

TOWN OF SAN ANSELMO  
STAFF REPORT  
February 5, 2008

For the meeting of February 12, 2008

TO: Town Council  
FROM: Debra Stutsman, Town Manager  
Subject: 10 Foss Avenue  
Request for Reconsideration

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**RECOMMENDATION**

That Council receive the report on request made by owners of 10 Foss Avenue to reconsider grant of appeal and to reopen public hearing. Consider adoption of motion to reconsider or consider adoption of resolution granting appeal.

**BACKGROUND**

At the Town Council meeting of January 22, 2008, the Town Council upheld the appeal of Planning Commission approval of the project at 10 Foss Avenue. On January 30, the attorney for the applicant, Neil Sorensen, submitted the attached letter requesting that the matter be reconsidered.

The appellant's attorney, Derek Weller, submitted a letter in opposition to the request for reconsideration, which is also attached.

Respectfully submitted,

*Debra Stutsman*

Debra Stutsman  
Town Manager

Attachment 1: Draft Resolution granting appeal  
Attachment 2: Letter from Applicant's attorney  
Attachment 3: Letter from Appellant's attorney

Copy: Neil Sorensen  
Derek Weller  
Larry & Debbie Stadtner  
Stephen & Kelly Willrich

**RESOLUTION NO. \_\_\_\_**

**A RESOLUTION OF THE TOWN COUNCIL OF  
THE TOWN OF SAN ANSELMO GRANTING THE APPEAL OF THE PLANNING  
COMMISSION APPROVAL OF DESIGN REVIEW AT 10 FOSS AVENUE, SAN  
ANSELMO.**

WHEREAS, On November 19, 2007, the San Anselmo Planning Commission granted design review and denied variances for the remodel of a residence at 10 Foss Avenue, San Anselmo; and

WHEREAS, On November 29, 2007, a timely appeal of the Planning Commission's grant of design review was made by Kelly and Stephen Willrich, who reside at 129 Sunnyside Avenue, San Anselmo, and who are neighbors of the proposed project at 10 Foss Avenue. Said appeal was based on the grounds that: 1) Inconsistencies in the documentation for the project did not accurately represent site conditions or impacts on the neighboring property, 2) The proposed project unreasonably impacted light and privacy at 129 Sunnyside Ave, 3) Maintenance of screening vegetation was not a condition of approval, 4) Drainage was not adequately investigated as it affects 129 Sunnyside Ave, 5) Soil stability associated with the removal of 600 cubic yards of soil was not adequately investigated, 6) Appellants were unaware of any commissioners viewing the project story poles from 129 Sunnyside Ave in order to ascertain the project's effect on air, light and privacy, 7) The project is not consistent with the overall character of the surrounding neighborhood; and

WHEREAS, On January 22, 2007, the Town Council considered the appeal, heard a presentation from the appellant and the applicant, took public comment, and discussed the merits of the appeal; and

WHEREAS, the required findings for design review are specified in Section 10-3.1505 of the San Anselmo Municipal Code that a project: 1) Will not unreasonably impair access to light and air of structures on neighboring properties, 2) Will not unreasonably affect the privacy of neighboring properties, 3) Will not materially affect adversely the health or safety of persons residing or working in the neighborhood of the property of the applicant and will not be materially detrimental to the public welfare or injurious to property or improvements in such neighborhood.

NOW, THEREFORE, BE IT RESOLVED, that the Town Council finds that the proposed project at 10 Foss Avenue, San Anselmo, will unreasonably affect the privacy of neighboring properties, will materially affect adversely the health or safety of persons residing or working in the neighborhood of the property of the applicant, and will be materially detrimental to the public welfare and injurious to property in such neighborhood. Specifically, the overall size, height, and proximity of the proposed project to the neighboring property will unreasonably affect the privacy of the neighboring property. Additionally, the project's required extensive excavation, in conjunction with the geological and hydrological conditions at the project site, will adversely affect the health and safety of persons in the neighborhood and be materially detrimental to property in the neighborhood.

