**Attachment 12**



January 2, 2014

Mayor Canning
Councilperson Krause
Councilperson Dunsford
Councilperson Barnes
Councilperson Lopez-Ortega

This document is the written submission by Appellants Robert (Joe Bob) and Marianne (Lily) Hitchcock with reference to the appeal hearing by the Calistoga City Council on January 7, 2014, regarding variances VA 2013-06 and VA 2013-05 originally heard by the Planning Commission on September 11, 2013 and the City Council on October 1, 2013.

This case is of great importance to me. As a result, I have spent literally hundreds of hours doing research, all the way from the Constitution down to the Planning Commission. Two things have become very clear.

First, an analysis of the relevant issues will lead any reasonable person, any jurist, or any judge, to see that the evidence is overwhelming. There exists no interpretation of the law which would allow approval of these variances. In the attached written document, there are 7 major issues discussed. While not everyone will agree with every point I make, I cannot imagine how anyone could not see the many, many valid reasons which require denial of the variance requests. And keep in mind that only one of these issues is sufficient to deny the applications.

The second point I wish to make is the degree of bias exhibited by the City of Calistoga in favor of the Applicant, and to the detriment of the Appellants. Throughout this written document are specific examples of bias. This is unacceptable. I have every right to take the course I have taken, and I should be accorded honesty, respect, and above all, fairness. My positions should be considered with care, and the City Council's actions should be taken only in a manner that supports the laws of our city and our state. To date, this has been a very one sided battle of me against the combination of the Applicants and the City of Calistoga. But obviously, I am not one to give up.

I welcome any challenge to my positions by the Applicants, by Staff, or by the Council. But I expect such challenges will backed up with a similar degree of detail, be substantiated by facts, and be in strict adherence to all laws from the Calistoga Municipal Code up to the U.S. Constitution.

Respectfully,

Robert Hitchcock

# APPELLANT ROBERT AND MARIANNE HITCHCOCK'S BRIEF IN OPPOSITION TO CITY OF CALISTOGA VARIANCES VA 2013-06 AND VA-2013-05

This is an appeal by Robert ("Joe Bob") and Marianne ("Lily") Hitchcock ("Appellants") of two variances pertaining to 1328 Berry Street*, Calistoga that were granted to Scott and Linda LeStrange ("Applicants").

City of Calistoga ("City") variance number VA 2013-06 (the "setback Variance") was granted after a hearing by the Planning Commission ("PC") on September 11, 2013, to allow proposed construction within four (4) feet of the common property line between the Applicants and the Appellants. After a second hearing by the Calistoga City Council ("Council") on October 1, 2013, Variance VA 2013-05, (the "floodplain Variance") was granted to permit Applicants to construct two non-conforming structures within the Napa River floodplain.

Appellants request the Council overturn both the 9/11/13 decision by the PC, and the later 10/1/13 decision by the Council. Following are the seven major issues that support denial of the requested variances. Additional legal discussion on these issues then follows.

There are 7 major issues identified and discussed below. They are:

**(1) The Variance sought is not permitted by the law.**
**(2) The CMC Code 17.38.020(E) - 10 foot setback requirement.**
**(3) Failing to prove Finding #1**
**(4) Failing to prove Finding #2**
**(5) Failing to prove Finding #3**
**(6) Failing to prove Finding #4**
**(7) CEQA exemption**

This process requires that the Council determine that the Applicants have provided evidence to support every required legal element of a variance. It takes only one unproven issue to mandate denial of the variances. Appellants will show below that the Applicants have not discharged this burden.

- Also referred to in proceedings herein as 1330 and/or 1332 ½ Berry Street.

## 1. THE VARIANCE SOUGHT IS NOT PERMITTED BY THE LAW.

A variance may be simply defined as a limited exception to the usual requirements of local zoning that is required because of the unique characteristics of a property that distinguish it from its neighbors.

