to permit previously-constructed Allan Block walls, which will be removed because they were constructed without a permit following erroneous advice received by Mr. McCosker.

The Proposed Project, when compared to the as-built walls, would have many fewer lineal feet of walls and much less exposed wall area.

The SFDB reviewed a proposal from Mr. McCosker in 2009 (for the as-built walls) and revised proposals in February and March 2010. The proposal in February was much reduced in scale from the as-built walls, and responded to earlier comments of the SFDB. In response to further comments of the SFDB in February 2010, Mr. McCosker and his designer made a number of changes between the February and March hearings, which further reduced the Allan Block walls.

The point is that Mr. McCosker has attempted to respond to comments and comply with City requirements, but also seeks to make a reasonable use of his back yard – notwithstanding the objections of one neighbor, which appeared to overly influence the SFDB process (as discussed below)

Since Mr. McCosker has appealed the denial of the March proposal and since the previously-constructed walls provide an existing frame of reference, the following comparison of the as-built and proposed walls is provided.

All numbers are approx.	Exposed Wall Area of Allan Block Walls (sq.ft.)	Length of Allan Block Walls (lin.ft.)	Exposed Wall Area of CMU Wall (sq.ft.)	Length of CMU Wall (lin.ft.)	**Exposed Wall Area of All Walls (sq.ft.)**	**Length of All Walls (lin.ft.)**
As-Built Walls	>900	>240*	-0-	-0-	**>900**	**>240**
Proposal on Appeal	144	50**	114	36***	**258**	**86**

* continuous, connected as-built walls
** Wall A (24 feet) and Wall B (26 feet)
*** Wall C on Exhibit A

continues next page.

2. Discussion of Cooks' Objections

The only objections from the public to this project have been from the neighbors to the west (Mr. and Mrs. Cook). Their participation and that of their attorney, Tony Fischer, seemed to dominate underlying SFDB proceedings, and to unduly influence the SFDB.

The irony is that the Cooks' existing deck is quite large and imposing, in contrast to the very modest project which is proposed on the McCosker property.

Mr. McCosker contends that the Cooks' opposition is simply part of a vendetta by the Cooks against him for having enlarged his home during a remodel project several years ago, all of which was work done pursuant to permits issued by the City.

In contrast to the Cooks, other neighbors have no objections to the proposed project.

The Council's site visit on Monday, May 17, will provide Council Members the opportunity to compare the height and mass of the Cook's deck, which looms over the McCosker's backyard, with the size and scale of the proposed McCosker project. Mr. McCosker and I believe that, given the topography, the Council's in-person observation is worth a thousand words, and I will spare you the thousand words attempting to describe what is best seen and understood in person.

It is respectfully submitted that a visit to Mr. McCosker's backyard places the comments of the Cooks and their representatives in perspective, and that, for purposes of evaluating the comments of the Cooks, what is in scale with and characteristic of the neighborhood should be ascertained from the massive deck that the Cooks built.

On behalf of Mr. McCosker, I acknowledge that neighbor battles are distasteful to the Council. The balance of this letter will focus on the Proposed Project itself.

3. The Proposed Project Merits Approval in this *De Novo* Appeal Hearing.

The basis for the Owner's appeal is that the all necessary findings can and should be made based on the proposed project description, the design of the project, the other evidence presented (plans and arborist letter), and the applicable provisions of the Neighborhood Preservation Ordinance, Single Family Design Board Guidelines and Hillside Housing Design Guidelines.

Trish Allen of Suzanne Elledge Permitting & Processing and I have assembled *attached Exhibits B, C and D*, which (1) set forth the various criteria and findings in the Neighborhood Protection Ordinance, the Single Family Design Board Guidelines, and the Hillside Housing Design Guidelines and (2) discuss why Mr. McCosker's Proposed Project is consistent. These exhibits are incorporated by reference.

In short, Exhibits B, C and D demonstrate that the Proposed Project is consistent with City ordinances and guidelines, and therefore the Proposed Project merits approval by the City Council, which considers the Proposed Project *de novo* at the appeal hearing.

In fairness to the SFDB, many of their comments in 2009 and in February 2010 have been incorporated into the Proposed Project and are essential elements why the Proposed Project merits approval at this time – as it did in March 2010.