**BE IT FURTHER RESOLVED**, that based on the findings of the Town Council as stated above, the appeal of the Planning Commission's granting of design review for the proposed project at 10 Foss Avenue is hereby granted and design review for the project is hereby denied.

The foregoing Resolution was adopted at the regular meeting of the San Anselmo Town Council held on February 12, 2008, by the following vote:

**AYES:**

**NOES:**

**ABSENT:**

\_\_\_\_\_  
Mayor

Attest:

\_\_\_\_\_  
Barbara Chambers, Town Clerk

*Pls copy to TC  
date*

RECEIVED

JAN 31 2008

Town of San Anselmo



LAW OFFICES OF  
**NEIL SORENSEN**

950 NORTHGATE DRIVE, SUITE 107  
SAN RAFAEL, CALIFORNIA 94903  
WEB WWW.SORENSENLAW.COM

TELEPHONE 415 499-8600  
FACSIMILE 415 499-0140  
EMAIL neil@sorensenlaw.com

January 30, 2008

Mayor Ted Freeman and Members  
of the San Anselmo Town Council  
525 San Anselmo Avenue  
San Anselmo, CA 94960

**Re: 10 Foss Avenue (AP 7-232-50) – Request for Reconsideration  
Stadtner Flatland Design Review**

Dear Mayor Freeman and Members of the Town Council:

This office represents Larry and Debbie Stadtner, the owners of the property at 10 Foss Avenue, San Anselmo, California.

The purpose of this letter is to request reconsideration of the Council's motion to deny the flatland design review of Mr. and Mrs. Stadtner, and to request that the Council conduct a further hearing on the matter. This request is made on the grounds that the Town Council deprived the applicants of a fair hearing and committed a prejudicial abuse of discretion. Specifically, the council's decision to deny the permit was based, in part, on issues raised after the public portion of the hearing was over. Accordingly, the Stadtners did not receive proper notice, or an opportunity to be heard on these issues, which were resolved against them.

**I. Background.**

The Stadtners' Application for Flatland Design Review was submitted on July 25, 2007. The application included a detailed "Geotechnical Investigation" prepared by Salem Howes Associates, which concluded that 10 Foss Avenue is underlain by bedrock at shallow depth and that there are no "geologic hazards that would adversely affect the site."

The project was reviewed by the Planning Commission at two meetings: October 1, 2007 and November 19, 2007. The Staff Report to the Planning Commission for the November 19, 2007 meeting stressed that the flatland design review was limited to the second story and that "The code does not provide review for the first story nor the materials and colors." The Staff Report recommended approval of the flatland design review because all three findings required by Municipal Code Section 10-3.1505(d) could be made. Specifically, the staff found that the proposed house would not unreasonably impair access to light and air of structures on neighboring properties, would not

unreasonably affect the privacy of neighboring properties, and would not adversely affect the health or safety of persons residing or working in the neighborhood.

At the conclusion of the November 19, 2007 Planning Commission meeting, the Commission voted (3-1) to approve the flatland design review based on the findings contained in the Staff Report (including a finding that the project would not affect adversely the health or safety of person residing in the neighborhood). The Commission also voted 3-1 to deny the retaining wall setback variances.

On November 29, 2007 Mr. and Mrs. Willrich, the owners of 129 Sunnyside Avenue, appealed the Planning Commission's decision. The Town Council hearing on the appeal was originally scheduled for January 8, 2008; but, was continued at the request of Mr. and Mrs. Willrich.

On January 22, 2008, the Town Council conducted a public hearing on the appeal. After the public hearing was closed and no further testimony was allowed from the public or the applicant, a member of the Town Council, for the first time, raised an issue regarding drainage and soil stability. Specifically, one of the Council members expressed concerns over drainage and soils stability, and the effect of drainage and soil stability on the "health or safety of persons residing or working in the neighborhood" (Finding 3 of §10-3.1505(d) – the Health and Safety" finding). Since the public hearing was already closed, Mr. and Mrs. Stadtner, their architect, and their attorney were unable to address the Town Council on these issues, point out information in the record that addressed the Council's concerns, or obtain a continuance and have their geotechnical engineer address the Council. In fact, the Stadtners' architect raised his hand and tried to speak but was not recognized by the chair. The motion to deny the flatland design review apparently included a finding that the health and safety of persons in the neighborhood would be adversely affected by drainage and/or soil conditions. The Council's vote on this motion was 3-2 (3 yes, 2 no) to sustain the appeal and deny the flatland design review.

