

**PLANNING COMMISSION MINUTES OF JANUARY 12, 2009**

**2008-0839** – Appeal by a neighbor of a decision of the Director of Community Development approving a Miscellaneous Plan Permit to remove an architectural feature (lattices) in an approved residential development. The property is located at **1034 Polk Avenue** (APN: 161-39-065) RZ

**Rosemarie Zulueta**, Assistant Planner, presented the staff report. She said staff was able to make the findings and recommends that the Planning Commission deny the appeal and uphold the decision of the Director of Community Development to approve the Miscellaneous Plan Permit (MPP) application. She said following the completion of the staff report the office of the City Attorney received a letter from the applicant.

**Kathryn Berry**, Senior Assistant City Attorney, explained that a letter was received by the applicant, raising the issue about whether the appeal had been timely filed. She said there is a 15-day appeal period and the applicant made the argument that that the time for counting the appeal period should be on the date of receipt of the letter. Ms. Berry said that the general rule for all appeals is that you do not count the first day of the decision and you do count the last day. She said the letter went out on September 18, 2008, the 15-day count started on September 19<sup>th</sup> and the appeal was timely filed on October 3, 2008. She Sunnyvale has adopted this rule and it is the rule of the courts, and in case law. She said the applicant has raised this as a legal issue, but the 15 day period was met.

**Comm. Sulser** asked staff about the lattices and whether they were required or optional on the part of the developer. Ms. Zulueta explained that the lattices were a part of the proposal from the developer. She said staff was more concerned about the visual impact from the public street. Comm. Sulser confirmed with staff that there were no specific conditions of approval that required the lattices.

**Vice Chair Chang** confirmed with staff that the City is not in conflict with the CC&Rs (Covenants, Conditions and Restrictions) of the Homeowners Association (HOA). Ms. Zulueta said that the applicant would need approval from the City and whatever is outlined in the CC&Rs for the development.

**Chair Rowe opened the public hearing.**

**Bill Hawkes**, appellant, asked how many of the Commissioners visited the site and confirmed that all the Commissioners had copies of the report. He said he would like to make one correction to the staff report, stating that the lattices have been removed and that the Commission is not approving something to be done, as it is past tense. Mr. Hawkes referred to a petition from some of the residents in the Legacy neighborhood. He described the homes in this community. He said that neither the

builder, the Planning Commission, or the City Council intended these for exteriors to be altered. He discussed details about the approval process of the development. He said all 34 homes in the development included lattice structures approved by the City Council. He said the large lattice structures have been a defining quality of this Legacy neighborhood. He discussed the physical characteristics of his side yard and the lattice structures are the only backdrop for the side yard design. He said he installed a patio and described the landscaping in front of the lattices which were not vines and were not climbing plants. He said usability of this personal patio space was severely affected in July 2008 when his neighbor, Mr. Swierski removed the three lattices without consulting him and without obtaining an MPP. He said his French doors now look out to a blank wall which is ugly. He described the size of the wall. He said that the lattices were a major architectural feature approved by City Council. He referred to Ms. Zulueta's letter dated November 21, 2008 which addresses condition of approval #4 from permit 2003-0020. He said his opinion is that condition #4 terminated when the construction was completed and that Section 19.82.050 of the code does not apply. He said the Single-Family Design Techniques are problematic. He said that allowing the removal of the lattices has a major visual impact on what he views. He provided a copy of his presentation to the Commission.

**Comm. Sulser** asked Mr. Hawkes about the architectural moldings confirming that his unit does have moldings on the side, but that they are high and not very visible and that not all of the homes have the moldings.

**Chair Rowe** confirmed with Mr. Hawkes that the lattices have been completely removed, that the landscaping by the lattices was not vines, and that the landscaping was two to three inches from his neighbor's house.

**Gary Swierski**, applicant, said that he applied to remove the lattices. He said prior to removing the lattices he came to the City and was told that he did not need a permit to remove them, later finding out he was given the wrong information. He said Mr. Hawkes filed a complaint with the City and the City then said that a he should have applied for a permit which he did, and which was approved. He provided the history of why he wanted to remove the lattices. He said the vegetation was growing against his house, that letters from the management company and the HOA had been sent to Mr. Hawkes about the vegetation, and they were ignored. He said they have had attorneys involved to put the requirement in laymen's terms. He said it is clear what is allowed and what is not allowed. He provided information about how vegetation growing next to the house can damage homes. He said that the lattices are not there to grow vines on. He said he has removed the lattices to protect his property and property value. He said he thinks this is a very minor change and not noticeable from the street. He said he is part of the Architectural Committee and active in keeping the neighborhood looking nice. He asked that the Commission to try to put themselves in his shoes and ask themselves if they would like their neighbor to be able to do whatever they want to your property.

