

Objections to Variance Application V23-0001

P.C. 01/11/2024

Item # 3

14 Pages

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Dear Chair and Planning Commissioners:

I represent Mr. Peter Lee and Mrs. Cheryl Lee regarding their property located at 1625 Player Court, South Lake Tahoe, California 96150 (the "Lee Property"). For the factual and legal reasons set forth in the attached letter, we respectfully submit that El Dorado County Variance Application V23-0001 regarding the neighboring property, 1627 Player Court (the "Atkins Property"), violates controlling law and therefore cannot be approved.

Please review the attached letter and include it in the administrative record regarding this proposed project. Thank you.

Respectfully,

Michael Patrick Durkee, Esq.

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El Dorado County Planning Commission
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Re: Objections to Variance Application V23-0001

Dear Chair and Planning Commissioners:

I represent Mr. Peter Lee and Mrs. Cheryl Lee regarding their property located at 1625 Player Court, South Lake Tahoe, California 96150 (“Lee Property”). Thank you for this opportunity to present the factual and legal reasons why we respectfully submit that El Dorado County Variance Application V23-0001 regarding the neighboring property, 1627 Player Court (the “Atkins Property”), violates controlling law and therefore cannot be approved.

I. SUMMARY.

Proposed Variance Application V23-0001 is legally flawed for several reasons, including without limitation, violating CEQA, violating the variance rules of California Planning and Zoning law, violating the Subdivision Map Act, and violating the Tahoe Regional Planning Agency (TRPA) Regional Plan and Code of Ordinances. Each of these points are presented in detail below.

II. FACTUAL BACKGROUND.

1. This quiet neighborhood (Country Club Heights association) is over 50 years old, is comprised of single-family homes only (averaging approximately 1500 square feet in size), and has its structures nestled in the natural forest setting with large setbacks from the street. There are no existing structures within the 20-foot setback from the roadway in the immediate neighborhood. The area is generally wooded with natural trees, and has open space/lots that give the neighborhood an open, natural, wooded and non-city like feeling (i.e., unlike the Bay Area where houses/structures are on top of the street or right next door to other homes).

2. The Atkins’ Variance Application (Variance V23-0001) - now pending before the Planning Commission – relates to the “Atkins Property” located at 1627 Player Court, next door

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to my clients' Lee Property at 1625 Player Court. The Atkins Property was purchased in 2021, and is a 4 bedroom, 2 bath, two-story (loft), 1639 square foot home with an existing paved driveway that can accommodate two parked vehicles, but no garage on a 0.17-acre lot. The Atkins' Variance Application (Variance V23-0001) requests a reduction of the front yard setback from 20 feet to six (6) feet, and a reduction of the western side setback from five (5) feet to three (3) feet to allow for the construction of a two-story, 440-square foot, 2-car garage; the second story would contain additional living space with windows looking into my client's master bedroom, bathroom, and kitchen. The Atkins house was constructed over 50 years ago, has had two full-time prior owners, and has never had a garage. No building/planning application to review the proposed structure has been submitted to El Dorado County and we consider the design of this structure to only be conceptual for this reason.