## **II. The Applicants Were Denied a Fair Hearing.**

The right to a fair hearing in land use cases is guaranteed by constitutional and state law. As stated by the California Supreme Court in English v. City of Long Beach (1950) 35 Cal.2d 155, 158-159:

"Administrative tribunals which are required to make a determination after a hearing cannot act upon their own information, and nothing can be considered as evidence that was not introduced at a hearing of which the parties had notice or which they were present.... The fact that there may be substantial and properly introduced evidence which supports the [council's] ruling is immaterial.... A contrary conclusion would be tantamount to requiring a hearing in form but not substance.... A hearing requires that the party be apprised of the evidence against him so that he may have an opportunity to refute, attest and explain it, and the requirement

of a hearing necessarily contemplates a decision in light of the evidence there introduced..."

Mr. and Mrs. Stadtner were denied a fair hearing before the Town Council because the Town Council's concerns relating to the third finding of Section 10-3.1505(d) (the so-called health and safety finding) were not raised for the first time until after the hearing was closed. As such, Mr. and Mrs. Stadtner were not permitted to adequately address the Town Council on this subject, which was resolved against them and which was cited as grounds for denying the flatland design review.

The facts of the Stadtner case are strikingly similar to those in Clark v. City of Hermosa Beach (1996) 48 Cal.App.4<sup>th</sup> 1152. In Clark, the California Court of Appeal ruled that permit applicants did not receive a fair hearing because the City Council's concerns about excessive lot coverage and insufficient open space were raised for the first time after the public hearing was over. The Clarks, like the Stadtners, were not able to address the council on these subjects and their subsequent request to reopen the hearing was denied.

**III. The Council Should Reconsider Their Previous Action, Reopen the Public Hearing, and Allow the Applicants to Present Evidence Relating to Alleged Soil and Drainage Problems.**

As noted by the court in Clark v. City of Hermosa Beach, the remedy for denial of a fair hearing is for the Town Council to rehear the matter and provide the applicants with a fair hearing. That is all that the Stadtners are requesting here. At such a hearing, the Stadtners intend to present evidence from their geotechnical consultant, Salem Howes Associates, Inc., relating to the drainage and soil stability issues raised at the last minute by the Town Council.

**IV. Conclusion.**

For the reasons stated herein, it is respectfully requested that the Town Council reconsider its prior motion denying the Stadtner flatland design review and reopen the public hearing on the application.

Sincerely,



NEIL SORENSEN

NS/mjs

cc: Robert Epstein, Town Attorney  
Debra Stutsman, Town Manager  
Larry and Debbie Stadtner  
Jeff Kroot

**KEEGIN  
HARRISON  
SCHOPPERT  
SMITH &  
KARNER LLP**  
ATTORNEYS AT LAW

February 6, 2008

Stafford W. Keegin  
Robert L. Harrison  
Jeffrey S. Schoppert  
Paul C. Smith  
Jessica Karner  
Wendy L. Wyse  
Derek A. Weller  
Deborah Miller Black  
OF COUNSEL  
Matthew N. White  
Kip Evan Steinberg

**SENT VIA EMAIL TO TOWN MANAGER**  
*(dstutsman@ci.san-anselmo.ca.us)*

Mayor Ted Freeman and  
Members of the Town Council  
Town of San Anselmo  
525 San Anselmo Avenue  
San Anselmo, California 94960-2682

Re: 10 Foss Avenue (AP 7-232-50) – Opposition to Request for  
Reconsideration & Reopening of Hearing  
Applicants: Larry & Debbie Stadtner  
Appellants: Stephen & Kelly Willrich

Dear Mayor and Town Council Members:

I am writing on behalf of Appellants Stephen & Kelly Willrich, the owners of 129 Sunnyside Avenue, San Anselmo. By letter dated January 30, 2008, Applicants' attorney Neil Sorensen has requested the Council to reopen the public hearing and reconsider the Council's decision made at its January 22, 2008 hearing granting the Willriches appeal and denying Applicant's proposed project design under Flatland Design Review. For the reasons stated below, we respectfully request the Council to deny Applicants' requests.

