

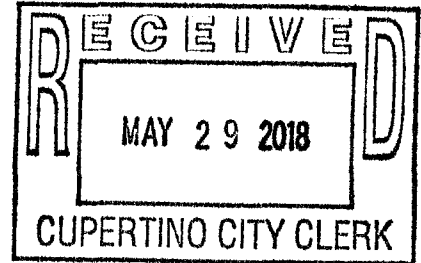
ABDALAH LAW OFFICES

A PROFESSIONAL LAW CORPORATION

RICHARD K. ABDALAH, ESQ.
EMAIL: RABDALAH@ABDALAHLAW.COM

10455 TORRE AVENUE
CUPERTINO, CALIFORNIA 95014
TELEPHONE: (408) 252-5211
FACSIMILE: (408) 996-2004
WWW.ABDALAHLAW.COM

EMPLOYMENT, REAL ESTATE, BUSINESS,
CONSTRUCTION,
TRANSACTIONS AND LITIGATION



Date: May 29, 2018

To: City of Cupertino
10300 Torre Avenue
Cupertino, CA 95014

Petition for Reconsideration

1. **Project requesting consideration:**

Application No. TM-2015-01, TR-2016-28

Applicant: Welkin International (Cai Xing Xie)

Location: 10234 Scenic Boulevard (APN 357-08-014, 357-08-047) ("Property")

2. **Contact information for party requesting consideration:**

Richard K. Abdalah
ABDALAH LAW OFFICES
10455 Torre Avenue
Cupertino, CA 95014
Phone: (408) 252-5211
Email: rabdalah@abdalahlaw.com

3. **Date of Council meeting considering project requesting consideration:**

May 15, 2018

4. **Details of grounds for reconsideration (Cupertino Municipal Code § 2.08.096):**

Grounds for Reconsideration:

- (a) Not proceeding in a manner required by law; and/or
- (b) Rendering a decision not supported by findings of fact; and/or
- (c) Rendering a decision in which the findings of fact were not supported by the evidence.

Background:

- This Property consists of three legal lots located at or near the intersection of Scenic Boulevard and Carmen Drive ("the Property"). The section of Scenic Boulevard in front of the Property is very narrow, causing a bottleneck at the intersection with Carmen Drive.
- From the Property to the dead-end of Scenic Boulevard there are 18 single family dwellings on the northwest side, and there are 28 townhouses and one single family dwelling on the southeast side, for a total of 47 dwelling units. It is useful to note that, each parcel in the proposed subdivision will exceed the size of any two of the 28 townhouses combined. (See Exhibit "A" hereto.)
- Every property owner living in these 47 dwellings must drive through the bottleneck in front of the Property to leave the cul-de-sac for work, school, shopping, because the area in front of the proposed subdivision is unimproved.

Proposed Subdivision:

- The Property owner requests that the three existing legal parcels be subdivided into four parcels. A driveway referred to as a fifth parcel is also included.
- The City will require the Property owner to improve Scenic Boulevard, thus eliminating the bottleneck. All 47 dwelling units on Scenic Boulevard will benefit from the street improvements to Scenic Boulevard paid for entirely by the petitioning Property owner.
- The proposed subdivision meets all applicable City standards and no exceptions or variances have been requested.
- The Environmental Review Committee voted unanimously to recommend that the proposed plan has been prepared in accordance with CEQA.
- The City's Public Works Department, Building Division, Cupertino Sanitary and Fire Department have approved the project. The school district was contacted and did not object to the project. Recology, the City's trash collection service, has indicated services can be provided.

The Planning Commission by a simple majority (3-2 vote) adopted the following findings in favor of the project on five of six categories as follows:

- (1) That the design and improvements of the proposed subdivision are consistent with the General Plan.

"The proposed map is consistent with the General Plan since the project is intended to have single-family homes consistent with the Low Residential (1-5 DU/ac) land use designation, and the four (4) residential lots proposed with the project is consistent with the density permitted per the General Plan. Additionally, the proposed lots are sized to be consistent with applicable zoning regulations and are comparable to adjacent residential development, and compatible with existing neighborhood orientation including homes face public streets and flag lots."

- (2) That the site is physically suitable for the type development contemplated under the approved subdivision.

"The project will be required to make all the necessary improvements to the site to ensure that the site is suitable for development. This will include new retaining walls, slope stabilization and improvements to the right-of-way."

- (3) That the design of the subdivision or the proposed improvements are not likely to cause substantial environmental damage nor substantially and avoidably injure fish or wildlife or their habitat.

"As identified in the Initial Study, the subdivisions and proposed improvements will likely not cause substantial environmental damage nor substantially and avoidably injure fish or wildlife or their habitat through the incorporation of the mitigation measures identified in the Initial Study."

- (4) That the design of the subdivision or the type of improvements associated therewith are not likely to cause serious public health problems.

"The design of the subdivision and improvements are not likely to cause serious public health problems through the incorporation of the mitigation measured identified in the Initial Study."

- (5) That the design of the subdivision and its associated improvements will not conflict with easements acquired by the public at large for access through or use of property within the proposed subdivision.

"The design of the subdivision or the type of improvements will not conflict with easements, acquired by the public at large, for access through or use of property within the proposed subdivision."

However, the Planning Commission concluded that the site was "physically unsuitable for the intensity of development contemplated under the approved subdivision." Nothing in the Planning Commission's action indicates there were errors or faulty information or conclusions either by Staff or the multiple consultants hired by the Property Owner.

The Property Owner contends that the Planning Commission findings are not supported by any evidence and that consideration of ADUs as part of the approval process contravenes state law.

