

June 10, 2019

VIA EMAIL: CommAsst@fppc.ca.gov

Chair Richard C. Miadich
Commissioner Frank Cardenas
Commissioner Brian Hatch
Commissioner Allison Hayward
Fair Political Practices Commission
102 Q Street, Suite 3000
Sacramento, CA, 95811

Re: June 2019 Agenda Item 14 – Request for Withdrawal or Modification of
Minner Advice Letter, A-19-032

Chair Miadich and Commissioners Cardenas, Hatch and Hayward:

As you may recall, we previously wrote to you, and appeared at the FPPC's May 2019 meeting, to request that the Commission exercise its authority to review and either withdraw or modify the *Minner* Advice Letter, A-19-032, which was issued on April 15, 2019. The Commission voted at its May meeting to review the letter, and asked FPPC staff to prepare an analysis of the points raised in our prior correspondence and comments to the Commission. That analysis was provided via a memorandum from FPPC Legal Division Counsel dated June 3, 2019, and included with Agenda Item 14 for the Commission's June meeting ("Staff Memo").

The analysis provided in the Staff Memo, however, does nothing to rehabilitate the *Minner* Advice Letter. Rather, it further illustrates why the letter is defective and must be withdrawn or corrected.

Absence of Facts

As noted in our prior correspondence and comments, the only "fact" that ostensibly supports the conclusion that the public generally exception applies here is a map provided by the City of Cupertino ("City") allegedly showing that 25% of the City's residences are located within 3,800 feet of the Project. Because such a map by itself is utterly meaningless (i.e., the *impacts* at various distances are what must be identified, provided to the FPPC, and analyzed), the Staff Memo disputes that the map is the only fact, and states that "the requestor provided an

abundance of facts to establish the basis for concluding the massive Project will have a reasonably foreseeable and material financial effect *on the Vice Mayor's interest in her residence*. Indeed, the facts leave no room to conclude otherwise.” (Emphasis added.) The Staff Memo then baldly concludes—in the absence of any actual evidence or analysis—that it is these same facts that provide the basis for the determination that the public generally exception applies because the Project “will no doubt affect properties throughout Cupertino including the 25% of the properties within 3,800 feet of the project.” Yet the Staff Memo provides absolutely no discussion of these “facts” that purportedly support the conclusion that the impact on properties nearly ¾ of a mile away from the Project will be the same (or even similar to) the impact on Vice Mayor Chao's property (which is a mere 939 feet away from the Project). The Staff Memo simply states that “because Cupertino is a relatively small city with the significant segment residing within the boundaries described above, the effects of the Project on Vice Mayor Chao's residence will likely not be unique in comparison to other properties.”

It should go without saying that basing an advice letter's ultimate conclusion on an *entirely speculative assumption* is a dangerous precedent that the Commission should decline to endorse, and there are multiple reasons to reject such conclusory analysis.¹

First, Cupertino is by no means a “relatively small city.” Cupertino, which is *larger* than 327 of the 482 cities in California, has a population of nearly 60,000² and contains the corporate headquarters of one of the world's most valuable companies, can hardly be considered a “small city” when compared to the vast majority of other California municipalities.

Second, the map provided by the City is not a “fact.” The map does not even purport to serve any purpose other than show (incorrectly) that 25% of the city's residences are located within 3,800 feet of the Project. As set forth in detail in our prior correspondence with the Commission, this map is completely

¹ The Staff Memo takes issue with our arguments with respect to the fact that under the newly amended version of Regulation 18702.2, “clear and convincing” evidence is required to rebut the presumption that a governmental decision will not have a material financial effect on properties located more than 1,000 feet away from the subject of the decision. Although we respectfully disagree with staff's analysis on this point, we note that it is largely beside the point. In this case, there is no evidence to support the ultimate conclusion in the *Minner* advice letter, which is insufficient under any interpretation of the relevant laws and regulations.