Applicants' request for reconsideration and reopening the hearing is based on the notion that Applicants were denied a fair hearing because issues concerning soil stability and drainage were raised for the first time after the close of public comment, and that as a result, Applicants did not receive proper notice or an opportunity to be heard on these issues. Applicants' claims are misplaced and without merit. These issues were raised prior to the hearing and again at the hearing prior to close of public comment. Applicants had ample opportunity to address these issues. There is no basis to conclude Applicants did not receive a fair hearing or to reopen the hearing.

First and foremost, items 5 and 6 in the Willriches' appeal specifically included drainage and soil stability concerns. (See January 17, 2008 Staff Report, Section II, p.2.) It is not necessary that the appeal include a specific statement of exactly how the Council will ultimately decide on an issue. It is enough that the issue was presented and the parties and public were given an opportunity to address the issue.

Concerns regarding site engineering, amount of soil excavation and drainage issues were raised in connection with and discussed at both the October 1, 2007 and November 17, 2007 Planning Commission hearings. The same concerns were raised again during the public comment period at the January 22nd Town Council hearing. Specifically, at the start of the January 22nd hearing, Barbara and RK Stewart submitted a letter, dated January 22, 2008, stating their concerns about adverse impacts to the *Serving The Bay Area Since 1963*

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neighborhood resulting from massive amounts of soil excavation and related drainage issues (copy enclosed). Copies of this letter were distributed to the Council members, as well as to the Appellants and I believe to the Applicants. Even if the Applicants did not get a copy of this letter at that time, Ms. Stewart reiterated (orally) all the concerns stated in her letter during the public comment period. At the beginning of the hearing, a petition signed by 19+ neighbors was also submitted and read aloud at the hearing expressing the neighborhood's concern over the amount of proposed soil excavation. Other members of the public also raised similar concerns over soil excavation and drainage issues. I also raised these concerns to the Council by reference to the Stewarts' letter during my presentation to the Council on behalf of the Appellants.

At the beginning of Applicants' presentation to the Council, Applicants specifically reserved time to respond to any issues raised during the remainder of the public comment period. Once the public comment period came to an end, Mayor Freeman asked more than once whether anyone had anything more to say before close of public comment. Applicants had the opportunity at this time to address the soil and drainage concerns raised earlier in the hearing, but chose not to.

The judicial cases cited in Mr. Sorensen's letter involve situations where public officials based their decision on information independently gathered by the officials outside of the public proceedings that was not disclosed until after close of public comment (the *English* case) or based on new issues and grounds for denial independently developed by the officials and not disclosed until after the close of public comment (the *Clarke* case). In both cases, the courts concluded that the applicant had not received a fair hearing because they did not have the opportunity to address the new information. The matter at issue here, however, involves a very different set of circumstances.

As discussed above, soil and drainage issues were included in the Willriches' appeal and were raised prior to the January 22nd hearing as well as during the hearing before close of public comment. I am also not aware of any information presented or discussed that was independently gathered by any Council member outside of the public proceeding process. Rather, the Council members received information contained in the record and as presented by the parties and public prior to and at the January 22nd hearing. With this information, the Council deliberated and reached a decision. No new information or issues were raised during deliberations. To the extent any Council members expressed their own views on any particular issue and Applicant had not yet heard these views, such statements do not result in an unfair hearing or provide a basis to reopen the hearing. If it did, no public hearing would ever conclude and anyone could seek to reopen the hearing based on any previously unheard views of any Council member. Due process does not require this.