Further, the City Council and Community Development Department are engaged in a process to reduce, not increase, the intrusiveness of City design review processes on back yard improvements of residences that are out of the public view. The SFDB's review of the Proposed Project in March 2010 is an example of how City design review can be overly intrusive for a back yard improvement that is out of the public view.

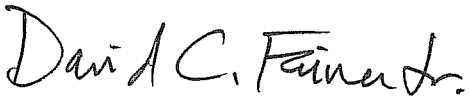
4. <u>Conclusion; Request for Final Action on May 18</u>

At the hearing on May 18, a further presentation by Mr. McCosker and his representatives will be made. However, it is believed that such presentation of additional information will make the most sense to Council Members after their site visit on the afternoon of May 17.

For the reasons set forth in this letter and its attachments, and in light of all of the evidence before the City Council (including plans and arborist letter), Mr. McCosker's appeal should be granted. It is respectfully submitted that the City Council grant final design approval when ruling on the appeal. Final design approval would allow Mr. McCosker adequate time to engage his contractor, remove the as-built walls, and construct the Proposed Project – before the next rainy season.

Thank you for your consideration of this appeal.

Sincerely,



DAVID C. FAINER, JR.

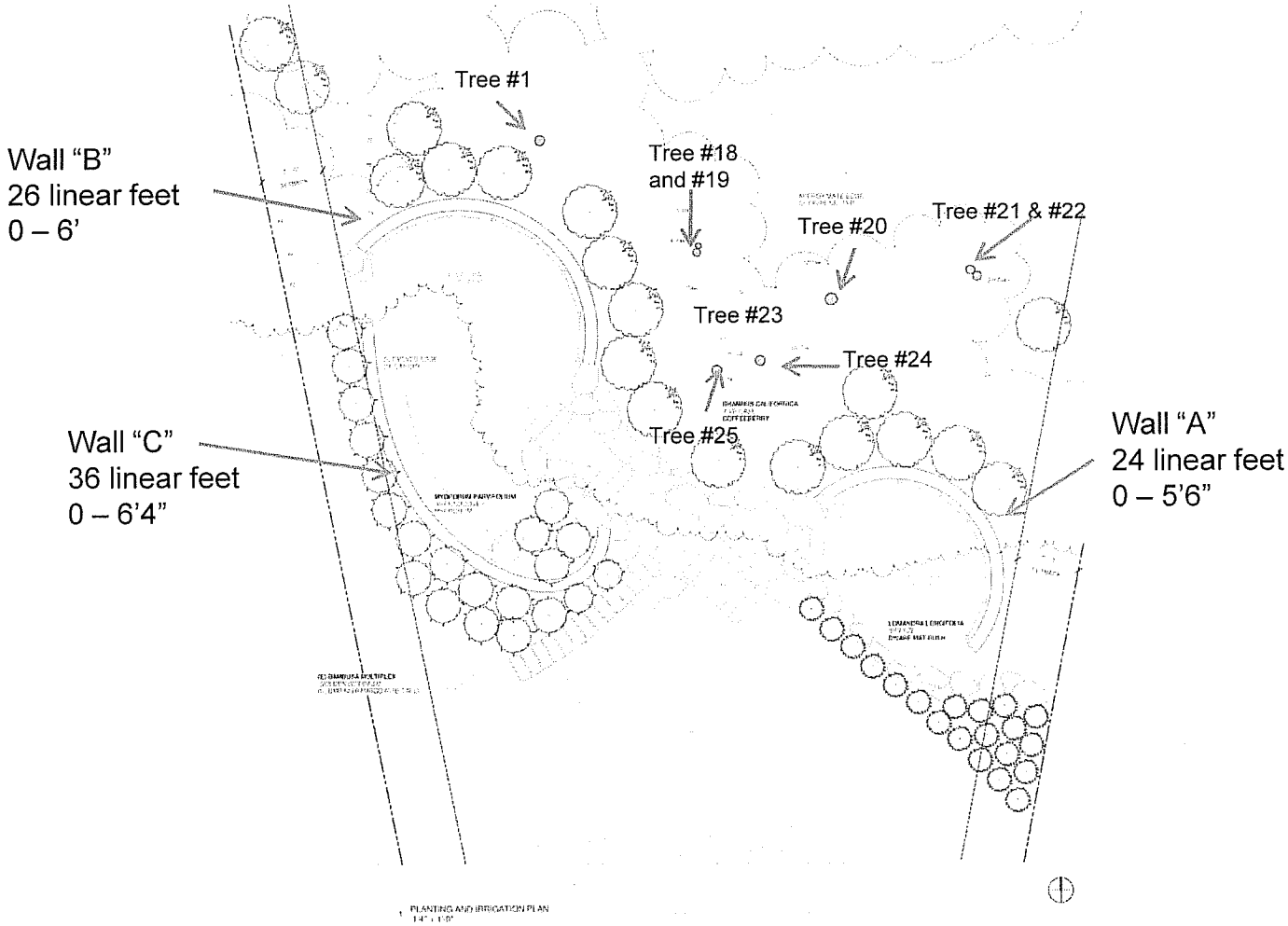
DCF/

Attachments: Exhibits A, B, C and D

cc: Scott McCosker
Trish Allen, SEPPS
Margie Grace Designs
Greg Van Sande, P.E.

Tree #1

EXHIBIT A



Distances and heights are approximate; heights reflect exposed wall height.
Wall "C" height measured from top of bench.

Findings Under Applicable Guidelines and Ordinances

Neighborhood Preservation, Grading and Vegetation Removal Ordinance Findings **Municipal Code § 22.69.050 A & B**	***Why the McCosker Proposed Project Complies***
1. **Consistency and Appearance**. The proposed development is consistent with the scenic character of the City and will enhance the appearance of the neighborhood.	1. To the extent that this finding is applicable to a back yard project that is invisible to public views, the proposed retaining walls are consistent with the character and appearance of the neighborhood. The walls meet the design standards set forth in the SFRDB pertaining to walls. (See Exhibit C.)
2. **Compatibility.** The proposed development is compatible with the neighborhood, and its size, bulk, and scale are appropriate to the site and neighborhood.	2. When completed, the proposed retaining walls will be separated from one another, and of varying heights, thereby avoiding a massive or bulky appearance. • Proposed Wall A is about 24 feet in length, of varying height between grade level and a maximum visible height of 5'6". • Proposed Wall B is about 26 feet in length, of varying height between grade level and a maximum visible height of 6 feet. • Proposed Wall C is about 36 feet in length, of varying height between grade level and a maximum visible height of 6'4".
3. **Quality Architecture and Materials**. The proposed buildings and structures are designed with quality architectural details. The proposed material and colors maintain the natural appearance of the ridgeline or hillside.	3. There are two types of walls, each intended to function in the transition from the modern residence to the natural areas of the back yard – a CMU wall cut into the hill which is visible almost exclusively from the outdoor seating area when looking back at the residence, would be painted to match the walls of residence and deck area, and two Allan Block walls, which blend with the natural appearance of the hillside. In between the white walls and the natural-colored Allan Block walls are the gravel patios. The proposed vegetation will screen and soften the appearance of the walls in the transition from the residence to natural areas.
