PLANNING COMMISSION MINUTES OF March 10, 2008

2007-1083 - Appeal of a decision by the Administrative Hearing Officer denying Special Development Permit to allow an accessory utility building (arbor) with a one-foot side-yard setback where 4 feet is required. The property is located at **1464 Yukon Drive** (near Cheyenne Drive) (APN: 323-47-025) NC

Gerri Caruso, Principal Planner, stated that this application is before the Planning Commission because it is an appeal of the decision of the Administrative Hearing Officer. The neighborhood where the project is located is in a planned development combining district therefore this application is for a Special Development Permit rather than for a Variance and requires different findings to be made. The purposed structure currently exists and was constructed prior to applying for necessary planning permits. The Administrative Hearing Officer considered the unique conditions of the small lot neighborhood as well as views from adjoining lots. Consideration was given to required set-backs as well as review practices typically used by the Planning Division when considering accessory utility buildings. Although this application is a Special Development Permit and allows consideration of deviations to set-backs the Administrative Hearing Officer denied the application as the purposed structure was found to be incompatible with the neighborhood in its purposed location near property lines even with the applicant's revised proposal to lower the roof. Staff concurs with this decision and it is recommended that the Planning Commission uphold the decision of the Hearing Officer and deny the appeal and Special Development Permit. However, if the Planning Commission feels that they are able to make the findings there are proposed conditions located in the staff report.

Comm. Babcock asked how a gazebo was classified as an accessory utility building. **Ms. Caruso** stated that it currently meets our Municipal Code definition and gazebos are considered accessory utility buildings. Comm. Babcock asked if an arbor would be classified as an accessory utility building and Ms. Caruso stated that in some cases for very minor structures that are less three dimensional we consider them fences across the property but anything that really has some dimension to it or relies on post's to uphold it we consider and review them as accessory utility buildings. Comm. Babcock asked about an arbor gate that is located on the fence line which Ms. Caruso mentioned that the arbor gate would be reviewed as a Miscellaneous Plan Permit and was unsure if it would be considered an accessory utility building. Comm. Babcock wanted to know what other options may be used up against a fence line that would give the same result as the structure, such as vegetation. Ms. Caruso stated that trees, shrubs, hedges, a line of Italian cypresses. Comm. Babcock wanted to know if the gazebo was brought in four feet, what is the height limit and would the applicant be able to add solar panels to the structure? Ms. Caruso stated that at four feet they would be allowed to construct the structure at eight feet.

Vice Chair Rowe wanted to know if the measurements reflected in the report started from the four foot set-back or if they are taken from the property line? Ms. Caruso stated that the code allows an accessory utility building up to 6'6" to be right up against the property line. By practice the Planning Division ads a three foot setback for every foot over six and a half feet in height.

Kelvin Long, Appellant, stated that on attachment C page 3 of 3 there is a height measurement of 8'9" but it should only be eight feet tall. Mr. Long stated that if he lowers the total height to eight feet there will be no visual impact, he also mentioned that there are many other structures around the neighborhood that up against the fence but he was unsure if these structures were constructed legally. He also noted that if he was to lower the height to meet the code there will be no difference to the visual impacts from his neighbors view.

Mark Tamura, Neighbor, stated that he lives at the property behind Mr. Long's and he is opposing the project. Mr. Tamura stated that the structure is very visible from their patio, kitchen, and family room. He also feels that this structure would greatly decrease their property value and set a bad precedence for the neighborhood. Mr. Tamura also noted that his property is a foot lower than Mr. Long's which makes the structure look a lot bigger than it really is. **Comm. Babcock** asked if Mr. Tamura has put any thought into what the applicants alternatives are and what they can do legally that may impact him far more greatly than a covered arbor? Mr. Tamura stated that he is fine with the appellant using vegetation to achieve the desired shading. **Comm. Klein** asked how far Mr. Tamura's trellis is from the appellant's yard and Mr. Tamura stated that he believes it is about ten feet. Vice Chair Rowe asked if there was a wall behind the trellis and wanted to know the height. Mr. Tamura stated that he does not have an accurate measurement but he believes it to be nine and a half feet. He also stated that the trellis was already in existence when he purchased the property and he stated that staff does have knowledge of the trellis and wall.

Mr. Long stated that he would like to get approval for the structure and he is aware of his other options but would much rather prefer to have the gazebo.

Chair Sulser closed the public hearing.