**Comm. McKenna** discussed with Mr. Swierski how the homes are laid out. Mr. Swierski explained that there is 10 feet between each house and each home owns five feet on each side of their house, though the neighbor on one side has easement rights to the five feet that becomes their the side yard. He said the CC&Rs are clear about what the neighbor can and cannot do in the easement areas. He said he has repainted the wall and it looks nice. Comm. McKenna confirmed with the applicant that the five foot easement area for the neighbor would not be an area where he would spend time as he would use the easement area on the other neighbor's side yard.

**Chair Rowe** asked the applicant if the CC&Rs say anything about how close vegetation can be planted near the neighbor's house. Mr. Swierski said that the attorney language says that nothing can be built in the area that materially interferes with the ability of the owner to protect the residence including planting creeping vines so that they grow onto the protected residences. He said these plants attract pest and moisture that cause problems for homes.

**Comm. Klein** asked the applicant what was there before the lattices were removed. Mr. Swierski said all three of the lattices had vegetation growing next to the house and into the lattices. Mr. Swierski said there are other issues that have occurred that do not comply with the CC&Rs. Mr. Swierski said he is on the HOA Board and is part of the Architectural Committee. Comm. Klein asked how many other residences in the development have built into the five foot easement of their neighbor's property. Mr. Swierski said maybe half of the residents and that there is a variety of things neighbors have done within the guidelines of the CC&Rs.

**Chair Rowe** asked if the CC&Rs have a fining process. Mr. Swierski said yes and that Mr. Hawkes has been fined. Chair Rowe discussed with Mr. Swierski other issues related to the CC&Rs and some of the events that have transpired.

**Alison Steer**, a Legacy resident said she is representing herself and husband and that they are in support of Mr. Hawkes' appeal. She commented that removal of the lattices decreases value of the neighbor's home and that they depend on the lattices for both enjoyment and value.

**Brandon Stevens**, a Legacy resident, said his home is the other residence that applied to remove the lattices and was approved and not appealed. He asked the Commission to deny the appeal. He said the lattices invite people to grow vines which would hurt the property value of these homes.

**Chi-Kai Kuo**, a Legacy resident, spoke in support of the applicant and asked the Commission to deny the appeal.

**Prashant Agarwal**, a Legacy resident, discussed both sides of the issue. He said he is unsatisfied with the five-foot easement that is part of their development as he has

sacrificed his five-foot easement, but received nothing in return. He said lattices are not open invitations to grow vines against a neighbor's home without prior written approvals. He said he thinks Mr. Swierski probably sleeps better now since he does not have fuel growing on the outside of his home.

**Michele Pierron**, a Legacy resident, said she wanted to emphasize that these are small homes, with French doors that look out into small yards and said that the lattices do make the walls look better.

**Stella Yu**, a Legacy resident, urged the Commission to deny the appeal. She said the petition list is signed by people that are not on the HOA Board and commented about the HOA Board and the CC&Rs.

**Wolfgang Pesch**, a Legacy resident, spoke in support of the appeal and said that he feels the lattice structures are an integral part of the community and the removal of the structures would reduce the property value of their investment.

**Mr. Hawkes** said that he has never planted any plants that touch Mr. Swierski's wall and that they had a trial and he swore under oath that there was never anything within two or three inches from the wall. He discussed other issues regarding the patio and said everything was done properly and by a professional. He said the major issue here is the design. He said the look of wall was approved by the City Council and the lattices were to break up the wall and are a major design element. He said Mr. Swierski does not use or view this yard. He said the lattices can be seen from the street, the loss of the lattices are a loss of a design element, and that 45% of his wall went from a nice design to a blank wall.

**Comm. Hungerford** referred to a letter in Attachment C, page 3 from the Board of Directors of the HOA indicating that there were vines and climbing plants 9 to 10 feet high on the trellis and on the home. Mr. Hawkes said the information is incorrect and pointed out that the letter is not signed saying that it was a fabrication. He added that they have not had an election for the Board since June of 2006 and therefore do not have a legal Board. He said he feels the Board has been hi-jacked by five people.

