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Our file: 4479

By Hand

September 14, 2009

District of Mission
8645 Stave Lake Street • Box 20
Mission, BC V2V 4L9

Attention: Mayor and Council

Dear Mayor Atebe and Council:

Re: Zoning Bylaw 5050-2009 and the Amending Agreements to the PDA

CAUSS appears before you today to make submissions on Bylaw 5050-2009 and other amendments to the PDA. CAUSS also requests that the District provide written reasons explaining how CAUSS' concerns were considered in its decision making in the event that Council adopts Bylaw 5050-2009

CAUSS will restrict its submissions to the No-Build Covenants, the Escrow Agreement, and to those parts of the zoning bylaw which affect the Silverdale Neighbourhood 1 zone and any land covered by the Phased Development Agreement. In particular, CAUSS will address the following issues:

1. The relationship between the PDA, Escrow Agreement, separate No-Build Covenants and Bylaw 5050-2009;
2. The effect of the Amending Agreement upon amenities provision under the PDA;
3. The tax implications associated with Small Scale Agriculture and the District's failure to provide details about the tax agreement between the District and the Developers;
4. The inadequate environmental protection provided by Bylaw 5050-2009 in general, and by the Streamside Protection and Enhancement Areas in particular; and

5. The environmental implications of the inclusion of Small Scale Agriculture as a principal use within the SN1A zone.

CAUSS takes the following positions with respect to Bylaw 5050-2009 and the Amending Agreements:

- The District is obliged to consider CAUSS' submissions on the separate No-Build Covenants and the Escrow Agreement at this public hearing.
- Adoption of Bylaw 5050-2009 will oblige the District to amend the PDA and to hold a further public hearing.
- The separate No-Build Covenants and the Escrow Agreement create an unacceptable risk that the District will not be able to realize the benefits of the complete amenities package as contemplated bythe PDA.
- In light of the amending agreements, the PDA should also be amended to include a financial penalty to be triggered in the event that the subdivision occurs and the Developers fail to provide a full amenities package.
- The District has failed to meet its obligation to disclose details of the oral agreement reached between District staff and the Developers regarding taxation of land assessed as agricultural land.
- If the District has no further details to disclose in relation to said taxation agreement, then Council does not have enough information before it to make a reasonable decision on the inclusion of Small Scale Agriculture as a principal use in the SN1A zone.
- The Developers' concerns around taxation could be better addressed through the existing processes contained in the *Local Government Act* and the *Assessment Act*.
- Bylaw 5050-2009 does not provide adequate environmental protection.
- The inclusion of Small Scale Agriculture as a principal use in the SN1A zone exacerbates the potential adverse impacts of development upon the environment.

Each of these positions will now be explained in detail.

1. Bylaw 5050-2009 is linked to the PDA

The first point to be made is that the proposed zoning bylaw is integrally linked to the PDA, and that therefore the Escrow Agreement and the separate No-Build Covenants signed by the District, Genstar and Madison, which amend the PDA, are appropriate topics for discussion at this public hearing.

Sections 108 and 1301 of Zoning Bylaw 5050-2009 clearly demonstrate an integral link between the new proposed zoning bylaw and the PDA, through the SNA1 zone created in contemplation of the PDA. As Mayor Atebe explained last fall, at the opening of the public hearing regarding the official community plan amending bylaw 4069-2008-4052(2), zone amending bylaw 4070-2008-3143(311) and phased development agreement bylaw 4071-2008, Mission's Zoning bylaw is closely connected to the PDA bylaw, and Council considered that "all comments apply to all of the bylaws": Regular Council Meeting Minutes, October 21, 2008 at 1-2.

Moreover, section 905.4 of the *Local Government Act* states:

> (3) The following matters may not be dealt with as minor amendments to the phased development agreement:
>
> (a) the specified zoning bylaw provisions;
>
> . . .
>
> (4) An amendment to a phased development agreement, other than a minor amendment, must be adopted by bylaw, and sections 905.1 to 905.3 apply to the bylaw.

