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10300 TORRE AVENUE • CUPERTINO, CA 95014-3255  
TELEPHONE: (408) 777-3223 • FAX: (408) 777-3366  
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May 11, 2020

Subject: Consider an appeal of the Planning Commission's approval of a Minor Residential Permit to allow a second-story balcony. (Application: RM-2017-39; Applicant: Francis Kun (Tsai residence); Project Location: 21865 San Fernando Avenue; A.P.N.: 357-15-043; Appellant(s): Shayjan Huang and Eric and Cindy Fang)

Condition No. 3 *Revision to the Second-Story Deck* of Resolution No. 20-036 denying the appeal of Application RM-2017-39 and upholding the Planning Commission's decision to approve the application has been amended. Attached is the revised resolution. Please contact Associate Planner Erika Poveda with any questions at [erikap@cupertino.org](mailto:erikap@cupertino.org).

Sincerely,

A handwritten signature in blue ink that reads "Kirsten Squarcia".

Kirsten Squarcia  
City Clerk

cc: City Attorney, Planning Department

## RESOLUTION 20-036

### A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF CUPERTINO DENYING AN APPEAL AND UPHOLDING THE PLANNING COMMISSION'S DECISION TO ALLOW THE CONSTRUCTION OF A SECOND-STORY BALCONY AT AN EXISTING SINGLE-FAMILY RESIDENCE LOCATED AT 21865 SAN FERNANDO AVENUE

#### SECTION I: PROJECT DESCRIPTION

Application No.: RM-2017-39  
Applicant: Francis Kun  
Property Owner: David and Yiting Tsai  
Appellants: Shayjan Huang and Eric and Cindy Fang  
Location: 21865 San Fernando Avenue (APN: 357-15-043)

#### SECTION II: FINDINGS FOR A MINOR RESIDENTIAL PERMIT:

WHEREAS, the City of Cupertino received an application for a Minor Residential Permit to allow the construction of a second-story balcony; and

WHEREAS, the project is determined to be categorically exempt from the California Environmental Quality Act (CEQA) pursuant to Section 15303 of the CEQA Guidelines; and

WHEREAS, the necessary notices were given and the comment period for the application was provided as required by the Procedural Ordinance of the City of Cupertino; and

WHEREAS, the Director of Community Development made the findings required under Section 19.28.140(A) and approved the application with conditions on June 25, 2019; and

WHEREAS, the notice of decision was mailed to the appropriate parties, including the applicant and any person who contacted City staff with comments during the comment period, notifying them about the possibility of appealing a project; and

WHEREAS, the Planning Commission of the City of Cupertino received an appeal of the Community Development Director's approval of the Minor Residential Permit on July 10, 2019; and

WHEREAS, the necessary notices were given as required by the Procedural Ordinance of the City of Cupertino, and the Planning Commission held at least one public hearing in regard to the appeal; and

WHEREAS, the Planning Commission made the findings required under Section 19.28.140(A) and approved the application with minor amendments to the conditions of approval on November 12, 2019; and

WHEREAS, the City Council of the City of Cupertino received an appeal of the Planning Commission's approval of the Minor Residential Permit on November 26, 2019; and

WHEREAS, the necessary public notices have been given as required by the Procedural Ordinance of the City of Cupertino, and the City Council has held at least one public hearing in regard to the appeal; and

WHEREAS, the appellants have not met the burden of proof required to support said appeal; and

WHEREAS, the City Council finds as follows with regard to this application:

1. The project is consistent with the Cupertino General Plan, any applicable specific plans, zoning ordinance, and the purposes of the R-1 Ordinance; and

*The proposed project is consistent with the existing residential land use designations of the Cupertino General Plan. There are no applicable specific plans that affect the project. The project has been found to be consistent with Chapter 19.28, Single-Family Residential (R-1) Ordinance, of the Cupertino Municipal Code for setbacks, lot coverage, and other applicable development standards. The R-1 Ordinance allows property owners the ability to construct second-story balconies as long as either privacy protection trees and/or shrubs are planted as required by the ordinance. The project complies with the privacy protection plantings as required by the R-1 Ordinance to ensure that visual impacts to adjacent neighbors are mitigated.*

2. The granting of the permit will not result in a condition that is detrimental or injurious to property or improvements in the vicinity, and will not be detrimental to the public health, safety or welfare; and