**Mr. Swierski** said that he finds it amazing that Mr. Hawkes can look at the letters and say everyone is lying. He said the patio does look nice except for the paver standing on end. He referred to pictures in Attachment I and said that though most of what is shown in the pictures is nice, much of it was never approved and is not in compliance with the CC&Rs. He asked the Commission to deny the appeal and help him to protect his investment.

**Comm. Hungerford** asked Mr. Swierski about the letter from Board to Mr. Swierski that is not signed. He said the Board is made up of volunteers and sometimes it is difficult to get everyone together for signatures. He said generally they just send the letters out.

**Chair Rowe** discussed with Mr. Swierski that there are five members on the Board of Directors and three on the Architectural Committee.

**Chair Rowe closed the public hearing.**

**Comm. McKenna** asked staff why this project is being reviewed by the Planning Commission. **Trudi Ryan**, Planning Officer, explained that this was a minor modification handled at a staff level and the decision can be appealed to the Planning Commission. Comm. McKenna discussed with staff about referring it back to the HOA with staff explaining why it was handled as a MPP.

**Comm. Hungerford** asked staff, assuming the Commission goes with the staff recommendation, is there any way to phrase the approval so it is not viewed as a blanket approval. Ms. Ryan said the Commission could state the rationale of why they feel this particular situation warrants approval of the application. Comm. Hungerford confirmed with staff that the rationale that the Commission lists could be taken into consideration for future applications.

**Vice Chair Chang** discussed with staff that staff has decided this is a minor modification and some of the public this evening feel it is a major modification. Ms. Berry said if the Commission determines that this is a major modification then the lattices could have to be reconstructed. Ms. Berry said, as a member of the public addressed, that there is one issue whether the lattices remain and another issue about what can be planted. She said that there is room for the Commission to discuss whether this is a minor or major modification.

**Chair Rowe** asked when was this development turned over to the Homeowners with Ms. Ryan stating it is usually when 75% of the units have been sold which may have been about three years.

**Comm. McKenna moved for Alternative 1, to deny the appeal and uphold the decision of the Director of Community Development to approve the Miscellaneous Plan Permit with the attached recommended Conditions of Approval. Comm. Travis seconded the motion.**

**Comm. McKenna** said that we are dealing with personal property affected rather than just an easement. She said that the lattices look better than the wall, however she does not see this as a major architectural feature.

**Comm. Travis** said he agrees with Comm. McKenna. He said he sympathizes with the appellant, yet the lattices are on the applicant's land. He said does not see the lattices as a major architectural feature.

**Comm. Sulser** said he will not be supporting the motion. He said he would grant the appeal as he feels the lattices are a major architectural feature to break up the blank wall.

**Comm. Klein** said he would not be supporting the motion. He said he was torn as far as the testimony is concerned. He said one of his pet peeves is large blank walls and he feels that the lattice as listed is an aesthetic and architectural feature throughout the property. He said whether or not the lattices are there that there are other issues that are not solved by putting the lattices back in. He said he feels the five foot easements are a problem issue in the long-run. He said he thinks the lattices are an architectural feature of these homes as they were originally designed and should be retained.

**Vice Chair Chang** said he would be supporting the motion. He said there are many conflicting stories that need to be worked out.

**Comm. Hungerford** said he would be supporting the motion. He said he does put some weight to the findings of the Architectural Review Committee and the reasons why they approved the removal. He said one of the findings to be made is to ensure the general appearance of proposed structures. He said if the lattices are used to grow vegetation then the lattices could detract from the integrity of proposed structure. He said he is voting for the motion as he thinks there is enough evidence in the record that there may have been plants growing on the side of the building.

**Chair Rowe** said she would not be supporting the motion as she feels the lattices are a necessary architectural detail. She said the members of the public seem to be split on this issue. She feels the HOA could have addressed this situation. She said that she would vote to keep the architectural feature. She said the homeowners can change their CC&Rs and they may need to get some help to make the changes.

**ACTION: Comm. McKenna made a motion on 2008-0839 to deny the appeal and uphold the decision of the Director of Community Development to approve the Miscellaneous Plan Permit with the attached recommended Conditions of Approval. Comm. Travis seconded. Motion carried, 4-3, with Chair Rowe, Comm. Klein and Comm. Sulser dissenting.**

**APPEAL OPTIONS: This action is final.**