² California Department of Finance, Demographic Research Unit, Table of January 2019 City Population Ranked by Size, Numeric, and Percent Change (released May 1, 2019) <http://www.dof.ca.gov/Forecasting/Demographics/Estimates/E-1/>

irrelevant without an accompanying showing, *based on actual evidence and analysis*, that the *impacts* on residences up to 3,800 feet away will be sufficiently similar to the impacts on property located a mere 939 feet away, such that the impacts on Vice Mayor Chao's property are not "unique." As discussed further below, there still has been no such showing here. Nor can there be, because the evidence simply does not exist.

Beyond that, the Staff Memo expressly acknowledges the evidence *we* previously provided, which shows that the map provided by the City does not even accurately portray what it purports to show: because the 3,800 foot radius circle covers substantial parts of neighboring cities and significant office/commercial areas within the city, only 18% of the city's households are located within 3,800 feet of the Project site. This is significantly less than the 25% required under the "public generally" exception, even assuming all 25% are homeowners—as opposed to renters—with a similar financial interest to Vice Mayor Chao. The Staff Memo does not dispute this, but cavalierly states that if this is true, the *Minner* Advice Letter provides no immunity to the requestor.

FPPC Regulation § 18329 is directly on point here. It plainly provides that the FPPC should decline to provide advice where "the material facts provided in the request may be inaccurate, incomplete, or in dispute." Here, the facts supporting the conclusion that the public generally exception applies are completely *nonexistent* (i.e., they were never provided by the requestor), but at the very least are incomplete and in dispute. Staff has conceded that the advice provided in the letter is based on a map provided by the City (which is inaccurate and irrelevant) coupled with the vague and entirely conclusory statement that Cupertino is a "relatively small city" (which, as noted above, is also inaccurate). In the absence of concrete facts, the letter therefore simply—and improperly—*assumes* that the effects on Vice Mayor Chao's residence will "likely" (but not certainly, or even probably) *not* be unique when compared to properties up to $\frac{3}{4}$ of a mile away,³ and based on that bald assumption, gives Ms. Chao permission to participate in governmental decisions involving a Project that will unquestionably have a material impact on her financial interests.

³ As noted in our prior communications with the Commission, it is noteworthy—and troubling—that the ultimate conclusion is even worded in the negative, stating "there is no indication" that the impacts on Ms. Chao's property will be unique or disproportionate when compared to the public generally. It is axiomatic that when dealing with important issues relating to government ethics and disqualifying financial conflicts, there is no place for negative inference. To the contrary, such matters must be rooted in positive statements of what the factual record actually supports or, in this case, fails to support.

This approach completely undermines the advice letter process. If the FPPC provides advice based on inaccurate, disputed, and incomplete facts, relying entirely on *assumptions* to fill in the gaps, the advice letters will not be worth the paper they are written on. Indeed, because advice based on inaccurate or incomplete facts provides no immunity, the requestor in such situations will rely on the advice at their peril, and risk being subject to a future enforcement action. This is even expressly acknowledged in the Staff Memo.

There is, however, a way to avoid such drastic consequences here by simply withdrawing the legally defective advice letter. We respectfully urge you to do so.

Impact on Vice Mayor Chao's Property is Undoubtedly "Unique"

As set forth above, it is clear that there are insufficient facts to support the *Minner* Advice Letter's conclusion that the public generally exception allows Vice Mayor Chao to participate in decisions involving the Project. Although the City provided ample evidence of the *abundance* of significant impacts on properties like Ms. Chao's that are close to the Project site, the City failed to provide *any* corresponding evidence relating to the specific impacts on properties farther away. As such, the Letter's conclusion with respect to the public generally exception is based on an unsupported assumption that impacts on Vice Mayor Chao's property "will likely not be unique in comparison to other properties."

Relevant facts showing the *difference* between impacts at 939 feet (where Vice Mayor Chao's residence is located) and impacts on properties further away, however, are readily available; the City has simply failed to provide those facts in a fair and objective manner, resulting in an Advice Letter that is flawed, and ultimately incorrect.