*The granting of the permit will not result in a condition that is detrimental or injurious to property improvements in the vicinity, and will not be detrimental to the public health, safety or welfare as the project is located within the R1-7.5 (Single Family Residential) zoning district, and will be compatible with the surrounding uses of the neighborhood. The project meets the building development regulations of the R-1 Ordinance and complies with the privacy protection measures to ensure that visual impacts to adjacent neighbors are mitigated.*

3. The proposed project is harmonious in scale and design with the general neighborhood; and

*The project is located within the R1-7.5 (Single Family Residential) zoning district and will be compatible with the surrounding uses of the neighborhood. The purpose of the R-1 Ordinance is to enhance the identity of residential neighborhoods, to ensure the provision of light, air, and a reasonable level of privacy to individual residential parcels, to ensure a reasonable level of compatibility in scale of structures within the neighborhood, and to reinforce the predominantly low-intensity setting in the community. The project meets the building development regulations of the R-1 Ordinance including lot coverage, setbacks and other applicable development standards. Furthermore, the City Council added Condition #3 requiring that the depth of the second-story deck be reduced to no more than 12' as measured from the second-story rear wall for a harmonious scale. Overall, the proposed project, as conditioned, maintains a single-family home scale and is compatible with the general neighborhood.*

4. Adverse visual impacts on adjoining properties have been reasonably mitigated.

*Any potential adverse visual impacts on adjoining properties have been reasonably mitigated through adherence to the setback requirements and privacy protection measures of the R-1 Ordinance. The proposal for 21865 San Fernando Avenue meets, and in some cases exceeds, all setback requirements for the R1-7.5 zoning district. The project proposes a rear-yard second-story balcony setback of over 60' where 20' is required.*

*The R-1 Ordinance allows property owners the ability to construct second-story windows and balconies as long as privacy protection trees and/or shrubs are planted as required by the ordinance. The project complies with the privacy screening requirements of the R-1 Ordinance by providing privacy screening plantings for the second-story balcony along the western, eastern, and northern property lines. Per the R-1 Ordinance, the objective of privacy protection plantings is to provide substantial screening within three years of planting. Privacy protection plantings are considered Protected Trees under the City's Municipal Code (Chapter 14.18) and are recorded as such with a covenant against the property to inform current and future property owners about their protected status. Protected trees cannot be removed without obtaining a tree removal permit and providing replacement plantings, which will be subsequently recorded as Protected Trees. Furthermore, the Planning Commission amended Condition #11 to require a minimum 48" balcony railing comprised of materials that provide sufficient privacy screening.*

NOW, THEREFORE, BE IT RESOLVED:

That after careful consideration of maps, facts, exhibits, testimony, and other evidence submitted in this matter, subject to the conditions which are enumerated in this Resolution beginning on PAGE 4 thereof:

The City Council DENIES the appeal of an application for a Minor Residential Permit (RM-2017-39) and UPHOLDS the Planning Commission's approval of the Minor Residential Permit. The City Council also finds that the subconclusions upon which the findings and conditions specified in this resolution are based and contained in the Public Hearing record concerning Application no. RM-2017-39 as set forth in the Minutes of City Council Meeting of April 21, 2020 and are incorporated by reference as though fully set forth herein.

SECTION III: CONDITIONS ADMINISTERED BY THE COMMUNITY DEVELOPMENT DEPT.

1. APPROVED EXHIBITS

The approval is based on a plan set entitled, "Residential Remodel and Addition for Mr. and Mrs. David and Yiting Tsai, 21865 San Fernando Avenue, Cupertino, CA 95014," consisting of 16 sheets labeled "A-1 through A-9, CB, FAD, L-1, L-2, and Boundary Topographic Survey Map" and the supplemental privacy screening documents consisting of two pages entitled "Existing Privacy Screening" and "Alternative Privacy Screening Used," except as may be amended by conditions in this resolution.

2. ANNOTATION OF THE CONDITIONS OF APPROVAL

The conditions of approval set forth shall be incorporated into and annotated on the building plans.

3. REVISION TO THE SECOND-STORY DECK

Prior to building permit issuance, the plans shall be revised to indicate that the depth of the second-story deck shall not exceed 12' as measured from the second-story rear wall. The proposed width of the deck shall not be increased.

4. ACCURACY OF THE PROJECT PLANS

The applicant/property owner is responsible for verifying all pertinent property data including, but not limited to, property boundary locations, building setbacks, property size, building square footage, any relevant easements and/or construction records. Any misrepresentation of property data may invalidate this approval and may require additional review.