California Government Code section 65906 expresses this principle, stating in relevant part:

> *"Variances from the terms of the zoning ordinances shall be granted only when, because of special findings, applicable to the property, including size, shape, topography, location, or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification."*

In accord, Calistoga Municipal Code ("CMC") 18.24.010 states:

> *"A variance may be granted for a parcel of property with physical characteristics so unusual that complying with the requirements of this title would create an exceptional hardship to the applicant or the surrounding property owners. The characteristics must be unique to the property and not be shared by adjacent parcels. The unique characteristic must pertain to the land itself, not to the structure, its inhabitants, or the property owners".*

The Calistoga Municipal Code enumerates the local requirements for the granting of a variance, including the Four Findings and the appropriate setback requirements. Also the California Court of Appeals has set a clear cut precedent for the requirements for variance approvals. These requirements are discussed in following sections.

A leading case in California covering the granting of variances is the California Court of Appeals decision in Hamilton v Board of Supervisors (1969) 269 Cal. App.2d 64, 69-70; Cal.Rptr 106 (aka "Hamilton"). This 1969 decision is a California landmark decision regarding the evidence required to permit a variance.

The California Court of Appeals is the level immediately below the California Supreme Court. The Court of Appeals makes both published and not published decisions. If a decision is not published, it applies to that case only, and does not set a precedent. If a decision is published, it is intended to be the precedent to be followed by all other courts in the future.

At an earlier meeting, the Applicants tried to dismiss this case as meaningless, but this is a published precedential decision, cited dozens of times in the intervening 44 years. Every administrative and judicial body in California is required to comply with this decision, from a City Council or Planning Commission to the various courts.

The Hamilton Court stated:

> *"If the property can be put to effective use, consistent with its existing zoning, without the deviation sought, a variance is not appropriate, even if it would make the applicant's property more valuable, enable him or her to recover a greater income, or provide relief from the cost of complying with the existing restrictions. Profit motive, attractive architectural features, benefit to the community, and practical difficulty do not justify a variance."* ***A variance based on those factors would confer not parity, but privilege."***

It has been admitted that evidence proves that the subject property can and has been put to useful purpose without a variance, and that the property does not differ materially from its neighbors.

**Hamilton holds that, on the facts of this matter, VA 2013-05 and -06 should be denied.**

## 2. THE PLANNING COMMISSION ERRED IN DERERMINING THE SETBACK VARIANCE.

**CALISTOGA MUNICIPAL CODE ("CMC") 17.38.020 (E) states:**

***"In case a dwelling is to be located so that the front or rear thereof faces any side lot line, such dwelling shall be located not less than 10 feet from such lot line . . ."***

The orientation of the proposed structure is such that the front faces North, toward the Napa River, and the rear faces South, toward the side lot line in common with Appellants. This structure, therefore, clearly falls under CMC section 17.38.020(E) ("17.38") and therefore must maintain a 10 foot setback from the common side property line.

To escape the 10 foot setback rule, there has been an attempt by City Staff ("Staff") to say that the South facing side is not the "back" or "rear".

This is a blatant attempt to circumvent 17.38 for the benefit of the Applicants, by a representation that defies logic. If Staff could identify any side as the "rear", there would never be a situation where 17.38 could or would be applied, because Staff could and would simply ensure the "rear" never faced a side lot line. Why then even have 17.38? CMC 17.38 states a legislative intent not to allow such situational subterfuge. Staff's conduct regarding this issue shows a blatant example of bias.

There can be no doubt about which side is the rear.

At the PC hearing of September 11, 2013, none other than Mr. Manfredi, Chairman of the Planning Commission, clearly identified, on numerous occasions, that the South facing side was the "back" or "rear" of the proposed structure. In just one example, Commissioner Manfredi stated:

> *"The recommended motion is to approve the setback variances with conditions. One of the conditions is to work with staff, the applicant to work with staff, to prevent or deal with the windows on the back side of the house that can possibly lead to bad neighbor feelings."*

**CMC 17.38.020 (E) requires a 10 foot setback. The variance requested is not 1 foot. It will be 6 feet.**

## NOTES ON FINDINGS

**Regarding the next four issues, it is the responsibility of the Applicants to show that each one of these Four Findings, defined in CMC 17.42.020 ("17.42") are, in fact, true.**

> *"No variance shall be granted unless it can be shown that all of the following findings exist."*