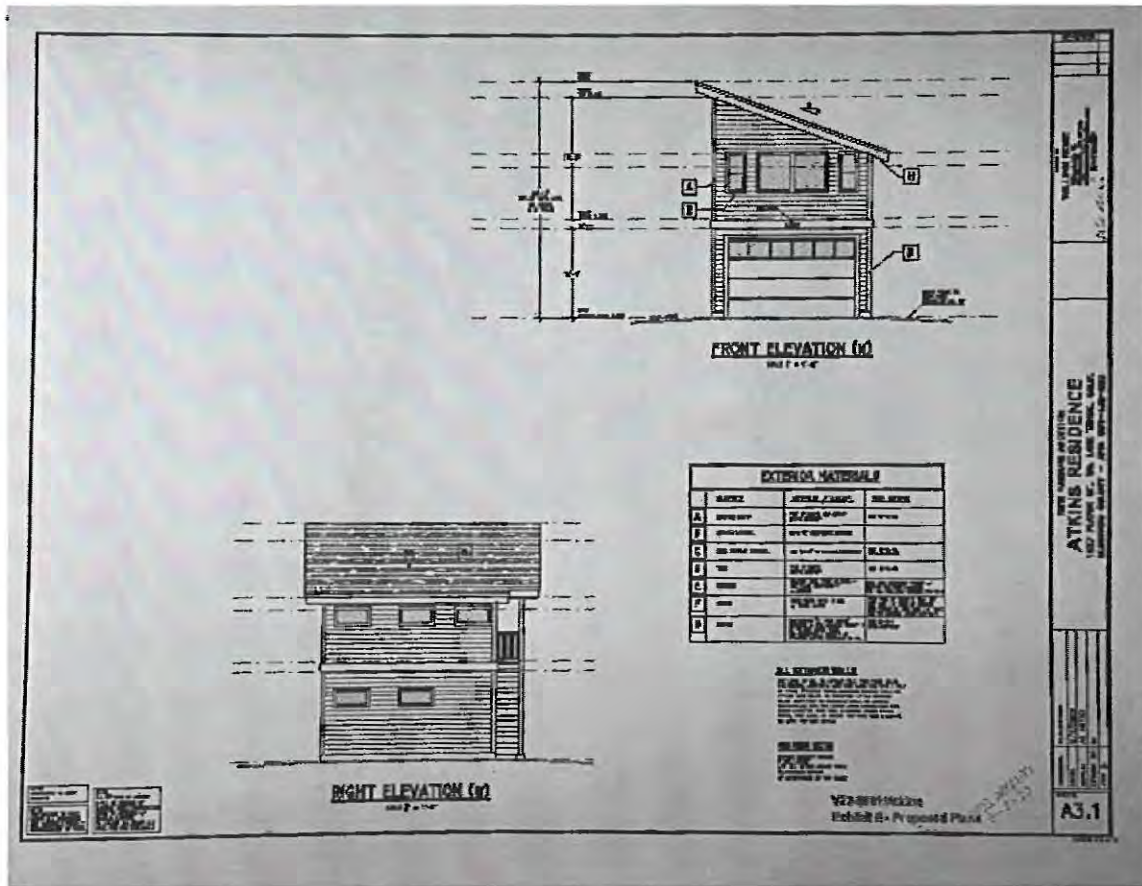
3. Both my clients' Lee Property and the Applicant's Atkins Property are located in the Player Court cul-de-sac, directly off of Player Drive.