5. COMPLIANCE WITH PUBLIC WORKS CONFIRMATION FORM

The project shall comply with the requirements indicated on the Public Works Confirmation form dated October 17, 2017, including, but not limited to, dedications, easements, off-site improvements, undergrounding of utilities, all necessary agreements, and utility installations/relocations as deemed necessary by the Director of Public Works and required for public health and safety. The Public Works Confirmation is a preliminary review, and is not an exhaustive review of the subject development. Additional requirements may be established and implemented during the construction permitting process. The project construction plans shall address these requirements with the construction permit submittal, and all required improvements shall be completed to the satisfaction of the Director of Public Works prior to final occupancy.

6. DRIVEWAY GATE FENCE EXCEPTION

The electronic driveway gate fence indicated on the plans is not approved. Either a Fence Exception Permit must be obtained in compliance with Chapter 19.48: Fences, of the Cupertino Municipal Code, prior to issuance of any building permits indicating the fence or it must be eliminated/removed.

7. ACCESORY BUILDINGS/STRUCTURES

The location of all existing and proposed accessory buildings and/or structures shall be indicated on building permit plans and shall comply with Chapter 19.100, Accessory Buildings/Structures, of the Cupertino Municipal Code for review and approval prior to issuance of building permits.

8. EXTERIOR BUILDING MATERIALS/TREATMENTS

The final building exterior plan shall closely resemble the details shown on the original approved plans. Final building exterior treatment plan (including but not limited to details on exterior color, materials, architectural treatments, doors, windows, lighting fixtures, and/or embellishments) shall be reviewed and approved by the Director of Community Development prior to issuance of building permits to ensure quality and consistency. Any exterior changes determined to be substantial by the Director of Community Development shall either require a modification to this permit or a new permit based on the extent of the change.

9. FRONT YARD TREE

The applicant shall indicate on site and landscape plans the location of a front yard tree to be located within the front yard setback area in order to screen the massing of

the second story. The front yard tree shall be a minimum 24-inch box and 6 feet planted height and otherwise be consistent with the City's requirements.

10. FRONT YARD TREE COVENANT

The property owner shall record a covenant on this property with the Santa Clara County Recorder's Office that requires the retention and maintenance of the required front yard tree. The precise language will be subject to approval by the Director of Community Development. Proof of recordation must be submitted to the Community Development Department prior to final occupancy of the residence.

11. PRIVACY PLANTING

The final privacy planting plan shall be reviewed and approved by the Planning Division prior to issuance of building permits. Privacy protection shall include alternative privacy plantings consistent with the City's requirements and balcony railing of at least 48", comprised of materials that provide sufficient privacy screening.

12. PRIVACY PROTECTION COVENANT

The property owner shall record a covenant on this property to inform future property owners of the privacy protection measures and tree protection requirements consistent with the R-1 Ordinance, for all windows with views into neighboring yards and a sill height that is 5 feet or less from the second story finished floor. The precise language will be subject to approval by the Director of Community Development. Proof of recordation must be submitted to the Community Development Department prior to final occupancy of the residence.

13. LANDSCAPE PROJECT SUBMITTAL

Prior to issuance of building permits, the applicant shall submit a full Landscape Documentation Package, per sections 14.15.050 A, B, C, and D of the Landscape Ordinance, for projects with landscape area 500 square feet or more or elect to submit a Prescriptive Compliance Application per sections 14.15.040 A, B, and C for projects with landscape area between 500 square feet and 2,500 square feet. The Landscape Documentation Package or Prescriptive Compliance Application shall be reviewed and approved to the satisfaction of the Director of Community Development prior to issuance of building permits, and additional requirements per sections 14.15.040 D, E, F, and G or 14.15.050 E, F, G, H, and I will be required to be reviewed and approved prior to final inspections.

14. CONSULTATION WITH OTHER DEPARTMENTS

The applicant is responsible to consult with other departments and/or agencies with regard to the proposed project for additional conditions and requirements. Any

misrepresentation of any submitted data may invalidate an approval by the Community Development Department.

15. DEMOLITION REQUIREMENTS

All demolished building and site materials shall be recycled to the maximum extent feasible subject to the Building Official. The applicant shall provide evidence that materials were recycled prior to issuance of final demolition permits.