For the purpose of analyzing whether decisions involving the Project will have a reasonably foreseeable material financial effect on Vice Mayor Chao's interest in her residence, the *Minner* Advice Letter includes an extensive discussion of the ways in which the Project will create view, parking, traffic, noise, and market value/income producing potential impacts on Vice Mayor Chao's property. The Letter concludes that, given the significant nature of the impacts, the Project will have a material financial effect on Vice Mayor Chao's interest in her property. (See *Minner* Advice Letter at pg. 7 ["there is a realistic possibility that the Project will substantially alter traffic levels and parking in areas **near Vice Mayor's home**"; "there is a realistic possibility that the intensity of use of property **surrounding her residence** will substantially increase"; "there is a realistic

possibility that the construction activities necessary for a project of this size and magnitude will substantially alter the noise levels in areas **surrounding her property**"; "it also appears that the views **from her residence** will be substantially changed as the appraisal concluded that both projects would change the view **from the property** resulting in a more urban feel"; there is a 'realistic possibility' that a project of this magnitude, seeking to become the focal point for the community, will impact the market value **of her residence**"; "there is also a realistic possibility, and thus reasonably foreseeable, that the Project will impact the potential rental prices of the Vice Mayor's home as well as the other homes **in the neighborhood**" (emphasis added)].)

In contrast with this thorough and well-supported analysis of the impacts the Project will have on Vice Mayor Chao's property and those in the **immediate vicinity**, the *Minner Advice Letter* includes absolutely no analysis of how or why properties significantly farther (nearly $\frac{3}{4}$ of a mile) away from the Project site will be similarly impacted. Instead, the letter simply states that "while some of the properties in closer proximity may be affected disproportionately, there is no indication that the foreseeable impacts, such as increased property value, increased traffic on several main thoroughfares, intensity of use or views, will have a unique or disproportionate effect on Vice Mayor Chao's residence, which is 929 feet from the Project, in comparison to the other properties within 3,800 feet of the project." This conclusion is confounding.

First, the conclusion contradicts itself, stating that "while some of the properties in closer proximity may be affected disproportionately, there is no indication that the foreseeable impacts . . . will have a unique or disproportionate effect on Vice Mayor Chao's residence . . . in comparison to the other properties within 3,800 feet of the project." This is nonsensical — either closer properties (including Vice Mayor Chao's) will be affected disproportionately or they won't be.

Indeed, it is a virtual certainty that the first part of the *Minner Advice Letter's* conclusion is correct, i.e., that properties in closer proximity to the Project will be affected *disproportionately*.

For example, land use research demonstrates that parking impacts are universally more intense closer to a project than they are further away:

[P]arking designers usually call for maximum walking distances between 300 and 600 feet for retail customers, but between 1,200 and 1,500 feet for employee parking.

Distances increase even more when you look at special event standards: maximum walking distances accepted for theme parks, stadiums and arenas reach as high as 2,000 feet.⁴

It is common sense that no one is going to park in a neighborhood that is up to $\frac{3}{4}$ of a mile away from the Project site. They are going to park within a few blocks, which is exactly where the public official lives in this case. Even Vice Mayor Chao herself has made this very point:

My neighborhood will also become practically free parking lot for Vallco workers. . . . At the same time, my streets will be lined up by Vallco employees taking 'alternative form of transportation'. My friend visiting me won't find a place to park.⁵

Similarly, it is also a matter of simple common sense that the Project will have a more significant impact on the views of those properties located closer to the Project than it will on the views of those further away. Although the City apparently disputes this fact, even its own appraisal is full of contradictions on this point.