4. **Trees**. The proposed project does not include the removal of or significantly impact any designated Specimen Tree, Historic Tree or Landmark Tree. The proposed project, to the maximum extent feasible, preserves and protects healthy, non-	4. The project does not propose removal of any trees. The project includes oak tree protection and mitigation measures for those oak trees that may be potentially impacted by the grading and the proposed retaining walls are consistent with SFDB Guidelines

EXHIBIT B

Findings Under Applicable Guidelines and Ordinances

Neighborhood Preservation, Grading and Vegetation Removal Ordinance Findings **Municipal Code § 22.69.050 A & B**	*Why the McCosker Proposed Project Complies*
invasive trees with a trunk diameter of four inches (4") or more measured four feet (4') above natural grade.	for Native Tree Protection Standards. All work proposed within the dripline would be conducted with hand tools and supervised by the project arborist in accordance with the arborist recommendations and mitigation measures.
5. **Health, Safely, and Welfare**. The public health, safety and welfare are appropriately protected and preserved.	5. The proposed walls are located in the backyard of a single family residence and will meet structural requirements established by the building code in order to protect public health, safety and welfare.
6. **Good Neighbor Guidelines**. The project generally complies with the Good Neighbor Guidelines regarding privacy, landscaping, noise and lighting.	6. The proposed walls create a useable outdoor area that is much lower in elevation than the adjacent neighbor's usable outdoor areas, and would not interfere with neighbor's views or privacy. Proposed landscaping provides additional privacy screening.
7. **Public Views**. The development, including proposed structures and grading, preserves significant public scenic views of and from the hillside.	7. The backyard is not visible from public vantage points.
B.1 Natural Topography Protection. The development, including the proposed structures and grading, is appropriate to the site, is designed to avoid visible scarring, and does not significantly modify the natural topography of the site or the natural appearance of any ridgeline or hillside.	B.1 The Proposed Project will not result in any scarring of the site and does not significantly modify the natural topography. The Proposed Project has no effect on any ridgeline and only a modest impact on a small portion of the hillside in the McCosker back yard. The Proposed Project has been fully engineered to assure stability on the hillside.
B.2 Building Scale. The development maintains a scale and form that blends with the hillside by minimizing the visual appearance of structures and the overall height of structures.	B.2 The Proposed Project blends with the hillside visually and is not visible to the public. The height of Walls A, B and C varies and is tied to the topography. On average, the walls are about 3 feet above ground – and the maximum exposed height of the walls is only 5 to 6 feet, for distances less than several feet long.