**It is crucial for Council members to recall that if any one of the findings is not proven by the Applicant, the Council must then deny the entire variance. Showing that these findings are met (i.e. proven) requires use by the Applicants of essentially the same rules of evidence as in a court of law. This requirement is discussed further in the Additional Details section below. Appellants, although not required to prove anything, do show, with facts, CMC references, and other evidence, that none of the findings can be shown to be true.**

### 3. FAILING TO PROVE FINDING #1

**The CMC requires that "*Conditions apply to the property that do not apply generally to other properties in the same zone or vicinity, which conditions are a result of lot size or shape, topography, or other circumstances over which the applicant has no control.*"**

The Applicants must prove that "*unique*" conditions apply to this property. Applicants' original application stated: "*FEMA requirements pursuant to the Napa River that runs adjacent to the property.*"

This statement does not even mention the issue of being "unique", and standing alone proves absolutely nothing. Applicants have not offered any other basis on which to make the finding of unique necessity.

Appellants argue it is manifestly evident that the property is not unique. In fact, FEMA requirements obviously apply equally to all of the properties adjacent to the Napa River or in the floodway. It is far from unique.

**The Applicants cannot prove this first finding is true; common sense tells us that it is not true. Failure to prove the property is unique is, in and of itself, sufficient basis to mandate the Council deny the variances.**

## 4. FAILING TO PROVE FINDING #2

***The variance is necessary for the preservation of a property right of the applicant substantially the same as is possessed by owners of other property in the same zone or vicinity.***

Applicants' originally stated: "*Accommodate residents parking and living accommodations. This would replace the existing structure as well as providing covered on site parking for the three addresses (no increase in number of occupants). We are trying to protect current occupants of the property from debris falling from neighbor's historical trees.*"

The Applicants must prove that a property right possessed by other property owners is at risk, and that a variance is necessary for the preservation of this property right. Their statement does not even mention the issue of property rights. None of their elements cited are permitted as a reason for granting a variance based on "Hamilton" as cited above.

Appellants' position is that the reverse is true. Applicants already enjoy a property right not enjoyed by other owners of similarly zoned and FEMA restricted property. This is because Applicants have a vested non-conforming structure that other property owners in this zone do not now and can never enjoy. Further, to replace this structure with two much larger non-conforming structures, will be an additional privilege not enjoyed by others. Applicants do not identify any property right which is actually threatened and thus needs to be preserved.

**Failure of the Applicants to show this finding to be true is also, by itself, sufficient for the Council to deny the variances.**

## 5. FAILURE TO PROVE FINDING #3

***The authorization of the variance will not be materially detrimental to the purposes of this title, be injurious to property in the zone or vicinity in which the property is located, or otherwise conflict with the objectives of City development plans or policies.***

Applicants' original application stated: "*The variance will not in any way be materially detrimental to any properties in the vicinity. Set backs are minimal.*"

Simply saying this does not make it the truth. The Applicants must prove that authorization of the variance will not be materially detrimental or injurious to other property in the zone or vicinity where the property is located. Not one admissible or authenticated bit of proof is provided by the Applicants to discharge this burden.

Appellants have expert qualifications pertaining to this subject. Robert Hitchcock was a licensed California real estate agent for many years. Over the past 42 years, Appellants have bought or sold real estate more than 30 times, including bare land, rental houses, multiple units, vacation property, and residences. In addition, for 18 years as a personal financial consultant, Appellant was involved in the analysis of dozens of

real estate valuations. Finally, Appellant has invested in dozens of trust deed notes, with both personal funds and funds invested for a charitable trust. Each of these has involved an assessment of the underlying real estate value.

Appellants will show that their views, privacy, and property value will all be negatively impacted. Who can actually speak to this issue? Only the other property owners, those most affected.

Currently, the **views** Appellants enjoy from their back yard are bucolic, and achieved without loss of privacy. To the east, south, and west, all views into this property are blocked. Most importantly, to the north, the direction in question, only parts of the roof line and part of the existing garage are visible. No windows look into Appellants' property. But the proposed structure is 12 feet high set on top of a 4 foot high foundation, for a total height of 16 feet. Therefore Appellants' view will be the rear of a building, rising 10 feet above the top of the fence and extending 50 feet along the common property line. How can anyone say that this is not detrimental to Appellants' view?