On the one hand, the City's appraisal summarily, and without any actual evidentiary support, concludes that 25% of the individuals/residential real property in the city will experience the same view impacts.⁶ On the other hand, the appraisal fully concedes that "the impact will be most obvious to residences **living closest to the project**," and states:

The view from the subject property as a result of the project will be changed. The approved SB 35 project includes 7 towers approximately 250 feet tall and 22 stories. Northwestern Santa Clara County where Cupertino is located is predominately low-rise buildings rarely exceeding 10 stories. Even the Specific Plan Project as

⁴ Mary J. Smith and Thomas A. Butcher, "How Far Should Parkers Have to Walk?," available at https://www.gsweventcenter.com/GSW_RTC_References/2008_05_Smith-Butcher.pdf

⁵ Liang Chao, May 25, 2016 post on Nextdoor.

⁶ Chris Carneghi Commercial Real Estate Appraisal, February 12, 2019, at p. 11.

originally approved included buildings are on the eastern side of the site that range from 120 to 150 feet (10 to 13 stories) tall.

This cluster of high rises will change the view from the subject property. It will likely feel more urban even though the actual neighborhoods surrounding Vallco will not experience physical change.⁷

In fact, visual renderings of the view impacts show that the latter conclusion is entirely accurate, and illustrate that it is not just that the view impact is more obvious to those living closest to the Project, it is that it is *only* obvious to those living closest to the Project (i.e., only those within approximately 1,000 feet will experience view impacts). In fact, the view impact disappears entirely at approximately 2,000 feet from the Project site. (See Attachment A hereto, [showing the project's readily apparent view impacts at approximately 939 feet from the project site versus the *lack of view impacts* at approximately 1,600 to 3,000 feet, including from all directions around the site].) As such, the impacts on Vice Mayor Chao's property are undoubtedly "unique" as compared to those properties more than 2,000 feet away (let alone up to 3,800 feet away), and there is simply no basis to apply the public generally exception.

The Staff Memo curiously defends the decision to ignore the disproportionate impacts on Vice Mayor Chao's property by arguing that "so long as a significant segment of the public is affected, the 'unique effect' test is intended to allow officials to take part in more decisions under the public generally provision despite minor differences between the interests affected by the decision." This may or may not be true, but the difference between a significant impact at 939 feet and no impact at 2,000 feet and beyond is far from a "minor difference." If this were a "minor difference," the public generally exception would apply in every case, and would completely subsume the conflict of interest analysis with respect to real property interests. For obvious reasons, this cannot be the rule.

In sum, the *Minner Advice* Letter is based on facts that are incomplete, inaccurate, and highly disputed. Pursuant to Regulation § 18329, the FPPC should decline to provide advice under these circumstances. Failing to do so sets a dangerous precedent, serves no public purpose, and puts the public official at needless risk of a subsequent enforcement action. For the foregoing reasons, we respectfully request that the Commission exercise its authority to withdraw or

⁷ Id at p. 8 & p. 10.

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modify the *Minner* Advice Letter, A-19-032 to remove any and all conclusions regarding the public generally exception.

Thank you for your continued attention to this important matter.

