
[PDF] 427 Riverview Avenue - City of Capitola Design Review & CDP App. 23-0400 - COAs 2 & 4

From Derric G. Oliver <doliver@fentonkeller.com>

Date Wed 9/24/2025 11:35 AM

To Leila J. Moshref-Danesh <lmoshref@bwslaw.com>

Cc Goldstein, Jamie (jgoldstein@ci.capitola.ca.us) <jgoldstein@ci.capitola.ca.us>; Sesanto, Sean <ssesanto@ci.capitola.ca.us>; Herlihy, Katie (kherlihy@ci.capitola.ca.us) <kherlihy@ci.capitola.ca.us>; Samantha Zutler <SZutler@bwslaw.com>; PLANNING COMMISSION <planningcommission@ci.capitola.ca.us>

 1 attachment (203 KB)

20250924 Letter - Oliver to Moshref-Danesh - CDP App. 23-0400 - COAs 2 & 4.pdf;

Good morning, Leila-

Attached please find my letter to you of today's date regarding the above-referenced subject.

Best,

Derric

Derric G. Oliver
FENTON & KELLER
Post Office Box 791
Monterey, CA 93942-0791
831-373-1241, ext. 207
831-373-7219 (fax)
doliver@fentonkeller.com
www.FentonKeller.com



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FENTON & KELLER

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

2801 MONTEREY-SALINAS HIGHWAY

POST OFFICE BOX 791

MONTEREY, CALIFORNIA 93942-0791

TELEPHONE (831) 373-1241

FACSIMILE (831) 373-7219

www.FentonKeller.com

LEWIS L. FENTON
1925-2005

OF COUNSEL
CHARLES R. KELLER
SARA B. BOYNS
TROY A. KINGSHAVEN

CHRISTOPHER E. PANETTA
BRIAN D. CALL
JOHN E. KESECKER
ELIZABETH R. LEITZINGER
ANDREW B. KREEFT
KENNETH S. KLEINKOPF
ALEX J. LORCA
DERRIC G. OLIVER
MARCO A. LUCIDO
CHRISTOPHER M. LONG

CAROL S. HILBURN
GLADYS RODRIGUEZ-MORALES
BRADLEY J. LEVANG
CHRISTOPHER J. NANNINI
TARA L. CLEMENS
MATTHEW D. FERRY
EMMANUEL PEREA JIMENEZ
REBECCA J. SAATHOFF
ALYSSA C. MATSUHARA
KALI N. SMILEY
ELIZABETH A. HERR

DERRIC G. OLIVER

September 24, 2025

DOliver@fentonkeller.com
ext. 207

VIA EMAIL ONLY (LMOSHREF@BWSLAW.COM)

Leila Moshref-Danesh, Esq.
Burke, Williams & Sorensen
1770 Iowa Ave, Ste 240
Riverside, CA 92507-2479

Re: 427 Riverview Avenue, Capitola (APN 035-132-01)
City of Capitola Design Review/CDP Application No. 23-0400 (amended)
Proposed conditions of approval 2 and 4
Our File: 60257.70409

Dear Leila:

Thank you (and Jamie Goldstein and Sean Sesanto) for meeting with us yesterday to discuss the above-referenced matter and the City of Capitola's proposed four conditions of approval relating to the 1922 easement and drainage facility. As you confirmed, the City contends (based on the 1922 easement deed and the County Flood Control District Zone 5 resolutions) the County is the easement holder and is responsible for the drainage facility under the property.

With that in mind, during our meeting yesterday, we asked you to provide us with supporting legal authority for the City's contention that it is within the City's "police power" authority to impose proposed conditions of approval #2 (indemnification of City/County for damages caused to the project/property by the drainage facility) and #4 (written consent from easement owner to construct the project), especially in light of the fact that the property owner/applicant already signed the City's "standard" indemnity agreement relating to damages caused by the project.

In response, you first pointed to the City's power to regulate for "health and safety." However, as we explained, no relevant law, code, or ordinance authorizes City regulation/enforcement of third-party easement rights; and, "health and safety" concerns are appropriately and adequately addressed by the City's proposed condition of approval #1 (project shall be designed/constructed in conformance with the engineer's recommendations).

In further response, you cited Capitola Municipal Code section 17.120.180(D) and explained that the 1922 drainage easement is a “property right.” However, section 17.120.180(D) makes no mention of easements or “property rights;” rather, it provides the City must find the project “will not be detrimental to the public health, safety, or welfare or materially injurious to the properties or improvements in the vicinity.” Once again, this required finding can be made upon City approval of the project engineer’s report/project plans and by imposing proposed condition of approval #1. In other words, section 17.120.180(D) and proposed condition of approval #1 are rationally related to “health and safety” because they require the project be designed and constructed to avoid causing physical harm to people or property.

Conversely, as we explained yesterday, proposed conditions of approval #2 and #4 relate to financial and legal interests (not “health and safety”), including those of a third-party easement holder (County) who, incongruously, has disclaimed any legal responsibility over the very same easement/area that is the purported basis for these two proposed conditions. On this point, your rebuttal was merely non-responsive vexation that, despite the City’s nearly two-year effort, the property/owner refuses to sign the demanded, unconstitutional indemnity agreement.

Once again, ahead of the upcoming Planning Commission hearing on October 2nd, we ask that you provide us with legal authority establishing the City’s power to impose proposed conditions of approval #2 and #4. Please also provide us with the following:

1. Legal and factual support for imposing conditions 2 and 4 on this project—and why those conditions are not arbitrary and capricious, in violation of constitutional principles of due process and equal protection—when no such conditions have been imposed on previously approved projects on similarly situated properties (including 419 Capitola Avenue).
2. Legal and factual bases sufficient to meet the City’s burden to establish that these two conditions satisfy the *Nollan/Dolan* essential nexus/rough proportionality tests and are not unconstitutional conditions/land use exactions placing public burdens on private shoulders.
3. The City’s legal and factual support for any relevant exception to California “black letter” easement law that, absent agreement to the contrary, (a) an easement holder’s rights are limited to the terms of the easement grant; (b) an easement holder is responsible for maintaining the easement area in safe condition and repair; (c) the property/servient tenement owner has no legal responsibility to maintain/repair the easement area; and (d) the property/servient tenement owner retains all other property rights not inconsistent with the easement.
4. Legal and factual support that proposed condition of approval #2 (indemnification of City/County for damages caused to the project/property by the drainage facility) does not unconstitutionally impair the obligation of contracts (i.e., extort an amendment to the terms of the 1922 easement).

Leila Moshref-Danesh, Esq.
September 24, 2025
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5. Legal and factual support that proposed conditions of approval # 2 and #4 do not violate the Permit Streamlining Act, as no such requirements were included in the City's development permit application form for this project.

We look forward to receiving and reviewing your responses. If we do not timely receive on-point responses to these specific requests, we will reasonably conclude the City has no such law or substantial evidence to "bridge the analytical gap" as required to recommend and approve imposing proposed conditions of approval #2 and #4. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.)

Please let me know if you have any questions or would like to further discuss this matter.

Very truly yours,
FENTON & KELLER
A Professional Corporation



Derric G. Oliver

Cc: Jamie Goldstein, City Manager, jgoldstein@ci.capitola.ca.us
Sean Sesanto, Associate Planner, ssesanto@ci.capitola.ca.us
Katie Herlihy, Community Development Director, kherlihy@ci.capitola.ca.us
Samantha W. Zutler, Esq., City Attorney, szutler@bwsllaw.com
Capitola Planning Commission, planningcommission@ci.capitola.ca.us