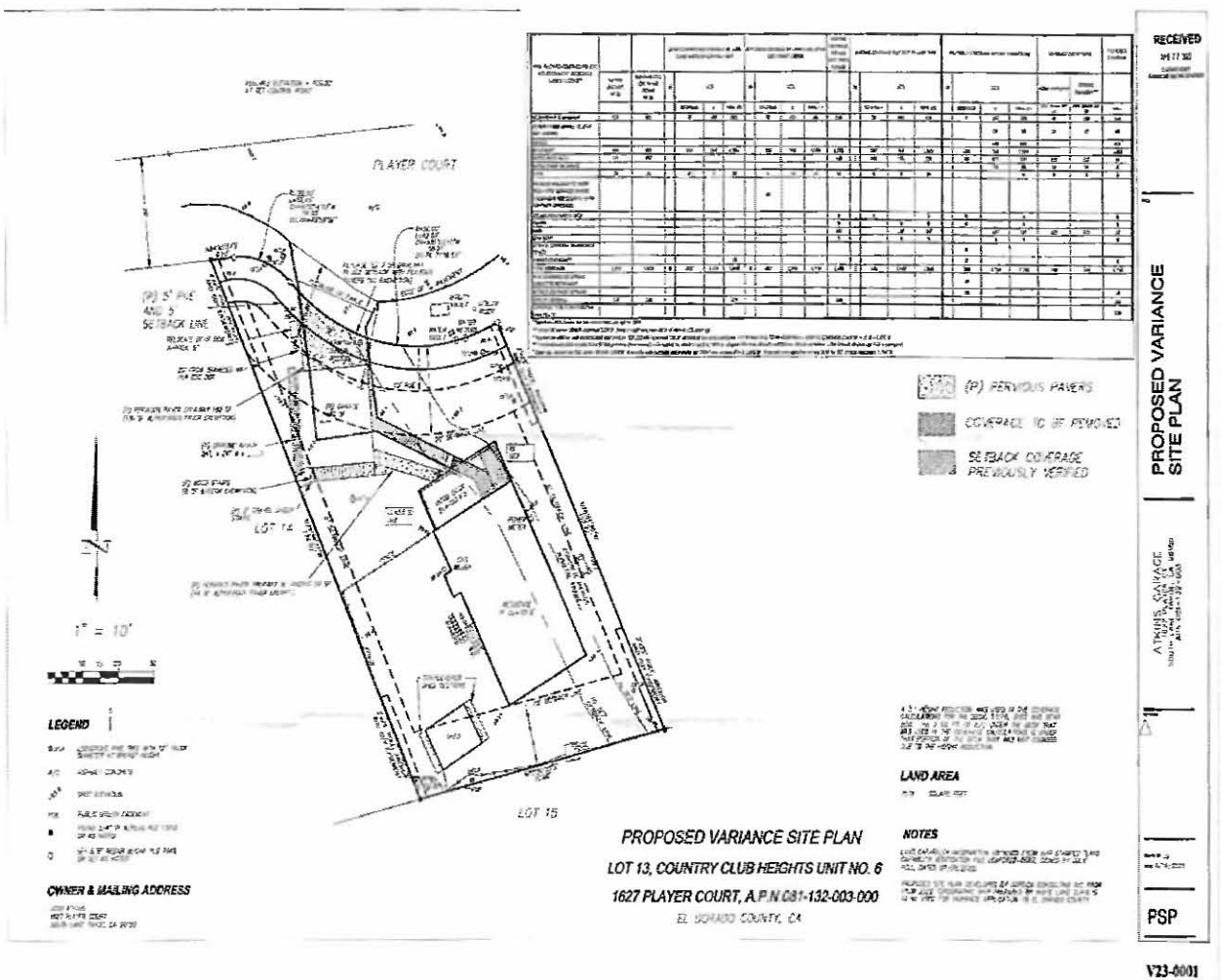
4. My client's property (the Lee Property) is located at 1625 Player Court (see arrow above), was purchased in 2009, and is a 3 bedroom, 2.5 bath, 2-story, 2309 square foot home with an attached 2-car garage on a 0.22-acre lot.

5. Again, the upstairs windows on the Atkins proposed 2-story garage would be a few feet from my client's master bedroom, bathroom, and kitchen windows – all privacy would be lost.

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6. The Atkins Property was created by a recorded Final Map, approved pursuant to the Subdivision Map Act, which Final Map set a “hardline” 20-foot setback from the road. That Final Map setback line cannot be altered by Variance. Instead, a Final Map “Amendment” must be approved and recorded. No such Final Map Amendment is pending with Variance Application V23-0001.



7. County Staff seems confused about the facts of the surrounding neighborhood:

- **A considerable portion of the surrounding homes are permanent residences with no garages:** For example, 3 of the 5 homes that comprise Player Court do not have garages. On neighboring Sikes Court, 2 of the 3 homes do not have garages. On Player Drive, 8 of the 21 homes do not have garages.
- **No other home has a 2-story garage with living quarters and no other garage encroaches into the 20-foot setback:** Of those homes with garages, only 2 homes have detached garages, and both of those comply with the 20-foot setback, are only one-story in size, and have no upper story living space with windows peering into neighboring bedrooms, bathrooms, and kitchens.
- **The neighborhood – and the Atkins Property - have successfully survived more than 50 years of winters with no garages:** For the last 50 years, approximately 40% of the homes in the area have not had garages. The Atkins purchased the Atkins Property with the full knowledge that it did not have a garage. No hardship specifically related to the