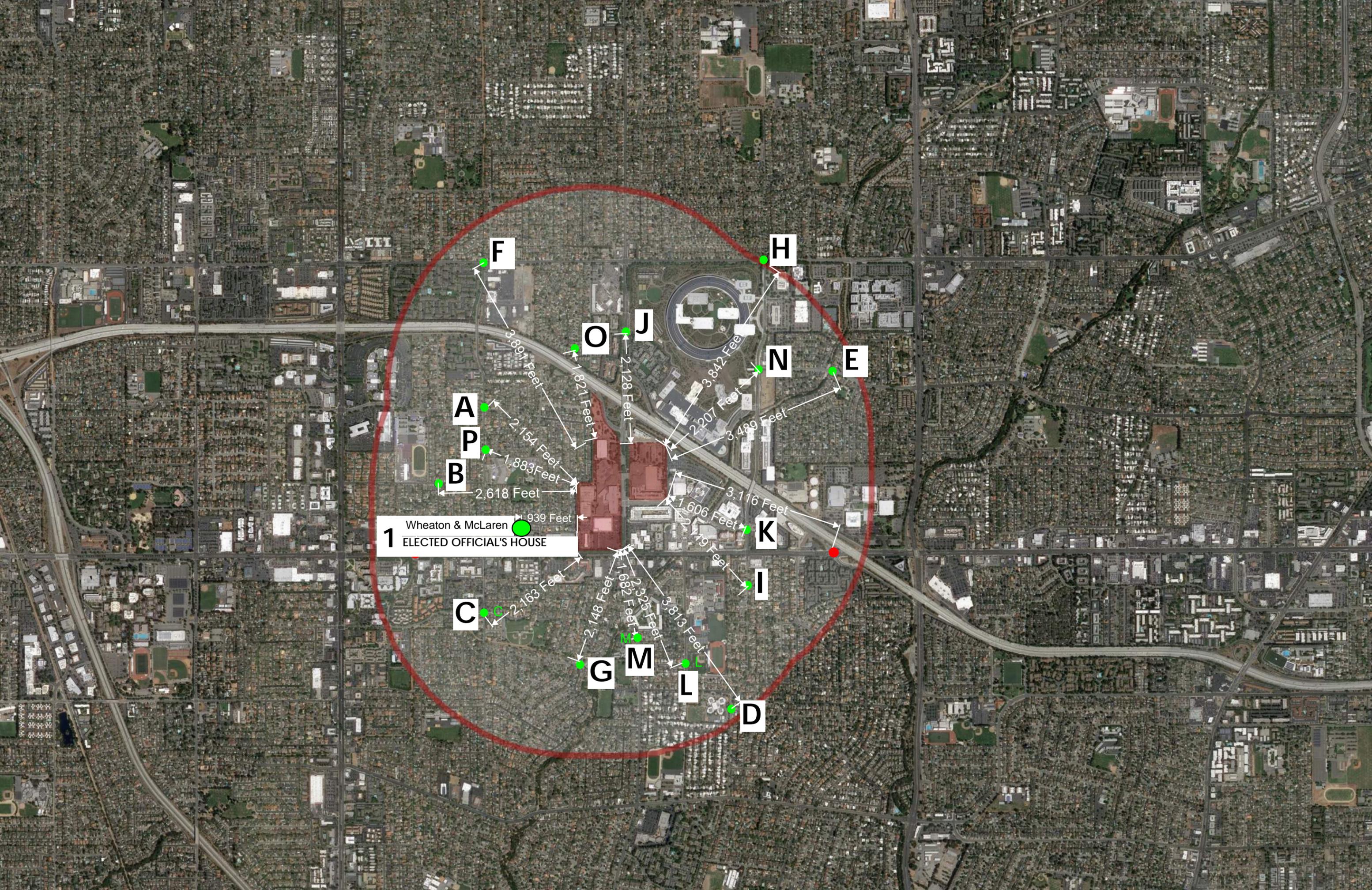
Sincerely,

A handwritten signature in blue ink that reads "Sean P. Welch". The signature is written in a cursive style with a long, sweeping tail.

Sean P. Welch

Encl.