EXHIBIT B

Findings Under Applicable Guidelines and Ordinances

Single Family Design Board Guidelines **concerning Native/Specimen Tree Protection & Replacement** **(p. 8-9 of Section 2, Landscape Guidelines)**	*Why the McCosker Proposed Project Complies*
1. **Earth Disturbance Prohibitions**. No earth disturbance is allowed in the circular area one third the distance of the overall canopy/dripline as measured from the trunk.	The McCosker backyard includes 25 oak trees, 14 of which have tree trunks 10 inches or greater. For identification, the three proposed walls been designated as Walls A, B and C and trees have been numbered 1 through 25. See Exhibit A, page 2. Both proposed Wall A and Wall C are far outside the "no earth disturbance zone" for all 25 trees on the applicant's property. Proposed Wall B is far outside the "no earth disturbance zone" for 23 of 25 trees on the applicant's property. Proposed Wall B would be located at approximately "one third the distance of the overall canopy/dripline as measured from the trunk" of Trees 1 and 25. The canopy/dripline of these 2 trees overlap, making a precise application of this Guideline difficult as to them. According to the arborist, the de-construction of the existing walls and re-construction of the proposed walls would have no greater effect on oak trees nearest the existing walls than the mere de-construction of the existing walls. As such, it is the de-construction of the existing walls and not the re-construction of proposed new walls that would result in earth disturbance near to Trees 1 and 25. To the extent of any concern about any slight intrusions into the "no disturbance zone," such concerns about potential impacts can be fully mitigated by additional plantings of oak trees per the arborist's oversight and direction during field work. The proposed project substantially, if not fully, complies with the "letter" of this Guideline, and also complies with the "spirit" (purpose) of this Guideline in that earth disturbance close to native trees as a result of the proposed project is avoided.

EXHIBIT C

Findings Under Applicable Guidelines and Ordinances

Single Family Design Board Guidelines **concerning Native/Specimen Tree Protection & Replacement** **(p. 8-9 of Section 2, Landscape Guidelines)**	*Why the McCosker Proposed Project Complies*
2. **Arborist Report**. Any work within the general vicinity of the dripline of a native specimen, the SFDB may defer to the report's recommendations.	An Arborist has evaluated the existing condition and the proposed condition. A report was prepared that addresses work within the oak dripline. The applicant proposes to follow *all* recommendations of the arborist.
3. **Paving.** Paving and other non-permeable surface encroachment under native and specimen tree canopy/driplines should be minimized.	The project does not propose paving. Most of the patio areas do not encroach into tree canopy/driplines; where this does occur, the ground surface of the patio areas is permeable and is designed to drain properly.
4. **Distance from Structures**. The edge of the mature native or specimen tree canopy/dripline should remain a minimum of five (5) feet from all new structures.	The project fully complies with this Guideline as to 20 out of 25 trees on the property, and substantially complies with this Guideline as to the other 5 trees since only relatively small portions of the project would be within the dripline of any of these trees. Again, to the extent directed by the Arborist during field work, any concerns about impacts can be mitigated. Wall C is entirely outside driplines of trees. Wall B is entirely outside the driplines of 22 out of 25 trees on the applicant's property, by more than 5 feet. Wall B is within the dripline of Trees 1, 18 and 19 to a minor extent. Trees 1, 18 and 19 have overlapping canopies – but well less than 25% of the canopy of these trees, which is the often-recognized criterion for evaluating potential impacts to oaks. Wall A is entirely outside the driplines of 23 out of 25 trees on the applicant's property by more than 5 feet, but Wall A is within the dripline of Trees 23 and 24 to a minor extent – again well less than 25% of the canopy of these trees, which is the often-recognized criterion for evaluating potential impacts to oaks.