site conditions of the Atkins Property exist. The Atkins' personal circumstances (financial or otherwise) arise from a condition created by a predecessor and are not, in themselves, reasons to grant a variance. Furthermore, the Atkins have not presented any evidence to show that a garage cannot be incorporated into a new home that would replace or modify the existing home on the property.

- **To now allow garage variances simply because some of the other properties in the neighborhood have them will be “the exception that swallows the 20-foot setback rule”:** *If the County now believes that every home deserves a garage, even if it encroaches into the 20-foot roadway setback, then it needs to change the County’s Planning and Zoning regulations, not “vary” from them whenever they want. . Neither El Dorado County nor TRPA currently mandates covered parking for single family dwellings. The Atkins currently have adequate parking on their property.*
- **If the Variance is approved, every home without a garage will now seek a Variance:** *If the County approves this Variance, it will set a precedent, and will eliminate the County’s ability to deny a future variance even when the garage violates the County’s Planning and Zoning regulations.*
- **The requested variance would also require the approval of the Tahoe Regional Planning Agency.** *TRPA has identified a stream environment zone (SEZ) on the Atkins Property. The identification of the SEZ creates a 10-foot building setback. The information in the Staff Report is internally inconsistent regarding whether TRPA has officially verified the existing land coverage for the Atkins Property. More critically, there is a lack of information about whether the Atkins Property is burdened by a snow storage easement along the street frontage that will now be curtailed by the construction of the garage within the existing setback identified in the subdivision map. TRPA may be required to approve any change to the subdivision map that impacts the recorded 20-foot front yard setback in accordance with Subsection 39.1.3.D of the TRPA Code of Ordinances (Modifications to Existing Parcels and Subdivisions). No evidence has been submitted to verify that TRPA has been requested to comment on the proposed variance and subdivision modification.*

III. LEGAL ARGUMENT.

A. The California Environmental Quality Act (CEQA)¹

1. *The County has not Provided an Adequate Project Description.*

The “Project,” as described in the Staff Report, is a variance to allow the construction of a two-story garage with an upstairs residential usage on the Atkins Property. The Staff Report

¹ The CEQA statutes (Pub. Resources Code, § 21000 *et seq.*), and the Guidelines for the Implementation of CEQA (Cal. Code Regs., tit. 14, § 15000 *et seq.*) (Guidelines), detail the protocol by which state and local agencies comply with CEQA requirements.¹ This document refers to the statutes and the Guidelines collectively as “CEQA” and cites to the Guidelines as “Guidelines, § ____.”

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further includes information and proposes findings that the variance be considered exempt from CEQA under Guidelines section 15303, the “small structures” exemption.²

The original staff report to the Zoning Administrator, however, included reference to needed action by the Board of Supervisors: “A Subdivision Map Amendment has been submitted to reduce the 20-foot setback required by the Subdivision. That approval will be reviewed by the Board of Supervisors.” (See Original Staff Report, p. 3.) In the current staff report, the issue concerning the subdivision map is now referred to as an abandonment of the easement reflected on the subdivision map; that action will be undertaken by the County Surveyor. (Planning Commission Staff Report, p. 2. “An Abandonment of Easement application (AOE23-0003) with the County Surveyor’s office has been submitted to reduce the 20-foot setback required by the subdivision map. Staff is recommending approval of this request.”) Under the County’s own FAQ for easement abandonment, the process still requires Board of Supervisors approval, and an action on the variance by the Planning Commission at this time piecemeals the review process. The abandonment of encumbrances requires signoffs from all entities with rights to the encumbrances, and these entities have not been made known in the variance application.