Appellants currently enjoy near total **privacy**. From this new house, occupants will be staring down from an eye level 10 feet above ground level into Appellants' garage, driveway, garden area, back yard, deck areas, back door area (which is used 95% of the time to go in and out), and directly into the breakfast room/kitchen of their house which is essentially a wall of windows facing the common property line. None of this is possible at present.

Also, Appellants are retired; both are usually at home. This loss of privacy will pervade their daily lives, every day, both day and night.

Appellants state that loss of privacy and loss of view will cause their **property value** to go down. Privacy increases a property's relative value; a nearly complete loss of existing privacy has the opposite impact.

To find that granting these variances will not be materially detrimental or injurious to Appellants' property is indefensible. It ignores totally Appellants' property rights, privacy rights, and property value. Not one person from City Staff or the Planning Commission has ever viewed the project from the Appellants' side of the property line. Only Mr. Barnes from the Council has visited Appellants' property. Frankly, it is impossible to assess fairly the negative impact on the Appellants without actually seeing, first hand, the situation from Appellants' property.

Appellant Robert Hitchcock speaks as an expert on this issue. The Applicants have offered no evidence to discharge their burden of proof on this issue.

**Failure of the Applicants to prove this finding is true is also, by itself, sufficient to deny the variances.**

## 6. FAILURE TO PROVE FINDING #4

***The variance requested is the minimum variance which will alleviate the hardship. (Ord. 339 § 1, 1978).***

Applicants' original statement said: "*We are attempting to maintain the maximum distance from the river and are replacing the existing residence in essentially the current footprint with minimal increase in coverage. Again, we are protecting the current residents' vehicles from falling vegetation, as far from the river as possible.*"

Once again, this does not address the main issues of the finding. There is no discussion of the minimum variance. There is no hardship identified that could justify replacement by variance of the existing residence. The applicants have not explained why remodeling the existing structure is not possible. By insulating, adding an air conditioning, etc., the Applicants could improve their existing structure with no change to existing vested conditions.

For the Applicants to say the existing residence is essentially being replaced in the same footprint is misleading. The existing structure is both a residential unit and a garage. The total area is 875 sq. ft., comprised of a garage of roughly 200 sq. ft., and a living area of approximately 675 sq. ft. The proposed new living area is 926 sq. ft., fully 251 sq ft larger than at present, or a 37% increase. The proposed carport area is 510 sq. ft., 310 sq. ft larger than the garage, or an increase of 155%. When combined, the new total lot coverage will be 1,436 sq. ft., or an overall increase of 561 sq. ft., or 64%.

To say that there is a "minimal increase in coverage" is intentionally misleading. It ignores the new carport and ignores the impact of incorrectly counting the garage as part of the current living area. It is hard to believe that a 64% increase in overall lot coverage could be considered a minimum increase.

Appellants stress again that there is no hardship defined, much less proven, by the Applicants. Compliance with local zoning laws and FEMA requirements is NOT a hardship. It is the same for everyone.

In fact, the Applicants' proposal creates a hardship that does not presently exist for the adjoining property owner. This hardship is the loss of view, loss of privacy, and loss of property value.

**Failure to show any hardship, plus the submission of misleading facts are, by themselves, each sufficient for the Council to deny the variances.**

**The Applicants have failed to show that even one of the Four Findings is proven to be true. The Appellants' evidence, as cited above, references facts, the CMC, applicable laws, and uses basic logic to show conclusively that these findings are not true as required in 17.42. They are not even close to being proven. Here, the Council has four overwhelming arguments to deny the variances, only one of which is needed. Can anyone honestly say that all four findings are proven? The answer clearly is no.**

7. **CEQA EXEMPTION:**

The purpose of the California Environmental Quality Act is to inform decision-makers, agencies, and the **public** of the potential adverse environmental impacts that a project might cause, before the project is approved. The California State legislature created Categorical Exemptions ("CE"s) for a particular group of actions that, on their own, do not have the potential to cause adverse environmental impacts. But depending on where the project is located, these CEs do not apply because of the sensitive environment where the project is located, such as in floodways, stream and wetland habitats, where the proposed project could potentially result in a significant adverse impact. Rendering a decision that a project is CE, without considering the exceptions to using a CE, is to violate the intent of CEQA, namely to inform interested parties as to a project's potential to significantly adversely impact the environment or people. **A CE notice should explain why the exceptions do not apply.** The City has offered no factual support for their decision to use a CE to grant zoning variances and to allow an increase in non-conforming structures that will result in significant impacts to the Appellants' property.