It is CAUSS' position that if the District adopts Bylaw 5050-2009 and if the Developers, who appear to have requested some of the amendments, agree that the Bylaw 5050-2009 applies to their lands, the District will be compelled to amend s. 1 of the PDA (definition of Specified Provisions). Such an amendment will oblige the District to hold a public hearing for the adoption of an amended PDA bylaw pursuant to ss. 905.1 and 905.3 of the *Local Government Act.*

The District has chosen to sign side agreements to the PDA such as the Escrow Agreement and the separate No-Build Covenants without full prior public disclosure, and without the benefit of public input through the public hearing process. The decision to sign separate No-Build Covenants with each of Genstar and Madison alters the liability of the parties for the provision of amenities, and represents another major amendment to the PDA. As discussed above, the *Local Government Act* mandates public hearings for such major amendments to the PDA. As the District did not hold a public hearing prior to implementing the results of its further negotiations with the Developers, it is incumbent upon Mayor and Council to hear submissions related to the amending agreements now, at the public hearing of a bylaw that is integrally related to the PDA.

2. The Amending Agreements: Effect on Amenities Provision under the PDA

a. Implications of the Separate No-Build Covenants

On September 29, 2008, the Developers wrote letters to the District requesting that their liability under the PDA be converted from joint and several to sole and separate. During the October 6, 2008 Council meeting, in response to questions regarding further negotiations on the PDA, Dennis Clark indicated, on behalf of the District, that there would be no further negotiations regarding the PDA, and that there would have to be another Public Hearing if there were new negotiations. He further stated that "Council was clear tonight that they will not change the PDA. If Genstar can't go forward with this, that is their decision".

However, to date there have been two significant agreements which change the PDA as it was presented to the public in the fall of 2008. It is arguable that through the separate No-Build Covenants and the Escrow Agreement, the Developers have achieved their goal of severing

liability under the PDA. The combination of these amending agreements gives rise to a real danger that the District of Mission will be unable to realize the benefit of the full amenity package mandated by the PDA.

Under the PDA as presented to the public last fall, and as adopted by Council in March 2009, the Developers were both to sign one single No-Build Covenant. The No-Build Covenant prevented the Developers from building on any particular piece of the land until they had filed an approved subdivision plan at the Land Title Office, and submitted a precinct phase plan to the District regarding that piece of land.

The language and structure of the separate No-Build Covenants signed by Genstar and Madison is essentially the same as the original joint No-Build Covenant. However, as explained by Dennis Clark to CAUSS in an August 12 email to Tracy Lyster, the separate covenants mean that Genstar cannot put a no-build covenant on Madison lands, and vice versa.

The effect of this separation is that if one of Genstar or Madison is ready and willing to go ahead with development of a particular piece of land by presenting a subdivision plan for approval and registering it at the Land Title Office, they can do so regardless of whether the other Developer is ready or financially able to proceed with development. This has significant implications for the provisions of amenities under the PDA.

The PDA defines "Owner" as Genstar and Madison collectively. Under the PDA, Genstar and Madison agree to collectively provide the amenities set out in sections 8-26. The amenities include: a water main to the Silverdale School and Silverdale hall; an 1100 square foot asphalt plaza with benches, history boards and play equipment; 1300 square feet of community meeting and child care space; improvements to the existing Silverdale play field; repairs to an existing trail; land for bus stops; bus shelters and a community shuttle bus; $206,000 toward fire equipment; and amenity payments to assist with the construction of a community centre, recreation facility, library and fire hall, and to assist with the purchase of public works equipment.

The provision of all of the above listed amenities is tied to the registration of subdivision plans, many of the amenities must be provided within a year of the registration of the first subdivision plan of all or a portion of the Owner's land.

Theoretically then, if Genstar were ready to proceed with development before Madison, Genstar could register subdivision plans for some or all of its lands and have its No-Build Covenant removed from some or all of its lands before Madison is in a financial position to contribute to the amenities contemplated by the PDA. The PDA contemplates contributions from two developers, not from one. Indeed, the District has recognized that the non-participation of one of the parties will mean that the entire project has suffered a major setback, and amended the wording of the Escrow Agreement in order to reflect this: Dennis Clark, August 24 Report to Council re: amendment of escrow agreement.

Neither the No-Build Covenants nor Bylaw 5050-2009 impose a penalty on the Developers/Owner for failure to provide a complete amenities package. While section 39 of the PDA indicates that the District may terminate the PDA if the Owner fails to provide amenities when required (after the Owner has been given 120 days to correct the default) the reality is that the Developer who proceeded first with subdivision still has the potential to take advantage of the zoning guarantees provided by the PDA to subdivide and build, prior to cancellation of the PDA.