In addition, TRPA may be called upon to review and consider changes to the subdivision map for those areas within its jurisdiction, as noted earlier.

CEQA requires that local agencies consider the potential environmental effects of “projects.” The first and most crucial step of any CEQA review is the project description. The term “project” refers to the whole of an action and to the underlying physical activity being approved, not to each government approval (Guidelines, § 15378(c)). Thus, even if the Lead Agency needs to grant more than one approval for a project, only one CEQA document should be prepared. Consideration of a variance is a project for purposes of CEQA.

In the case of this requested variance, it is not possible to determine whether the action on the subdivision map by either the Board of Supervisors or TRPA is included in the environmental analysis undertaken for the variance itself—or indeed whether any action to change the setback reflected on the subdivision map has been reviewed under CEQA. The failure to have an adequate “Project Description” is thus fatal to the proper analysis of the potential environmental impacts of the proposed Project.

2. The County has Improperly Segmented Environmental Review of the Project.

Piecemealing or segmenting means dividing a project into two or more pieces and evaluating each piece in a separate environmental document, rather than evaluating the whole of the project in one environmental document. “Courts have considered separate activities as one CEQA project and required them to be reviewed together where, for example, the second activity is a reasonably foreseeable consequence of the first activity; the second activity is a future expansion of the first activity that will change the scope of the first activity’s impacts; or both

² Class 3 consists of construction and location of limited numbers of new, small facilities or structures; installation of small new equipment and facilities in small structures; and the conversion of existing small structures from one use to another where only minor modifications are made in the exterior of the structure. The numbers of structures described in this section are the maximum allowable on any legal parcel. Examples of this exemption include but are not limited to:***(e) Accessory (appurtenant) structures including garages, carports, patios, swimming pools, and fences. (Cal. Code Regs. tit. 14 § 15303)

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activities are integral parts of the same project.” *Sierra Club v West Side irrigation Dist.* (2005) 128 Cal.App.4th 690, 699, 27 Cal. Rptr. 3d 223 (internal cits. om.). Segmenting is explicitly forbidden by CEQA, because dividing a project into a number of pieces may allow a lead agency, such as El Dorado County, to minimize the apparent environmental impacts of a project by evaluating individual pieces separately, each of which may have a less-than-significant impact on the environment, but which together may result in a significant impact. Segmenting a project may also hinder developing comprehensive mitigation strategies.

Here, because of the lack of including the potential action by the Board of Supervisors on the subdivision map and potential action by TRPA on considering encroachment into the setback, the County has impermissibly segmented its environmental review of allowing the construction of the proposed garage. As such, the County should prepare an initial study to determine all of the potential environmental impacts of each approval necessary for the Project to proceed.

3. The Exception Under Guidelines Section 15330.2 Applies; Further Environmental Review is Required.

Once a lead agency has determined that an activity is a project subject to CEQA, the next step in the analysis is whether the project qualifies for an exemption. (Guidelines, § 15061.) Once an exemption is found, the lead agency must then consider whether “there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.” (Guidelines, § 15300.2(c), emphasis added.) The courts have characterized “unusual circumstances” as having two parts: (1) unusual circumstances and (2) a potential impact on the environment. *Berkeley Hillside Preservation. v. City of Berkeley* (2015) 60 Cal.4th 1086, 1115, 184 Cal. Rptr. 3d 643, 343 P.3d 834, as modified by *Berkeley Hillside Preservation v. City of Berkeley* (2015) 61 Cal.4th 163, 348 P.3d 845 {*Berkeley Hillside*). When an exemption no longer applies because of the exception, the lead agency must then prepare an initial study and determine whether a negative declaration/mitigated negative declaration or an environmental impact report is required to analyze the environmental impacts of the proposed project.

As outlined above, the proposed garage on the Atkins Property is a significant departure for the character and development of the area, with impacts on the environment due to its size and position, including its placement within an area routinely used by El Dorado County to store snow from the adjacent street. Thus, the use of an exemption is not legally defensible, and the County must prepare an initial study to determine the appropriate level of environmental review.