Attachment A



1 Wheaton & McLaren
ELECTED OFFICIAL'S HOUSE

F

H

O

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N

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3,891 Feet

1,821 Feet

2,128 Feet

3,842 Feet

2,207 Feet

3,489 Feet

2,154 Feet

1,883 Feet

2,618 Feet

1,606 Feet

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1,939 Feet

2,163 Feet

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2,148 Feet

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2,325 Feet

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2,163 Feet

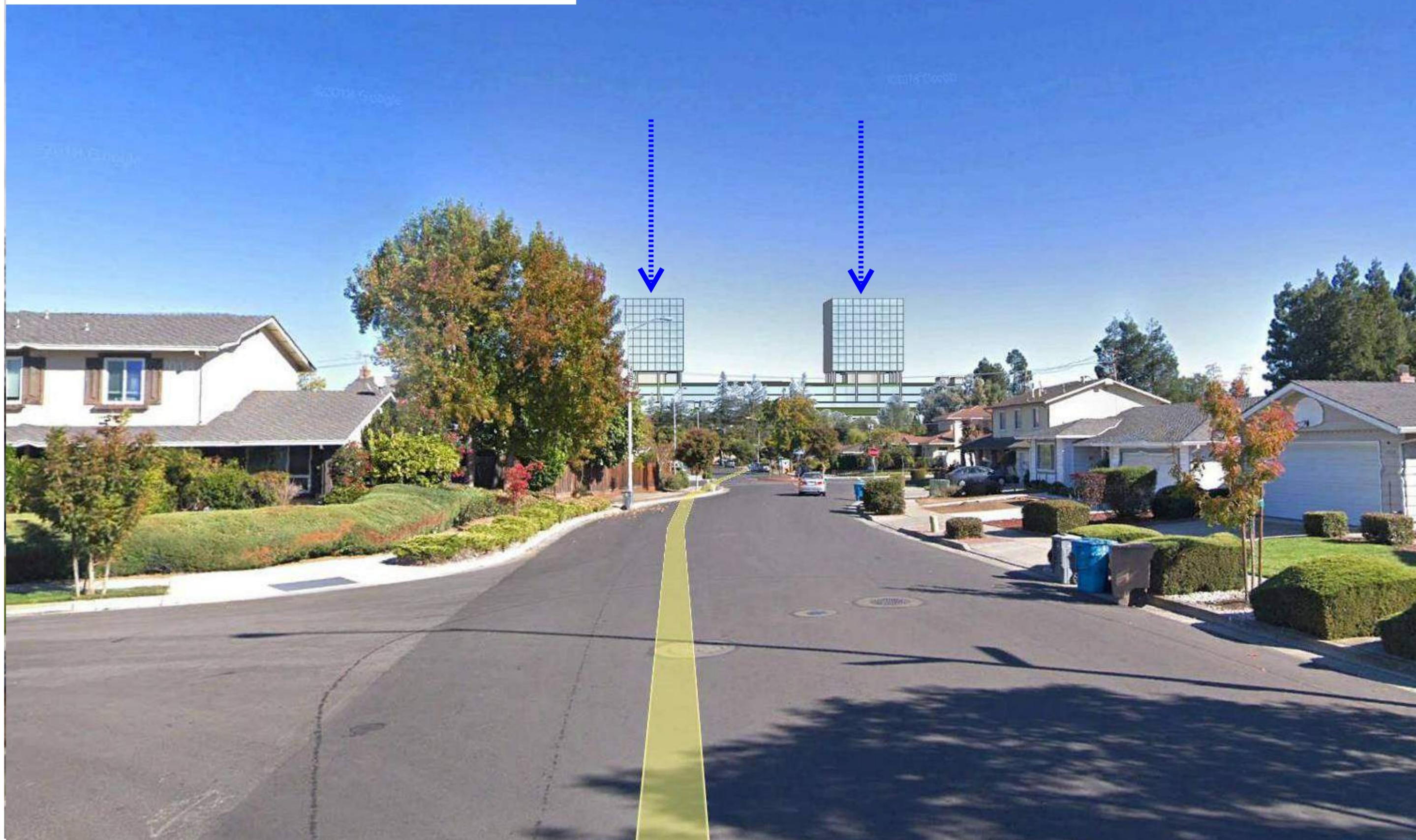
2,148 Feet

1,682 Feet

2,325 Feet

3,813 Feet

**1 WHEATON & MCLAREN - 939 Feet
ELECTED OFFICIAL'S HOUSE**



VIEW A - 2,154 FEET



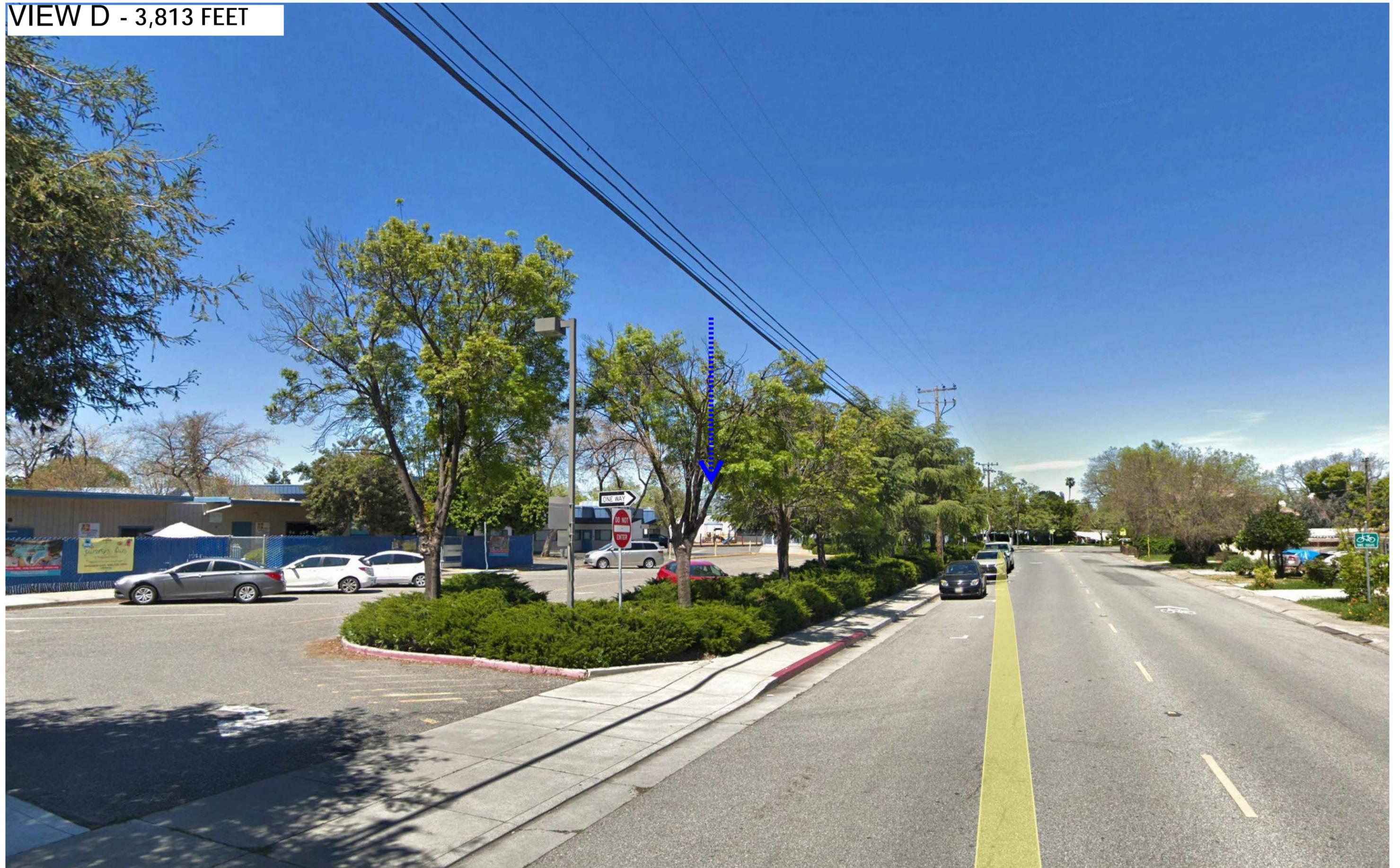