16. DUST CONTROL

The following construction practices shall be implemented during all phases of construction for the proposed project to prevent visible dust emissions from leaving the site:

- a. Water all active construction areas at least twice daily and more often during windy periods to prevent visible dust from leaving the site; active areas adjacent to windy periods; active areas adjacent to existing land uses shall be kept damp at all times, or shall be treated with non-toxic stabilizers or dust palliatives.
- b. Cover all trucks hauling soil, sand, and other loose materials or require all trucks to maintain at least 2 feet of freeboard;
- c. Pave, apply water at least three times daily, or apply (non-toxic) soil stabilizers on all unpaved access roads, parking areas and staging areas at construction sites.
- d. Sweep streets daily, or more often if necessary (preferably with water sweepers) if visible soil material is carried onto adjacent public streets.
- e. The applicant shall incorporate the City's construction best management practices into the building permit plan set.

17. GRADING AND CONSTRUCTION HOURS AND NOISE LIMITS

The applicant shall comply with the following grading and construction hours and noise limit requirements unless otherwise indicated.

- a. All grading activities shall be limited to the dry season (April 15 to October 1), unless permitted otherwise by the Director of Public works.
- b. Construction hours and noise limits shall be compliant with all requirements of Chapter 10.48 of the Cupertino Municipal Code.
- c. Grading, street construction, underground utility and demolition hours for work done more than 750 feet away from residential areas shall be limited to Monday through Friday, 7 a.m. to 8 p.m. and Saturday and Sunday, 9 a.m. to 6 p.m. Grading, street construction, demolition or underground utility work within 750 feet of residential areas shall not occur on Saturdays, Sundays, holidays, and during the nighttime period as defined in Section 10.48.053(b) of the Municipal Code.



- d. Construction activities shall be limited to Monday through Friday, 7 a.m. to 8 p.m. and Saturday and Sunday, 9 a.m. to 6 p.m. Construction activities are not allowed on holidays as defined in Chapter 10.48 of the Municipal Code. Night time construction is allowed if compliant with nighttime standards of Section 10.48 of the Cupertino Municipal Code.
- e. Rules and regulations pertaining to all construction activities and limitations identified in this permit, along with the name and telephone number of an applicant appointed disturbance coordinator, shall be posted in a prominent location at the entrance to the job site.
- f. The applicant shall be responsible for educating all contractors and subcontractors of said construction restrictions.

#### 18. INDEMNIFICATION

Except as otherwise prohibited by law, the applicant shall indemnify and hold harmless the City, its City Council, and its officers, employees and agents (collectively, the "indemnified parties") from and against any claim, action, or proceeding brought by a third party against one or more of the indemnified parties or one or more of the indemnified parties and the applicant to attack, set aside, or void this Resolution or any permit or approval authorized hereby for the project, including (without limitation) reimbursing the City its actual attorneys' fees and costs incurred in defense of the litigation. The applicant shall pay such attorneys' fees and costs within 30 days following receipt of invoices from City. Such attorneys' fees and costs shall include amounts paid to counsel not otherwise employed as City staff and shall include City Attorney time and overhead costs and other City staff overhead costs and any costs directly related to the litigation reasonably incurred by City.

#### 19. NOTICE OF FEES, DEDICATIONS, RESERVATIONS, OR OTHER EXACTIONS

The Conditions of Project Approval set forth herein may include certain fees, dedication requirements, reservation requirements, and other exactions. Pursuant to Government Code Section 66020(d) (1), these Conditions constitute written notice of a statement of the amount of such fees, and a description of the dedications, reservations, and other exactions. You are hereby further notified that the 90-day approval period in which you may protest these fees, dedications, reservations, and other exactions, pursuant to Government Code Section 66020(a), has begun. If you fail to file a protest within this 90-day period complying with all of the requirements of Section 66020, you will be legally barred from later challenging such exactions.

PASSED AND ADOPTED this 21st day of April, 2020, at the Regular Meeting of the City Council of the City of Cupertino, State of California, by the following roll call vote:

Vote                    Members of the City Council

AYES:                    Scharf, Paul, Chao, Sinks, Willey

NOES:                    None

ABSENT:                None

ABSTAIN:               None

SIGNED: /s/Steven Scharf <hr/> Steven Scharf, Mayor City of Cupertino	<hr/> Date
ATTEST: /s/Kirsten Squarcia <hr/> Kirsten Squarcia, City Clerk	<hr/> Date