(a) Unusual Circumstances.

The first inquiry under *Berkeley Hillside* is whether there are unusual circumstances. The Atkins Property is located in an area that has been developed for over 50 years. The proposed garage is *out* of character for the area due to its size and closeness to the road. Many of the other properties in the area do not have garages. The existing garages in the neighborhood are not two stories and all comply with the 20-foot setback/no build easement established by the original subdivision map. Third, the proposed garage is not simply a place to park cars—there is a second story proposed to include residential use with windows peering into the master bedroom, bathroom, and kitchen of the Lee Property. There is no doubt that the proposed garage is “unusual” for the character and existing development of the neighborhood.

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No analysis has been provided to confirm that this living space envisioned above the garage conforms to TRPA accessory space requirements pursuant to Chapter 21 of the TRPA Code of Ordinances, including whether or not a TRPA residential allocation or bonus unit will be required for the space. Also, no mention is made as to whether or not the proposed living space above the garage will require a TRPA deed restriction limiting use of the structure, nor the conditions contained in such a deed restriction.

(b) Potential Impact on the Environment

The second prong under *Berkeley Hillside* is whether there is a potential impact on the environment. That test is also met for this proposed garage Project.

The proposed two-story garage Project would alter the character of the neighborhood, with the potential for causing aesthetic impacts. In addition, the construction of the garage will have potential impacts on traffic by potentially reducing the amount of on-site parking and increasing the demand for street or other off-site parking for visitors and residents of the Atkins Property. Note that street parking is prohibited in the Lake Tahoe portion of El Dorado County during snow removal conditions, and this fact has also not been analyzed. Likewise, the inventory of snow storage is reduced without guaranteed replacement storage. Moreover, as discussed more fully below, the potential impacts related to run-off from the site due to the increase in impervious structures on the Atkins Property present the type of environmental concerns the TRPA was designed to address. Each of these issues represents a potential impact on the environment that is unique to the Atkins Property and is thus deserving of greater environmental review than the “small structures” exemption provides.

Therefore, controlling law requires that the County prepare an initial study and conduct appropriate environmental review under CEQA before it can act on Variance Application V23-0001 and the related Subdivision Map Amendment and TRPA consideration of the easement encroachment.

B. The Applicable Law Regarding Variances.

1. The County has not Provided Sufficient Analytical Reasoning nor Evidence to Support Granting the Variance.

California Government Code section 65906 controls over all local city and county ordinances dealing with variances and expressly limits the granting of a variance to those situations where “because of special circumstances 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....” See *Orinda Assn. v. Board of Supervisors* (1986)182 Cal.App.3d 1145, 1162-63 (*Orinda*). A city or county when acting on a variance request *cannot* consider financial hardship, community benefit, or the worthiness of the proposed project when determining whether a particular project qualifies for a variance. *Orinda*, 182 Cal.App.3d at 1161. In the absence of an affirmative showing that the property requesting the variance *differs substantially* and in relevant aspects from other parcels in the applicable zone, any variance granted would amount to a “special privilege” explicitly *prohibited* by Government Code section 65906. *Orinda*, 182 Cal.App.3d at 1167.

Additionally, because a variance is a “judicial action” subject to the Fifth Amendment requirements of “Due Process,” any public agency action taken on a variance must be supported

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by “substantial evidence in the record,” and must justify its decision with written findings that bridge the analytical gap between the substantial evidence in the record and the decision reached. These written findings must provide the “analytical roadmap” that allows a reviewing court – or the affected public—to follow the path of reasoning from the facts and substantial evidence in the record to the decision reached by the public agency. *Topanga Assn. for a Scenic Comm. v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.

El Dorado County Code section 17.52.070 lists the findings that must be made to grant a variance. An examination of the proposed findings in support of the variance, as contained in the Staff Report, shows that those findings have not been made and cannot be made.