This is in stark contrast to jurisdictions like the City of Seattle. In Seattle, if a developer takes advantage of relaxed height and density requirements in exchange for meeting green building standards as part of an amenities package, and then fails to meet the requirements of the package within 90 days of receiving a Certificate of Occupancy, they face a fine of $500 per day until an independent report verifies the amenity package requirements have been met. A developer will also pay a further substantial penalty based upon the construction value of the development: Seattle, Department of Planning and Development: Development Incentives, online: http://www.seattle.gov/dpd/GreenBuilding/OurProgram/PublicPolicyInitiatives/DevelopmentIncentives/default.asp.

CAUSS opposes development in the Silverdale area, as contemplated by the PDA and Bylaw 5050-2009. However, should the District continue upon its the present course, it is CAUSS' position that Bylaw 5050-2009 should be revised, to incorporate a substantial financial penalty in the event that the Owner fails to provide a complete amenity package. Alternatively, when adopting a new PDA bylaw per *Local Government Act* s. 905.4(3)(a), due to the change to the Specified Provisions that will flow from the adoption of Bylaw 5050-2009, the PDA should be further revised to incorporate a substantial financial penalty to be triggered if the Owner fails to provide a complete amenities package.

In sum, by signing separate No-Build Covenants with each of Madison and Genstar, the District has opened itself up to the risk that the amenity package contemplated by the PDA will not be provided in full. This risk is exacerbated by the terms of the Escrow Agreement.

b. Effect of the Escrow Ageement

It is CAUSS position that in combination with the separate No-Build Covenants, the Escrow Agreement provides an unacceptable escape hatch through which the Developers can subdivide and build but still avoid liability for the full amenities package contemplated under the PDA.

As Dennis Clark explained to Council in his August 24, 2009 Report re: Amendment to Escrow Agreement – Late Item, the Escrow Agreement provides either of the developers with the option of terminating the PDA. Mr. Clark further advised Council that the Escrow Agreement would become null and void (i.e. the Developers would lose their option to terminate) with the first subdivision application. However, while s. 3(a)(ii) indicates that the Escrow Agreement will only come into effect if there has been no subdivision of lands, s. 1(e) states that Genstar, Madison, and the District can choose to agree that a subdivision does not constitute a subdivision for the

purposes of the Escrow Agreement. The implication is that subdivisions could be filed in the first four years of the PDA but the parties could agree to leave the Escrow Agreement and the associated Waiver and Release in place. In other words, even if one developer is ready to proceed with subdivision and development and does so, the parties can agree that it remains open to either Developer to end the PDA by instructing the Escrow Agent to file discharges of the No Build Covenant during the fifth year of the Escrow Agreement. The agreement indicates that upon the filing of the discharges, Madison, Genstar, and Mission will be bound to sign a Waiver and Release of all rights and obligations under the PDA: Escrow Agreement ss. 3(c), 9(c), 14. This would leave Mission in the untenable position of being unable to insist upon the provision of amenities, despite the presence of registered subdivisions.

The Escrow Agreement provides an escape clause for the Owners from their obligations to provide amenities pursuant to the PDA. Further, it provides them with a hefty bargaining chip in relation to future negotiations. CAUSS is extremely concerned about the language of Recital D, which states:

> Genstar, Madison and Mission have agreed to the terms hereof in order to provide the parties with a mechanism to facilitate the discharge of the Section 219 Covenants and the return of matters to their pre-existing state if various relevant matters, including infrastructure requirements and financing and neighbourhood two land use planning and regulation prove impossible to address to the satisfaction of Mission, Genstar and Madison within a reasonable period of time.

The wording of Recital D indicates that changes to the structure and provision of the PDA's amenity package that was presented to the public last fall and as adopted by Council in March 2009, are within the contemplation of the parties despite what Council has represented to the citizens of Mission in the past. The amenities package, including infrastructure requirements and financing, is at the heart of the PDA. It is CAUSS' position that any changes to the infrastructure requirements and financing constitutes a major amendment to the PDA and must be addressed by public hearing and a new PDA bylaw. CAUSS is also concerned by the reference to the currently non-existant neighbourhood two.