VIEW B - 2,618 FEET



VIEW C - 2,163 FEET



VIEW D - 3,813 FEET



VIEW E - 3,489 FEET



VIEW F - 3,891 FEET



VIEW G - 2,148 FEET



VIEW H - 3,842 FEET



VIEW I - 2,119 FEET



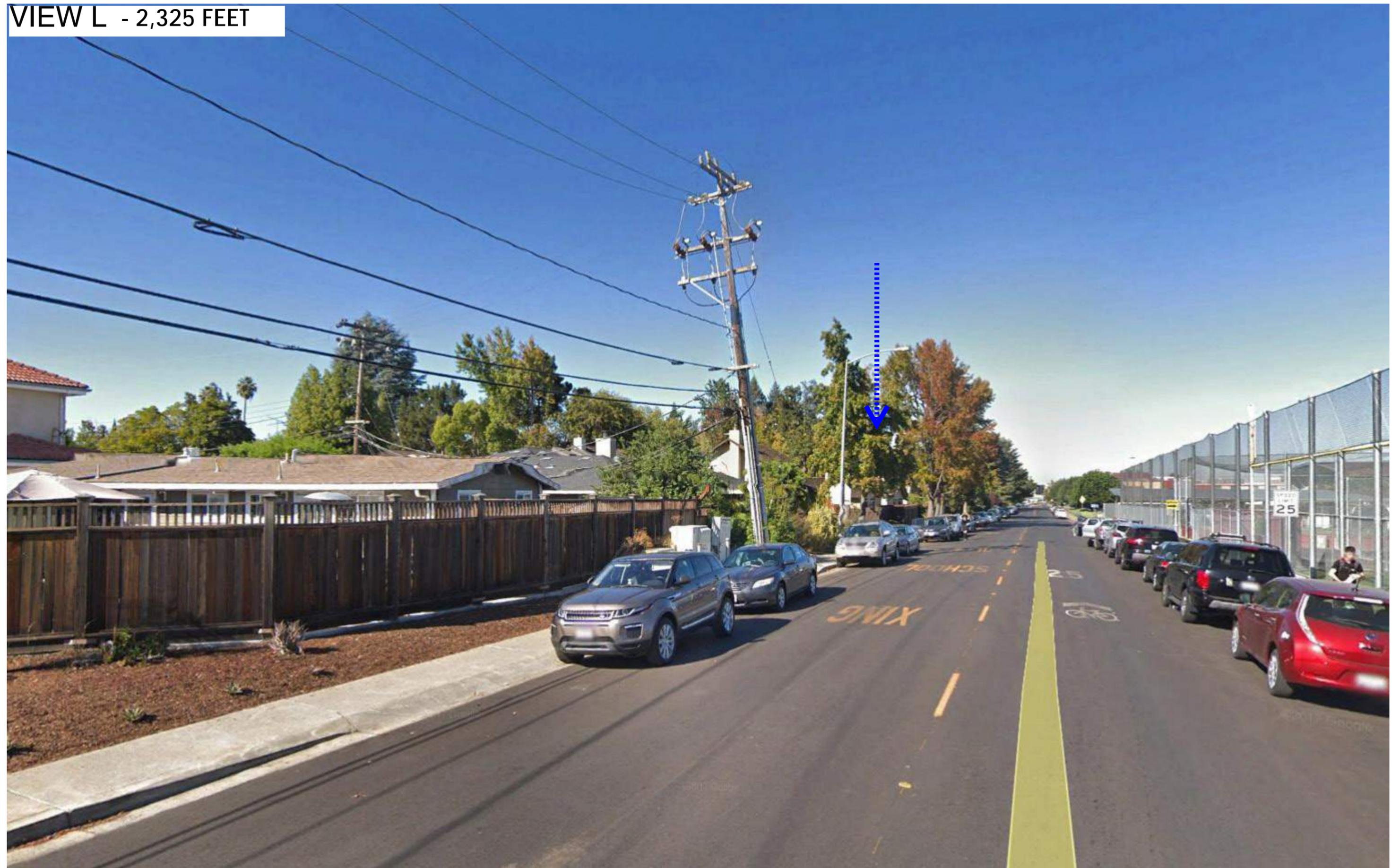
VIEW J - 2,128 FEET



VIEW K - 1,606 FEET



VIEW L - 2,325 FEET



VIEW M - 1,682 FEET



VIEW N - 2,207 FEET



VIEW O - 1,821 FEET



VIEW P - 1,883 FEET