What appears to be really going on here is that Applicants believe that the soils report is conclusive on the question of soil stability and drainage and that there is no factual basis to support the Council's determination that it could not make the third finding under Flatland Design Review (detriment to neighborhood). Although I would not agree with Applicants on this point because there is substantial evidence to support the Council's findings, assuming they are correct, their remedy is to seek a writ of mandate based on lack of substantial evidence to support the finding. Lack of substantial evidence is not a valid basis for finding an unfair hearing or for reopening the hearing.



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Applicants will not likely seek a writ based on lack of substantial evidence, however, because they know that the Council action was based on two grounds: their inability to make the required finding regarding detriment to the neighborhood and their inability to make the required finding that the proposed design does not unreasonable affect privacy of neighboring properties. The Council's determination on the privacy issue is well supported by the evidence in the record and by itself provides sufficient and independent grounds to uphold the Council decision. Even if a court ruled in favor of Applicants on the detriment to neighborhood finding, the Council's denial of the project would still be upheld on the basis of the privacy finding.

So, instead of pursuing a writ and likely failing, Applicants are instead seeking to redo the entire process in hopes of achieving a different and more favorable result. The Council has heard the evidence and rendered a decision on this matter. To reconsider the matter and reopen the public hearing with no legal basis to do so would result in an injustice not only to the Appellants and the public who deserve finality on this matter, but also to the Council and the process in general. In fact, if the Council does reopen the hearing and reaches a different result, that decision would then be subject to judicial challenge.

To the extent the Council decides to reopen the hearing at all, it is strongly urged that any further public discussion on rehearing be limited only to the soil and drainage issues discussed by Council members at the January 22nd hearing. To reopen the hearing on all issues would be a dramatic waste of time and effort for everyone involved.

Thank you for your consideration on this matter.

Sincerely,



Derek A. Weller

cc: Stephen & Kelly Willrich  
Lisa Wight, Town Planner  
Rob Epstein, Town Attorney  
Riley Hurd, Deputy Town Attorney

To: Members of the San Anselmo Town Council  
Re: 10 Foss Avenue Review

Date: January 22, 2008  
From: Barbara and RK Stewart  
18 Foss Avenue, San anselmo

**"Required Findings for Approval"**

**Point 3.** *"Will not adversely affect the health or safety of persons residing or working in the neighborhood of the property of the applicant and will not be materially detrimental to the public welfare or injurious to the property or improvements in such neighborhood."*

As shown on the plans submitted by the applicant, the proposed house at 10 Foss is approximately 4,000 SF plus a 2-car garage. It is more than twice the size of the typical house on this street and is essentially a 3-story house (regardless of the "technical" definition of a story believe that **as designed, the 10 Foss house "will be materially detrimental to the public welfare and injurious to the neighborhood" for the following reasons:**

**A. Its construction requires lowering the natural grade close to street level which involves a massive removal of existing earth (650 square yards minimum according to the property owner – or 65 of the dump-trucks shown on the following page!). It also requires constructing extensive retaining walls.**

**This site is a hillside with underground streams of water cutting through this property and the neighboring houses. I believe that such a massive removal of earth will be harmful to the neighborhood because it violates the earth to such an extent that it will interrupt the natural streambeds and could cause slippage or sliding at 14 and 18 Foss Avenue, and could threaten 129 Sunnyside.**

**@18 Foss: Throughout the rainy season we have streams of water running through our garage and in our crawl space even though we are at 5 - 10 feet above the street. We also have water bubbling up vertically into our garage in two places. Water from the hillside exits through drains in front of our house throughout the year.**

**@14 Foss: Water visibly leaks through the driveway and garage at all times of the year. It is visible today...weeks after the last rainstorm.**