The following is a summary of the County Ordinance’s (El Dorado County Code section 17.52.070) requirements, Staff’s Findings under those Ordinance requirements, and our response revealing those Staff Findings to be legally flawed:

- 1. County Ordinance Requirement 1 (3.1):** There are exceptional or extraordinary circumstances or conditions relating to the land, building, or use referred to in the application, which circumstances or conditions do not apply generally to land, buildings, or uses in the vicinity and the same zone, and have not resulted from any act of the owner or applicant.

☐ **Staff’s Proposed Finding 3.1** (pages 1-2 of the Staff Report):

“The land coverage was verified by TRPA staff in 2022 as both high capability land and as Stream Environment Zone (SEZ) with an associated 10-foot non-buildable setback. Any new land coverage must be developed within the high capability area outside of the SEZ setback. That area is on the western portion of the parcel. Further, the amount of land that can be covered is limited to 1,800 square feet. As shown in Exhibit E, the proposed project stays out of the SEZ and SEZ setback and uses 1,790 square feet of the 1,800 square feet of land coverage available. Staff has determined that the Variance is the minimum necessary for the reasonable use of the land consistent with the TRPA land coverage requirements. Staff finds that there are exceptional or extraordinary circumstances or conditions applying to the land, building, or use referred to in this application due to significant constraints on the property as it relates to land coverage and land capability. These circumstances have not resulted from any act of the owner or applicant.”

⇒ **Our Response:**

First, Staff has not described a unique physical problem with the Atkins Property, as required by State law. All properties in this area are required to comply with County and TRPA rules. Just because the rules limit what a property owner can do does not create a “physical problem” with the property justifying a variance. The Atkins chose to buy this property. Again, 40% of existing homes in this area have no garages, and the 2 detached garages that do exist meet the 20-foot setback requirement. The

*Atkins could have purchased a house with a garage that complied with all County and TRPA rules, as my clients did. Second, TRPA has not verified the existing land coverage on the Atkins Property and has not determined whether the proposed garage can lawfully be built within the constraints of the SEZ. According to Accela (TRPA's on-line file record database) and eTRAKiT (El Dorado County's on-line planning application database) existing land coverage has **not** been verified on the Atkins Property. Although the TRPA land capability verification file (LCAP2022-0067) contains a 2006 survey from InSite Land Surveyors, this survey only contains preliminary land coverage calculations. A note was added to the official LCAP2002-0067 site plan stating that land coverage calculations are "not a part" of the TRPA verification. Until existing land coverage is officially verified, it is impossible to tell whether or not the parcel is eligible for a land coverage transfer up to the 1,800 square foot limit. Note that new land coverage is only permissible on the Class 5 portion of the lot and not in the SEZ.*

Proposed Staff Finding 3.1 is thus legally insufficient because it does not contain substantial evidence evincing how the Atkins Property is physically different from the neighboring properties, either in coverage by the TRPA or the application of other zoning regulations, such as the restrictions from the subdivision map.³ This lack of disparity precludes the granting of a variance.

2. **County Ordinance Requirement 2 (3.2):** The strict application of the provisions of the ordinance requested to be varied would deprive the subject property of the reasonable use of the land or building that are enjoyed by other properties in the vicinity and the same zone;

☐ Staff's Proposed Finding 3.2 (page 2 of the Staff Report):

"Houses on either side of this parcel are developed with garages. No other location exists on-site that meets the requirements for setbacks, land coverage, and land capability."

⇒ Our Response:

*This analysis falls short of that required by the Topanga case. The evidence shows that 40 percent of the surrounding homes are permanent residences with **no garages**, the neighborhood has successfully survived more than 50 years of winters with no garages, no other home or garage encroaches into the 20-foot setback, no other home has a 2-story garage with living quarters, and to now allow garage variances simply because some other properties have them will be the exception that swallows the 20-foot setback*

³ The issues surrounding the setback from the subdivision map are not subject to a variance as such restrictions are not predicated on the zoning code. Thus, the map act activities are an important part of the current Project. Without action on this part of the Project, the variance is at best premature.

