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July 8, 2016

VIA ELECTRONIC MAIL

File No. 4880.000

Hon. Mayor and Members of the City Council,
c/o Ashlee Wright, City Clerk
Carmel-by-the-Sea City Hall
P.O. Box CC
Carmel-by-the-Sea, CA 93921

**Re: Yencken Appeal of Planning Commission Approval of Design Study Application:
DS 15-217 (Chadwick Living Trust)
Scenic Road, 2NW of 8th Avenue
Blk C2, Lots 10 and 11, APN: 010-312-026**

Dear Mayor Dallas and Members of the City Council:

Art and Farah Chadwick's proposed project is the demolition of their existing two story home that was built in the early 1980's and construction of a new two story home with a basement that will have a roof ridge line, floors and backyard decks three to four feet **lower** than the existing home. Their neighbors to the south, Mr. and Mrs. Yencken, have appealed the Planning Commission's approval of their application on four grounds:

1. That the proposed residence is "too massive";
2. That the proposed vehicle lift to the basement transforms the residence into a prohibited "three-story" building;
3. That the City cannot grant a variance for a "third" deck at the rear of the home; and
4. That the Chadwicks should be prohibited from rebuilding the fence between their property and the Yenckens' home along the actual property line because the Yenckens like having a few extra inches of space on their side of the fence.

None of these grounds has any merit. Therefore, the Chadwicks request that the Council uphold the Planning Commission's approval of their project.

Before receiving the Planning Commission's approval, the Chadwicks' project was extensively modified in response to comments from Planning staff, members of the Commission, the Yenckens, and other neighbors. The roof line and entryway have been modified, several

proposed windows have been eliminated, relocated, and made smaller, and the chimneys have been shortened to reduce the home's effect on the neighbors' views. In addition, the backyard has been completely redesigned: extensive grading and tall retaining walls originally proposed to create a level yard area have been eliminated and replaced with a smaller deck. The latter changes will reduce the visual impact of the raised rear yard on the neighbors to the south and west but require a variance of site coverage limits.

1. The Proposed Residence Does Not Violate the City's "Mass" and "Bulk" Standards

The Yenckens' first ground for appeal is that the proposed residence is inconsistent with the City's General Plan, Municipal Code, and Residential Design Guidelines due to its "mass" and "bulk". In support of that contention, the Yenckens assert that the proposed residence will dwarf the homes on adjacent properties on the west side of Scenic Avenue. However, the proposed home would be both several feet lower and considerably less boxy than the home that has stood on the property for over 30 years. More importantly, numerous other houses on Scenic Avenue, including the properties across the street from the Chadwicks', are as big or bigger and more visually imposing than the Chadwicks' proposed new home.

During the July 11 site visit, the Chadwicks' architect, Eric Miller, will show the Council that the bulk and mass of numerous properties in the immediate vicinity greatly exceed both the existing and proposed Chadwick residences. In addition, during the July 12 hearing, Miller will present photographs of both the existing Chadwick home and numerous homes in its immediate vicinity to demonstrate the consistency of the proposed home with others in the neighborhood. Pictures of two of the houses across Scenic Road from the project site are attached hereto as Exhibits 1 and 2. An aerial photograph of the immediate neighborhood showing the existing Chadwick residence and the dozen closest homes is attached as Exhibit 3.

The Yenckens' appeal quotes the City's General Plan Policy P1-40 and Municipal Code section 17.64.080(A)—along with nonexistent Sections 17.10.010(D) and 17.58.080¹—all of which contain language prohibiting "excess mass or bulk" inconsistent with other structures in the immediate block and neighborhood. A comparison of the elevations of the Chadwicks' proposed new home with the photographs of the nearby properties and the existing Chadwick home will establish that the size, bulk, and visual impact of the proposed house are consistent with the character of the immediate block and neighborhood. Therefore, the Council should uphold the Planning Commission's approval of the project.

2. The Proposed Project Is a Two-Story House with a Basement, Not a Prohibited Three-Story Building

¹ It appears that the Yenckens may have intended to cite Municipal Code section 17.58.060(5), which required the Planning Commission to find that "[t]he project does not present excess visual mass or bulk to public view or to adjoining properties. The project relates to a human scale in form, elements and in the detailing of doors, windows, roofs and walkways."

The Yenckens' second contention is that the proposed car lift in the garage makes the project a prohibited three-story building. The relevant Municipal Code section is 17.70.020, which defines "basement" and "story" as follows:

Basement. An underground room or excavated space between five and nine feet of interior height, finished or unfinished where the finished floor level directly above the space is not more than one foot above both the existing or final grade. Any subgrade space where the finished floor elevation directly above the space is more than one foot above existing or finished grade shall be considered above-ground space. All areas where the finished floor elevation directly above a subgrade space is more than five feet above either existing or final grade shall also be considered a story. (Note: In calculating the floor area of a basement it may be necessary to count part of the area in a floor level as basement and part of the area in a floor level as above-ground space.) Basement spaces may be used for any residential occupancy allowed by the Uniform Building Code such as bathrooms, family rooms, hobby rooms, offices, mechanical equipment, storage and, if equipped with window wells, bedrooms.