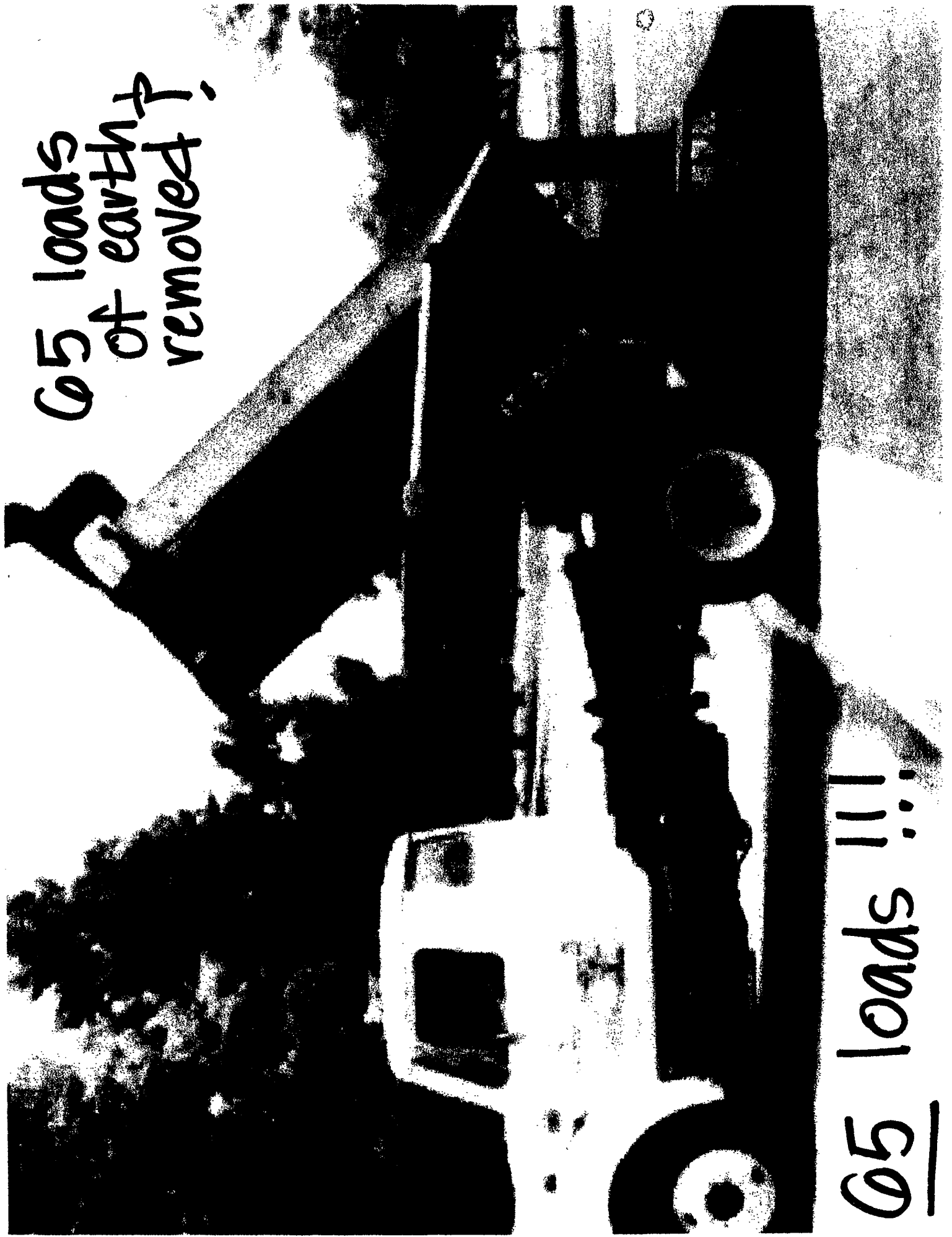
**@129 Sunnyside: While renovating their lowest level, water rushed in and created a pond that no-one had anticipated and which required extensive repair work.**

**(Note: We have called the Marin Water District numerous times to test and make sure this is not water leaking from a swimming pool or a damaged uphill pipe and the verdict has always been "natural underground water".)**

**10 Foss Avenue is so large and changes the natural topography of the land to such an extent – whether with large vertical retaining walls or a series of smaller walls – that the uncontrollable natural re-routing of the underground water streams due to the major removal of earth and extensive new retaining walls will interrupt the natural hillside drainage patterns and may be structurally harmful to the adjacent hillside houses and the neighborhood.**

*(attachment  
to Weller letter)*

65 loads  
of earth  
removed,



65 loads !!!