3. Failure to provide full disclosure and tax implications of Bylaw 5050-2009

CAUSS understands that Council passed Bylaw 5050-2009 through first and second reading with the understanding that the addition of Small Scale Agriculture as a principal use in the SN1A zone would change the tax payable to the District by the Developers in the coming years, but that the Developers had made some form of oral agreement with District staff to reimburse the District in future for any tax differences. Although CAUSS has requested all documents and materials related to these tax consequences, details of the oral agreement reached between District staff and the Developers have not been forthcoming. Therefore, CAUSS' submission on this point does not have the benefit of full information.

Instead, CAUSS' submission must be based solely upon what appear to be contradictory statements on pages 6 and 7 of the August 4 District staff memo and the August 12 email response from Denis Clark to a query from Tracy Lyster on this issue.

On one hand, the August 4th staff memo states:

> if the owners implement the agricultural use on any of their lands they may be able to claim farm status. If successful with this claim, there would be an impact on the property taxation for those lands. Staff have discussed this with the owners of the lands, and they have agreed that they would reimburse the District for any difference in property taxes, including any tax increases approved by council in future years.

On the other hand, the same staff memo states:

> The obvious risk to the owners is that if BCAA determines that the value of the lands has increased because of the rezoning, their property taxes will increase very substantially – potentially by millions of dollars over a period of a few years. Since the land is sterilized from development, council may agree that this does not reflect the actual current value of the land. . . given that the owners are prepared to ensure that there is no property tax loss to the District. . . there would not appear to be any reason to not proceed with this primary use in the zoning bylaw.

CAUSS and the rest of the public is left to wonder how there is to be no property tax loss to the District if the owners are allowed to pay farm class taxes in a zone clearly slated for, and in fact created for the purpose of, residential development. Further confusion arises from Mr. Clark's August 12 responses to CAUSS queries regarding the tax implications of the inclusion of Small Scale Agriculture as a principal use in the SN1A zone.

In that email, Mr. Clark stated:

> Genstar and Madison have committed that the District would not lose any revenue as a result of their applying for agricultural status on any of their land. That commitment will have to be formalized if the proposed zoning bylaw is to be adopted. Formalizing the agreement may occur, for example, if council gives third reading to the bylaw.

Several important questions arise from the above excerpts. CAUSS does not expect answers to the following questions this evening, but requests that the District reply in writing as soon as possible.

First, in the absence of any formalized agreement or binding contract, and in the context of two developers who have shown a marked lack of respect for the terms of the PDA as it currently

exists, why is the District taking Genstar and Madison at their verbal word that they will reimburse Council for a tax difference in future years?

Second, how will the difference in tax value even be calculated? The August 4 staff report admits that "neither the owners not the District know how the British Columbia Assessment Authority (BCAA) will assess the value of the owners lands". CAUSS suggests that absent a detailed formal agreement, Council does not have the information in front of it that it necessary to make an informed and reasonable decision on the question of whether Small Scale Agriculture should be included as a principal use in the SN1A zone.

Third, why has Mr. Clark suggested to CAUSS that a formal agreement regarding taxes would occur after council gives third reading to the bylaw? This implies that a formal agreement that is not before the public at this public hearing will be before Council prior to adoption of the bylaw. With respect, such an ordering of events would be in direct violation of the District's duty of full disclosure pursuant to section 890 of the *Local Government Act* and the accompanying case law (i.e. *Pitt Polder Preservation Society,* 2000 BCCA 415 *Eaton v. Vancouver (City)*, 2008 BCSC 1080; *Wilde v. Metchosin (District)* 2005 BCCA 453). The Legislature and Courts of British Columbia have clearly indicated that the District has a legal obligation to disclose to interested members of the public all documents, reports and materials that were or will be considered by Council when passing bylaws in advance of the public hearing.

Fourth, if the District and the Developers fear the impact of a sudden change in the assessed value of the Developers land, why have they not invoked s. 198 of the *Community Charter*, and made an attempt to utilize the process established by Legislature of British Columbia, for addressing situations where assessed property values may escalate significantly and suddenly?

Finally, the language of the August 4th staff report suggests that the District wishes to provide a form of assistance to Genstar and Madison in the form of deferred taxes – can the District explain how the proposed inclusion of Small Scale Agriculture as a principal use in the SN1A zone does not violate s. 25 of the *Community Charter* (General prohibition against assistance to business and exceptions)?