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rule. Such a policy change is contrary to the purpose of a variance. More importantly, the lack of other properties that have needed relief from the same restrictions belies the argument that Atkins Property is being disparately impacted by the setback and land coverage restrictions from which they now seek a variance.

3. **County Ordinance Requirement 3 (3.3):** The Variance is the minimum necessary for the reasonable use of the land or building.

☐ **Staff's Proposed Finding 3.2** (page 2 of the Staff Report):

“Staff has determined that the Variance is the minimum necessary for the reasonable use of the land consistent with the TRPA land coverage requirements.”

⇒ **Our Response:**

Again, this bald “determination” is not supported by any facts or other substantial evidence and is thus legally insufficient to support the granting of a variance. As discussed above, the proposed garage exceeds the size of other garages in the area, includes more than simply car storage by having a second story living area, and encroaches into an area that no other structure in the area encroaches into. An option to incorporate a garage into the existing residential structure, or in a new structure that would replace the existing residence, has not been considered likely due to understandable costs or inconveniences to the Atkins. However, these sympathies are not reasons to grant a variance under El Dorado County regulations and State planning law.

4. **County Ordinance Requirement 4 (3.4):** The granting of the Variance is compatible with the maps, objectives, policies, programs, and general land uses specified in the General Plan and any applicable specific plan, and not detrimental to the public health, safety, and welfare or injurious to the neighborhood.

☐ **Staff's Proposed Finding 3.4** (pages 2-3 of the Staff Report):

Covered parking in the Tahoe Basin is not a grant of special privileges. The development of a two-car garage is to provide on-site covered parking for two (2) vehicles in compliance with the Parking and Loading Standards found in the Zoning Ordinance. Other properties on Player Court are developed with garages.

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⇒ **Our Response:**

Staff Finding 3.4 is insufficient to support the granting of a variance. The facts show that only about half of the residences in the neighborhood have garages. Moreover, those existing garages do not intrude into the setback areas identified by either the subdivision map or the TRPA. Additionally, none of those existing garages contain a second-story residential area in addition to the car storage. The Atkins also have adequate paved parking on their property at this time and are not out of conformance with County requirements for this reason. Finally, this finding overlooks the fact that the Atkins have another option to be able to have a garage: remodel the existing structure and incorporate the garage into that remodeled house. Such an approach would allow the Atkins to obtain the garage they wish without creating a special privilege by the granting of a variance where the findings cannot be made because the facts and substantial evidence supporting those required finding are absent.

Based on the foregoing, we respectfully assert that the substantial evidence needed - and the written finding resulting from that substantial evidence – are absent and therefore the variance cannot be legally granted.

There is little, if any, analysis applying the facts to the required findings under El Dorado County Code section 17.52.070(D) and as required by the *Topanga* case. The facts that have been provided by my clients show that granting a variance would grant a special privilege to the Atkins Property because no showing has been made that the Atkins Property is specially burdened by the restrictions from the subdivision map or the exclusion area under TRPA or for any other reason. Every other property in the vicinity has been developed without encroachment into the setbacks. Granting the variance would therefore confer a special privilege - something the law does not allow. We therefore respectfully request that the variance be denied.

IV. CONCLUSION.

For the factual and legal reasons provided above, we respectfully submit that proposed Variance Application V23-0001 is legally flawed for several reasons, including without limitation, violating CEQA, violating the variance rules of California Planning and Zoning law and El Dorado County Code section 17.52.070, violating the Subdivision Map Act, and violating the Tahoe Regional Planning Agency's Regional Plan and Code of Ordinances.

Thank you for this opportunity to provide this information and for your attention to this matter. I will be present at your hearing to provide additional evidence and to answer any questions you may have.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'A. Jacobs', written in a cursive style.

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Michael Patrick Durkee, Esq.

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