...

Story. A space in a building between the upper surface of any floor and either the upper surface of the next floor above, or in the case of the topmost floor, the ceiling or roof above. Those portions of a subgrade or partially subgrade living space, space used for parking, underfloor space or crawl space are counted as a story where the finished floor above such space is five feet or more above the final grade adjacent to any exterior wall around the perimeter of the building.

Within Residential Zones. Those portions of excavated space not used for parking, that qualify as a basement, do not count as a story. All portions of a garage are considered a story. See also "Basement."

Within All Commercial Zones. A basement or cellar is considered a story if the finished floor level directly above such basement or cellar is more than five feet above the surface of the ground adjacent to any portion of any exterior wall of such structure that faces on a public street, way, place, or park.

While a literal interpretation of these definitions might determine the basement portion of the car lift to be a garage, the Chadwicks' proposed car lift is clearly not the type of condition the code was intended to prohibit. The City, whether acting through the Planning Commission or the Council, has the ability to interpret its Municipal Code. As the City's Planning staff has acknowledged, the intent of these provisions is to prohibit true "three-story" structures with "ordinary" basement garages, i.e. visible basement garages accessed by driveways, topped by

two additional stories of living space. The basement car lift space will not be visible, has no separate door, and reduces the overall size and visual impact of the structure rather than increasing them. As such, the car lift to the basement does not create a three story “look”, which is the condition these provisions were designed to prevent.

Where the City gives careful consideration to its legislative intent and the practical considerations of one interpretation versus another, California courts will grant significant deference to the City’s interpretation of its zoning code. (*See Yamaha Corporation of America v. State Board of Equalization* (1998) 19 Cal.App.4th 1, 12; *Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2010) 184 Cal.App.4th 1032, 1041-1042. Therefore, just as the Planning Commission did, the Council should find the basement car lift to be consistent with Section 17.70.020 notwithstanding the apparent prohibition on such conditions.

3. The Council Should Uphold the Variance for the Size of the Rear Deck

The Yenckens’ third ground for appeal is that the City cannot grant the Chadwicks a variance because there are “three” decks and restricting them to two would not result in a hardship. This argument is nonsensical: the design only includes two decks—one in the backyard at the main floor level, and one on the roof at the second floor level—plus an at grade patio outside the basement bedrooms. The original project design called for a level yard / patio to be created with extensive fill and retaining walls. In response to significant comments from the Planning Commission regarding the amount of grading involved and the visual impact of the proposed retaining walls, the filled yard has been replaced by the proposed deck. While the graded and filled yard would not have required a variance, the deck requires a variance regarding the amount of site coverage allowed. The Planning Commission granted that variance to allow that design change that it had strongly suggested to the Chadwicks. The Council should uphold that decision.

4. The Chadwicks Should Be Allowed to Rebuild their South Fence on the Actual Property Line

The Yenckens’ final issue is that the Chadwicks should be forced to keep the existing fence between them despite the fact that portions of the fence are located as much as fifteen inches on the Chadwicks’ side of the property line. The Yenckens’ argument against replacement of the fence amounts to nothing more than an expression of their personal preference for keeping the fence on the Chadwicks’ side of the property line.

Although the Yenckens may prefer the location of the existing fence, they do not have any legal right to maintain a fence on the Chadwicks’ property instead of on the property line. The legal doctrine that governs transfers of title to property by long-term occupation is adverse possession. In order to establish an interest in property by adverse possession, a party must bring a lawsuit

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and prove all of the following elements multiple elements, including that he or she has paid all property taxes on the disputed area for at least five consecutive years. [See Code of Civil Procedure § 325.] The Yenckens have not filed suit pursuing a claim of ownership of the narrow strip between the fence and the property line and would be unable to satisfy the elements necessary to prevail if they were to do so. Therefore, they have no right to force the Chadwicks to keep the existing fence on the Chadwicks' property instead of replacing it with a new fence on the actual property line. (In fact, a decision in favor of the Yenckens on this issue would be tantamount to the City exercising its power of eminent domain to take the disputed area from the Chadwicks and give it to the Yenckens. The City has no power to perform such a taking and gift of property for such purely private purposes.)