The August 4th staff report is based upon the premise that the lands are sterilized from development until the s. 219 Covenants are removed, and that the BCAA may not accurately determine the "actual current value" of the lands. CAUSS observes that it is the BCAA, not the District of Mission, who has been given the jurisdiction, and who possesses the expertise, to determine the actual value of the lands. Further, when determining actual value, BCAA assessors are legally obligated to take into account the terms and conditions of the s. 219 No-Build Covenants, along with other factors such as present use: *Assessment Act*, R.S.B.C. 1996, c.20 at ss. 19(3)(7). Given that the concern about 'sterilization' is already addressed by the assessment process as legislated, CAUSS is concerned that the inclusion of Small Scale Agriculture as a principal use in the SN1A zone could be interpreted as an attempt to circumvent the BCAA's authority and as *ultra vires* the District.

CAUSS would certainly like to make informed submission to the District on whether or not the proposed inclusion of Small Scale Agriculture as a principal use in the SN1A zone meets the public purpose test, and whether or not it may be in violation of s. 25 of the *Community Charter*. At the time of this public hearing, however, CAUSS does not have before it the information required to make such submissions.

4. Inadequate Environmental Protections

There are several outstanding environmental concerns with the development that will be covered by the PDA. In particular, section 108 of Bylaw 5050-2009, regarding Streamside Protection and Enhancement Areas, is based upon the same flawed base information (i.e. the Neighbourhood One Plan and the relevant Studies) as its' previous reincarnation in Bylaw 4070-2008, which was adopted by Council in March of this year. CAUSS' concerns in this area were presented to Council in December 2008, and those concerns still stand. In fact, CAUSS takes the position that the addition of Small Scale Agriculture as a permitted principal use in the zone has compounded those concerns by decreasing the protection that the No-Build Covenant would have provided under Bylaw 4070-2008.

a. Section 108 – Environmental Protection

One new concern with the proposed zoning bylaw is that the definition of "non fish bearing stream" has been significantly altered. While the definition of "non fish bearing stream" in Bylaw 4070-2008 recognized that non-fish bearing streams provide water, food, and nutrients to a downstream fish bearing stream or other water body, this recognition has been removed from the Bylaw 5050-2009 definition. The deletion of this phrase is especially important given the fact that at least one stream which is classified as fish-bearing outside of the SN1A zone has been classified as non-fish bearing streams within the SN1A zone, and other streams classified as non-fish bearing clearly feed into fish bearing streams: Silverdale Neighbourhood One Plan, Draft July 15, 2008 at 17.

To the best of CAUSS' knowledge, the size of stream setbacks has still not yet been approved by the DFO or the MOE. CAUSS notes that Bylaw 5050-2009 would allow Developers to decrease the already inadequate 30 metre stream setbacks by 5 metres: Bylaw 5050-2009 at s. 108. In addition, the DFO has a long list of outstanding concerns about the current status of the Silverdale Urban Reserve Planning process and the District of Mission's Lan.48 policy. In a letter to the District of Mission on December 20, 2007, the DFO area manager stated that it was "unlikely that DFO can enter into agreements with the District based on planning deliverables and process thus far". The letter, which I have attached to previous correspondence with the District, included 18 specific concerns. For example, the DFO determined that the Environmental Base Map was insufficient to meet the objectives set forth in the Lan.48 document. The boundary of neighbourhood one cropped the headwaters of many creeks, contrary to watershed principles Further, the DFO stated that they were not afforded the

opportunity to review the Terms of Reference (the "TOR") for environmental studies prior to approval and indicated that "many improvements" to the TOR should be made. Both water quality and hydrology studies were deemed to provide limited useful information.

The provincial MOE has also indicated several outstanding environmental concern and non-compliance with Lan. 48. The Environmental Stewardship Division of the MOE reviewed the Draft Environmental Studies of Vegetation and Wildlife in support of the District of Mission's Lan. 48 planning initiative. In a letter to the District on May 20, 2008, MOE Ecosystem Officer Sylvia Letay noted several deficiencies and areas of concern.