# ADDITIONAL DETAILS

In the following sections are found additional facts on issues raised in the written presentation above, as well as additional information regarding the decision on the appeal.

## WHAT LEGAL FRAMEWORK GOVERNS THIS PROCESS?

To begin, it is necessary to review this City Council hearing at a more foundational level. One of the Applicants is an attorney, the Appellants are not. Appellants felt it prudent, therefore, to study not only the Calistoga Municipal Code, but also the body of relevant laws and court decisions, the federal, state, and municipal legislative actions, commonly known as "*statutes*", and the published judicial decisions created by the application of principles to laws and to facts, which collectively are referred to as the "*common law*".

Elsewhere in this document are several references to the Court of Appeals decision in "Hamilton". Published judicial decisions, such as Hamilton, make up the "*common law*", the law of our land. Subsequent Courts then abide by the principles and interpretations established, by precedent, in these published decisions. The purpose of the common law is to ensure that there will be a consistency of decision from one case to another with similar facts.

Administrative tribunals, such as this City Council, are required to follow strictly the laws as interpreted by our courts. If differing decisions were tolerated, there would not be **due process** or **equal protection** as mandated by the Constitution. As a result, the courts have long rejected conduct in which a law can be neutral on its face or purpose, but is actually applied in a discriminatory or biased manner.

In addition to establishing our institutions of government and our system of laws, the Constitution sets forth the rights of the individual and the government's responsibility to honor those rights. The principles of Constitutional **due process** and **equal protection** are not just theoretical or abstract, and are not applicable only to larger issues. These principles are directly applicable to this very matter under consideration. As stated by Louis E. Goodman, former Chief Justice of the Court, Northern District of California U.S. District, *Law Day*, 1961:

> *"Inroads into, and shortcuts around our basic laws safeguarding individual rights, are too easily accepted - due to indifference, or callousness, or to too quick yielding to the clamor of those who seek to glorify an end, no matter what the means. To proceed step-by-step in every process that affects life or liberty is, at times, a tiresome and tedious procedure. The temptation to short cuts is often strong."*[2]

The importance of understanding this aspect of our legal system becomes initially apparent in the reading and understanding of this seminal court decision, i.e. Hamilton, which governs approval of variances in the State of California and hence in the application of this precedent to the matter now under consideration..

**Due process**, in cases such as this, requires in part that there be adequate notices given. There are numerous examples of inadequate notices given to Appellants in the course of this matter, including:

- the original notice of the hearing on September 11, 2013,
- the notice of the decision to allow or deny an appeal on October 1, 2013,
- the unavailability of the technical engineering reports on which Council decided to grant the floodplain Variance, VA 2013-05,

These examples, and others, have limited from the start, Appellants' ability to formulate testimony and responses; they also, at times, make it logically impossible for the Council to conduct even a superficial pro forma review of highly conflicted data, as required by law.

The violations of the right to **equal protection** are equally as egregious. Over the past five or six months, the Applicants have been allowed to meet with City Staff, and lobby for approval of their project. In contrast, the Appellants testified that they became aware of the scope of the project just two days before the original Planning Commission hearing. Since then, Staff has never offered any assistance to Appellants.

Another glaring example of failure to provide equal protection is that, for this January 7th appeal hearing, the Appellants were advised that all written comments must be submitted by Thursday, January 2, 2014. That is this very document you are reading.