EXHIBIT C

Findings Under Applicable Guidelines and Ordinances

Single Family Design Board Guidelines **concerning Native/Specimen Tree Protection & Replacement** **(p. 8-9 of Section 2, Landscape Guidelines)**	*Why the McCosker Proposed Project Complies*
5. **Protection Notes**. Proposed projects which may impact existing native or specimen trees are required to submit Tree Protection notes as part of the final landscape submittal. Notes shall be located on all site and/or grading plans.	Oak tree protection notes recommended in the Arborist report will be incorporated into the final landscape submittal and on all site plans.
6. **Replacement Dimensions.** If it is determined that a native or specimen tree is to be removed, the diameter of the required placement tree(s) will be equal to or greater than one-quarter the diameter of the existing tree (e.g., a 12-inch-diameter oak will be replaced with one measuring no less than 3 inches). Smaller tree replacement sizes than this formula may be specified in some cases to ensure replacement tree availability.	Although the project does not propose oak tree removals, the Arborist report includes mitigation measures for any unplanned removals and for any potentially impacted trees. These notes will included on the final landscape plans.

EXHIBIT C

Findings Under Applicable Guidelines and Ordinances

Hillside Design District And Sloped Lot Findings **From 34. Retaining Walls (which repeats portions of 9.)**	*Why the McCosker Proposed Project Complies*
34.1 Minimize length of solid fences, landscape walls, and retaining walls on hillsides. Walls should not exceed 50' in length.	34.1 The retaining walls in the proposed Project are well less than 50' in length, and are separated from one another.
34.2 Minimize fence and wall heights. An 8' wall may be acceptable if the materials are aesthetically pleasing (for example, stone), but a 6' height limit is more appropriate for materials such as stucco.	34.2 Wall heights have been minimized and have been designed to be aesthetically pleasing, with natural appearing allan block walls along the natural areas and a painted CMU wall that ties into the architecture of the home. All wall heights vary, with maximum wall heights of 5'6' to 6'4" for only a short distance and average wall heights about one-half of these maximum heights.
34.3 & 34.4	-- N/A
34.5 Follow topography with fence and wall design.	34.5 Wall C retains the hillside above by following the topography of the natural grade. In contrast, the curved walls of Walls A and B create the patio areas with minimal intrusion into oak trees, which is another design consideration, by starting at grade level.
34.6 Use earth tone colors that tend to blend with the surrounding natural colors of the hillsides and minimize visual effects. Avoid use of colors contrasting with natural terrain such as bright white walls or large areas of bright non-native flowers.	34.6 Since none of the walls is visible to the public, this guideline is probably not applicable. Nevertheless, the Proposed Project complies. The Allan Block walls are natural colored and blend in. The CMU wall is proposed to be painted, but should be viewed as uniting the white walls of the nearby residence – with the two patio areas as the transition from the white walls of the residence and the natural areas of the yard down-slope.
34.7 Use stone or other native, natural materials.	34.7 In the redesign that resulted in the Proposed Project, boulders were substituted for walls where possible. The Allan Block is natural in color.
34.8 Integrate vegetation and landscaping with fence and wall design.	34.8 The landscape plan integrates new plantings that are compatible with the oak trees and plantings that will drape over the CMU wall.

Findings Under Applicable Guidelines and Ordinances

Hillside Design District And Sloped Lot Findings **From 34. Retaining Walls (which repeats portions of 9.)**	*Why the McCosker Proposed Project Complies*
34.9 through 34.12	–N/A
34.13 The following are suggested maximum heights for fill slope retaining wall systems: • 6 feet suggested maximum exposure for individual retaining walls • 12 feet suggested maximum combined exposed retaining wall faces.	34.13 This guideline is applicable to Walls A and B. The maximum exposure of the two Allan Block walls is less than 6', and is much less on average.
34.14 The following are suggested maximum heights for cut slope retaining wall systems: • 8 foot suggested maximum exposure for individual retaining walls • 16 feet suggested maximum combined exposed retaining wall faces.	34.14 This guideline is applicable to Wall C. The visible portion of CMU wall is 6'4" briefly (but less on average) due to its design that follows topography.

EXHIBIT D
Page 2 of 2