For example, wildlife surveys deviated significantly from Lan. 48 Terms of Reference. Some components of required studies (snow tracking and bird surveys) were not be complete in time for the MoE to provide review and comment. Trowbridge's shrew, a blue listed species at risk was not assessed, and the Draft Report indicated that the shrew's presence or absence would not significantly affect planning. It was unclear whether avian species at risk with the potential to occur in the plan area were assessed. These species include Barn Owls, Band-tailed Pigeons and Barn Swallows. Appropriate surveys and assessment was not undertaken for the following listed species with the potential to occur in the plan area: Snowshoe Hare, Mountain Beaver, and Long tailed weasel. Finally, the habitat suitability ratings and mapping products for wildlife as presented in the Draft Report, have limited use for planning purposes.

The Environmental Studies contained several deficiencies with respect to wetlands. Wetlands assessments were not conducted at the right time of year, so wetland boundaries as mapped may not reflect their maximum extent or inundation. It was unclear if seasonally wet depressions were assessed for biological and ecological function, and not all wetlands were mapped and labelled. A ranking system from outside of Canada was used, and could not be validated by the Environmental Stewardship Division. At least one low accuracy GPS unit may have been used to create mapping products. Enhancement and restoration opportunities were not identified.

Ms. Letay also had concerns regarding the Environmental Studies' treatment of plants. It is not clear that upland areas (outside riparian) were included in a survey for rare plants. Two species at risk (the Phantom Orchid and the Vancouver Island beggartick) were insufficiently surveyed, resulting in a lack of confidence that they do not occur within the subject plan area.

More recently, in October 2008, both the federal Department of Fisheries and Oceans and the provincial Ministry of the Environment sent you letters outlining their serious concerns regarding the inadequacy of environmental work done in connection with the development covered by the PDA. Indeed, DFO will not support any rezoning application associated with the Plan at this time.

b. Environmental Implications of allowing Small Scale Agriculture as a principal use

CAUSS' concerns about inadequate environmental protection have been heightened due to the inclusion of Small Scale Agriculture as a principal use within the country development precincts of the SN1A Zone. As Mayor and Council are likely aware, several of the country development precincts overlap or border on the conservation areas identified in the No-Build Covenants. A Small Scale Agriculture use would allow developers to clear land and cut trees without permits under section 4.2(b) of the District of Mission Tree Management Bylaw 3872-2006. As pointed out by the DFO and peer reviews of the Environmental Base Map of the area, wetlands and streams have not been adequately catalogued and mapped out, which means that the lack of requirement of a permit for cutting for agricultural use could lead to trees being cut in places that would normally be prohibited by Bylaw 3872-2006.

Given the already insufficient protection for streams and fish habitat, CAUSS is concerned that deforestation without permits will result in unnecessary deleterious effects. Moreover, the Developers will have a motivation to clear land for 'agricultural purposes' in order to avoid high tax assessments on the properties. However, given the now separate No-Build Covenants and the Escrow Agreement, the Developers are not bound to actually develop the land once cleared. In the end, the District may be left with an ecological and visual mess that does not even lead to development as envisioned by the Neighbourhood 1 Plan.

5. Summary

In closing, CAUSS takes the following positions with respect to Bylaw 5050-2009:

- The District is obliged to consider CAUSS submissions on the separate No-Build Covenants and the Escrow Agreement at this public hearing.
- Adoption of Bylaw 5050-2009 will oblige the District to amend the PDA and to hold a further public hearing.
- The separate No-Build Covenants and the Escrow Agreement create an unacceptable risk that the District will be unable to realize the benefits of the complete amenities package as contemplated under the PDA.
- In light of the amending agreements, the PDA should also be amended to include a financial penalty to be triggered upon failure to provide a full amenities package.
- The District has failed to meet its obligation to disclose details of the oral agreement reached between District staff and the Developers regarding taxation of land assessed as agricultural land.
- If the District has no further details to disclose in relation to said taxation agreement, then Council does not have enough information before it to make a reasonable decision on the inclusion of Small Scale Agriculture as a principal use in the SN1A zone.
- The Developers concerns around taxation could be better addressed through the existing processes contained in the *Local Government Act* and the *Assessment Act*.
- Bylaw 5050-2009 does not provide adequate environmental protection.

- The inclusion of Small Scale Agriculture as a principal use in the SN1A zone exacerbates the potential adverse impacts of development upon the environment.

Yours truly,
WOODWARD & COMPANY

Jenny Biem

c.c. Tracy Lyster, CAUSS