Appellants have been repeatedly admonished that failure to adhere to this timeline might prejudice their chances for success. However, the Appellants have also been advised that City Staff may not provide their revised Staff Report until several days later. By using this unfair tactic, the City of Calistoga will deliberately and effectively prevent Appellants from including any comments in their written submission based on this new Staff Report. Yet this timing will give both Staff and the Applicants time to review Appellants' positions, potentially to assist in their attempts to frame counter arguments. This is absolutely contrary to the requirements of Federal and State law and a clear violation of Appellants' equal protection rights.

A further example is the Applicants' original application wording with regard to the Four Findings, as compared to the Staff Report for the Planning Commission hearing of September 11, 2013. The Applicant's application wording was entirely rewritten by Staff. In the hearing, almost the entire case in

favor of granting the variance was presented not by the Applicants, but by Senior Planner Erik Lundquist, who is of course, the person purportedly charged with fairly reviewing the project to ensure compliance with CMC and all other rules and laws, and then making a recommendation to Council. Not surprisingly, Mr. Lundquist, not surprisingly, recommended approval of his very own proposal and presentation. This is a conflict of interest, and once again shows bias against the Appellants.

Additionally, in setting the hearing for this appeal, Staff avowed in its report to Council that January 7, 2014, was the earliest date on which the matter could be heard. Two weeks later, in a Staff report pertaining to a different variance appeal, it was avowed that the appeal must be heard within 30 days. These two statements were contradictory.

Therefore, In order to ensure that this appeal would not be ultra vires, the Appellants have consented post facto to a continuance of the hearing beyond 30 days, but such inequality in the application of the law is a clear violation of appellant's rights.

These (and other) unequal processes are all fundamental violations of **due process** and **equal protection**, and present clear cases of bias against Appellant. Bias is further discussed below.

## THE APPEARANCE OF BIAS BY THE CITY OF CALISTOGA

Although they are the employees of all residents, and should be neutral in their efforts, City Staff has shown an inappropriate preference for the Applicants herein. Given that the City Staff has, in this matter, either offered or permitted evidence that is clearly at odds with the facts, and even on occasion directly contradicted its own testimony, there is much to suggest that this entire process has thus far been biased, and that the Appellants are today being further denied their rights to **due process** and **equal protection** under the law. In addition to the examples cited above, there are numerous other examples of bias.

- At the September 11, 2013 Planning Commission hearing, the Applicants had the burden of proof, to prove (in Finding #1) one essential required fact, that their property is unique from all adjacent properties. They did not. The only evidence offered was a bare recital of the terms of the statute coupled with the statement that the subject property is within the FEMA floodplain. Staff displayed bias when they failed to correct Applicant by pointing out that all adjacent properties lay within the floodplain, and therefore Applicants' argument fails utterly to prove the finding. Instead Staff accepted the finding without proof.

- Further, at the September 11, 2013, the Applicants had the burden of proof (in Finding #3) to show that there would be no harm to adjacent properties. They offered absolutely no proof in that regard as is clearly required. The only evidence proffered was speculative opinion offered by Staff and the Commissioners themselves, with inconsistent and inaccurate factual assertions. Yet the PC did not seem to care about the

lack of evidence and allowed the finding, reflecting bias against the Appellants in favor of the Applicants.

- On other occasions, Staff supported the proposition that there is only a minimal increase in land coverage proposed, while the very documents submitted by the Applicants reveal it be an overall increase of over sixty per cent, (ten times greater than orally alleged). This is shown in detail above on page 7. Failure to correct this erroneous information again displayed bias by Staff against the Appellants.

- Additionally, Staff testified that the "rear" of the proposed house is (miraculously) now just a "side" of the building (i.e. not the rear) for setback calculations, without acknowledging the existence and import of a ten foot setback requirement per CMC 17.38.010 (E) (see below).

Examples of such obviously biased conduct bring civic administration into serious disrepute, and consequentially, invite judicial review to ensure fairness.

When approving or denying a variance, a decision maker must make findings of fact to bridge the analytical gap between the raw evidence and ultimate decision. The courts will find an abuse of discretion if the decision maker (1) has not proceeded in a manner required by law or (2) if the determination or decision is not supported by substantial evidence.

**In this matter It is hoped that the City's conduct and decision will, in this hearing, accord all parties the same due process and equal protection, and will be in complete conformity with all statutes and the common law.**