5. Conclusion

Applicants Art and Farah Chadwick designed their proposed new home to minimize its visual and other impacts on their neighbors. In the course of navigating the Design Review process, they have made extensive changes to further reduce impacts on the neighbors, and the resulting project is entirely consistent with the characteristics of the neighborhood. Nonetheless, their neighbors Simeon and Sally Yencken's continue to oppose the project in an unreasonable attempt to have it further modified to fit their own preferences and illegally transfer a narrow strip of property to them. However, the Design Review process should not be a vehicle for individual neighbors to exercise carte blanche control over proposed projects. For the reasons set forth herein, in the report prepared by City staff, and to be presented at the July 12 City Council meeting, the Chadwicks respectfully request that the Council deny the Yenckens' appeal of the Planning Commission's approval of the Chadwicks' Design Study application and uphold the grant of that permit.

Very truly yours,



Michael A. Churchill

cc: Art & Farah Chadwick
Eric Miller, Eric Miller Architects, Inc.
Donald Freeman, City Attorney

EXHIBIT 1

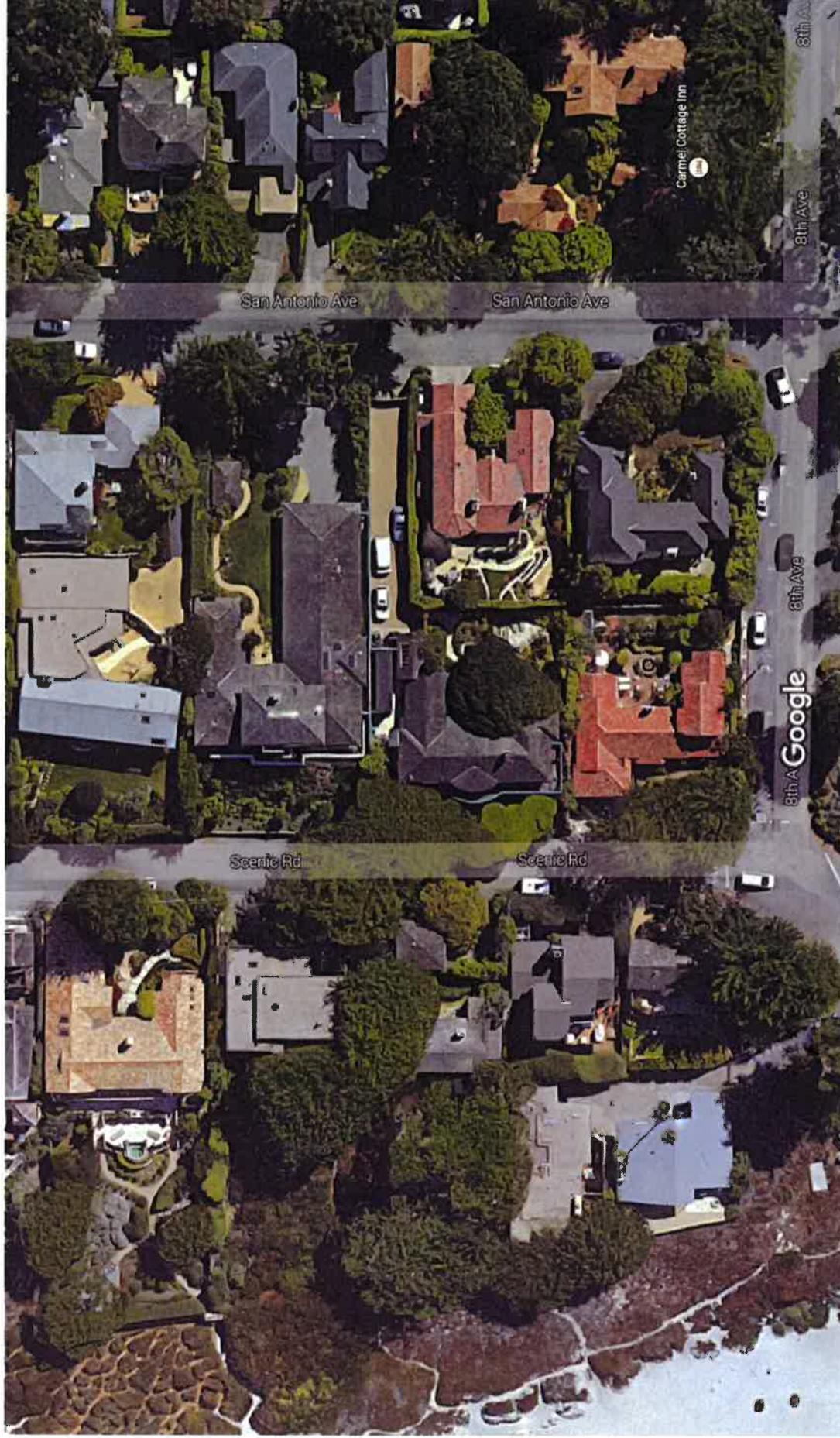


EXHIBIT 2



EXHIBIT 3

Google Maps



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