Vice Chair Rowe wanted to know if structures such as the one purposed have been permitted in this development which **Ms. Caruso** stated that there has been a structure similar to the one on the neighbor's lot that has been approved through a hearing. It is a passive structure that is more of a landscaping decorative feature and is lower than the height of the fence behind it. Ms. Caruso said staff has spoken to the President of the home owners association and asked him if he could talk to the other neighbors to see if they would like to come in collectively and make an application for specific guidelines for their neighborhood, they are still waiting to hear back from them. Vice Chair Rowe asked if the common interest development has addressed this matter in their CC and R's. Ms. Caruso stated that they have not adopted specific accessory utility

buildings and garden decorative structure guidelines and that it normally is not typical for them to have these types of guidelines in their CC and R's.

Comm. Babcock moved alternative number three to grant the appeal, and approve the Special Development Permit with modified conditions; no portion of the structure to exceed seven and a half feet.

Comm. Simons seconded and added a friendly amendment that no solar panels due to the proximity of the fence and no future solid roof may be added. **Comm. Babcock** approved the amendment. Comm. Simons stated that if the home owners association, for this development only, creates a set of guidelines for these types of structures that are more restricted than our code then their guidelines will supersede this decision. Comm. Babcock state that this would be approval as a gazebo or arbor, nothing with a solid roof or solid walls.

Kathryn Berry, Assistant City Attorney, wanted to add that the city cannot deny anyone the opportunity to apply for a permit to install solar panels. **Comm. Simons** stated that the modification for the solar panels should be that the gazebo would meet set back requirements in order to install the panels. Ms. Berry also noted that when applying for solar panels *it used to be that* you must meet the shading requirements, *but state law has removed agency discretion*. Comm. Simons stated that his main concern is that the city has setback requirements for solar panels and just because the structure is approved in the setback, it does not give permission for any future installation of panels to be in the setback if installed on the gazebo.

Comm. Babcock stated that she feels the alternatives would be far more distressful to the neighborhood. *She said she feels that this accessory utility building was obviously not designed to be a shed.* She also stated that a gazebo that is limited in height is a far better alternative than having trees grow that will have a bigger impact on all surrounding neighbors due to the small sizes of the lots.

Comm. Klein stated that he will not be supporting this motion because, in his opinion, they are allowing a Special Development Permit that would normally not be allowed to pass. He also feels that the structure could easily be put farther from the fence *to meet the setback requirements*. The neighbor that showed up tonight has a similar structure and it is centered on their property. Comm. Klein also mentioned that he feels the conditions of approval on this motion will be difficult to meet in the future such as, if the appellant was to add solar panels he must meet the setbacks, he can meet the required setbacks right now. The roof of the gazebo does make this an accessory utility building on the property and he feels that they cannot make any exception for it. He also stated that if this project is approved the Commission will be setting a precedent for the neighborhood.

Vice Chair Rowe stated that she will not be supporting this motion due to the fact that this is a common interest development which means the neighbors are

living much closer than they would be if they were living in a typical single family home development. She feels that this is one of those situations where the neighbors must make concessions to the fact that they live very close to one another. Vice Chair Rowe also stated that putting this structure so close to the fence magnifies the size of the gazebo.

Comm. Simons stated that he can make the findings with modifications. He feels that this motion is unique because it will encourage the Home Owners Association to enforce a set guidelines for future purposed structures similar to this one. He feels that the neighborhood should make the decision on approving these types of structures due to the limited space of their lots. Comm. Simons stated that they are applying rules for multiple types of structures and he has a difficulty with some of the City's rules. He stated that he will be supporting this motion.

Comm. Hungerford stated that he will be supporting this motion because he feels that this structure is more of a landscaping feature and for that reason he is willing to be flexible. He also agrees with Comm. Simons that the Home Owners Association should formulate their own guidelines for these types of structures.

Comm. Klein stated that if they are going to make *it* incumbent on the Home Owners Association (HOA) to make the rules then the commission should not set a precedent before their rules are created and therefore the commission should deny the project and keep *the applicant* within the current Sunnyvale code. Comm. Klein stated that he would much rather prefer to see trees than a structure.

Vice Chair Rowe stated that an association can limit the type of trees that are planted on your property due to the size of the individual lot.

Comm. Sulser stated that he will not be supported the motion due to the rationale articulated by Comm. Klein.

ACTION: Comm. Babcock made a motion on 2007-1083 to grant the appeal, and approve the Special Development Permit with modified conditions that no portion of the structure shall exceed 7.5 feet and that no solid walls be added. Comm. Simons seconded with a friendly amendment that no future solid roof shall be added and if solar panels are added, the gazebo must meet the setback requirements. He also noted that more restricted neighborhood association rules shall supersede these conditions. Motion failed 3-3 with Chair Sulser, Vice Chair Rowe and Comm. Klein dissenting, Comm. Chang absent.

APPEAL OPTIONS: A tie is effectively a denial of the appeal. The applicant has 15 days to appeal this decision to the City Council, which would be no later than March 25, 2008.