A. *"The Property proposes construction of four houses in the subdivision which will have to be served by a single road. The Project also proposes an additional driveway leading to the single road, which will create additional traffic. These conditions will contribute to unsafe driving and road conditions on Scenic Boulevard."*

The number of driveways leading to Scenic Boulevard will be the same if the three parcels are developed or the subdivision is approved for four parcels.

As explained above, at present, the Property consists of three legal parcels. If the property owner wishes to build on these parcels, each parcel would have a separate driveway onto Scenic Boulevard.

There are four parcels directly across from the Property (one house is built on two parcels). Each parcel has a separate driveway, and in one case the property has two driveways.

The proposed subdivision mirrors the properties on the opposite side of the street but has one fewer driveway and is therefore consistent with the adjacent development.

The proposed subdivision will have two parcels bordering Scenic Boulevard, each with its own separate driveway. The other two parcels will access Scenic Boulevard by a single driveway. In sum, the number of driveways leading to Scenic Boulevard will be the same if the three parcels are developed or the subdivision is approved for four parcels.

Since the Planning Commission meeting, Staff has agreed to allow 4 feet more widening to Scenic Blvd. The Council appears to have overlooked or disregarded this revision altogether.

- B. *"The size, location, and slope of the proposed parcels do not support the proposed density."*

No facts or evidence were cited to support the conclusions of the three-person majority of the Planning Commission.

Again, the proposal is to increase the number of parcels from the existing three to four. The City's professional Staff found that the site was suitable for the intensity of development.

The three members of the Planning Commission who voted to deny the project failed to cite any fact or conclusion made by Staff that was not supported by the evidence or was plainly erroneous. In sum, there is nothing cited by the three person majority on the Planning Commission to support the conclusion that the Property does not support the proposed density.

- C. *"While the zoning designation allows up to four (4) of dwelling units with four (4) accessory dwelling units on this site, the grading, drainage, and other infrastructure improvements required for the proposed density cannot be supported given the slope of the site and building constraints."*

Nothing in the record supports the assertions that grading, drainage or infrastructure were not adequately addressed.

Staff concluded that the project required satisfactory grading, drainage mitigation measures, and that a detailed updated plan be

reviewed by the Project Geotechnical Consultant. There is not a single fact set suggested by the Planning Commission to suggest that the Staff findings are not valid or accurate.

By exercising its discretionary authority to deny construction of future Accessory Dwelling Units, the City has likely violated State Law that has converted approval of these units to a ministerial act.

In addition, the power to regulate the construction of Accessory Dwelling Units (“ADUs”) is no longer within the discretion of the City. In 2016 and 2017, the California legislature passed numerous reforms regarding ADUs. One reform was to establish design standards that, when met, required municipalities to give “ministerial approval” instead of discretionary approval of ADUs.

Denial of a proposed subdivision because ADUs may be erected in the future is an attempt by the City to thwart state law.

Whether an ADU is permitted is no longer within the discretion of the City.

In addition, nothing in the City’s regulations says the possibility of construction of an ADU will be a factor in deciding whether to approve or disapprove.

- D. *"Finally, the proposed project cannot ensure the preservation of mature specimen trees, including Tree #39, due to the number of parcels and buildable area for homes thereon."*

Again, Staff concluded that the Owner was taking reasonable steps to preserve this tree and identified the steps.

To address the possibility that the project might damage a specimen tree, the City could require that the Owner agree to replace the tree with a like kind in the event the tree cannot be saved. The Council apparently ignores the fact that since the matter went before the Planning Commission, the Fire Marshal has approved a smaller inner circle so there will be more native soil around the tree. The arborist reported this change would ensure the survival of this tree.

Conclusion:

The Property Owner hired experienced engineering firms and prepared all revisions requested by Staff and the City's consultants. A lengthy Environmental Review was required. Subsequent to the Planning Commission's hearing, additional revisions were prepared and incorporated. Safety concerns expressed by the neighbors were addressed by adding turnaround areas on the two parcels facing Scenic Boulevard. All tree removals have been approved by Staff. The area around the center tree has been increased, thus ensuring that the specimen tree will be saved. Scenic Boulevard will be widened and approved by the Public Works Department Property. The result will benefit every property owner north of the subdivision at no cost to the neighbors. Every affected department and agency supports the proposal.

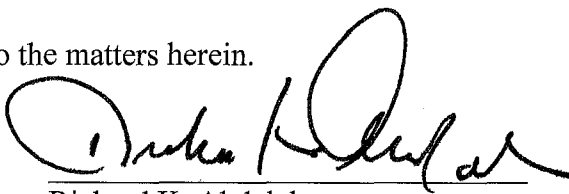
Only some of the neighbors (all of whom stand to benefit from the road improvements) have opposed the project. Clearly, they do not want the project in their backyard. The neighbors are certainly entitled to their opinion.

The Property Owner is equally entitled to know the basis for the Council's denial. For example, what observations/calculations/conclusions/recommendations of the engineer or arborist are incorrect? Without this information, the Property Owner is left to guess what is necessary to change/improve on the project that will make it acceptable to the Council. Without information from qualified persons that contradicts the consultants, Staff or departments, all of whom should be "experts" in their field, failure to approve the proposed subdivision could be seen as without any valid reason.

Given this project meets every requirement of the City, it would be fair for the Council to rescind its prior action, set another hearing in 60 days, and direct Staff to schedule at least two meetings with the Property Owner and some of the neighbors to see if the parties can reach a compromise. If not, the Council could revisit the project at the next hearing.

Thank you for attention to the matters herein.

Dated: 6-29-2018



Richard K. Abdalah
Attorney for Welkin International

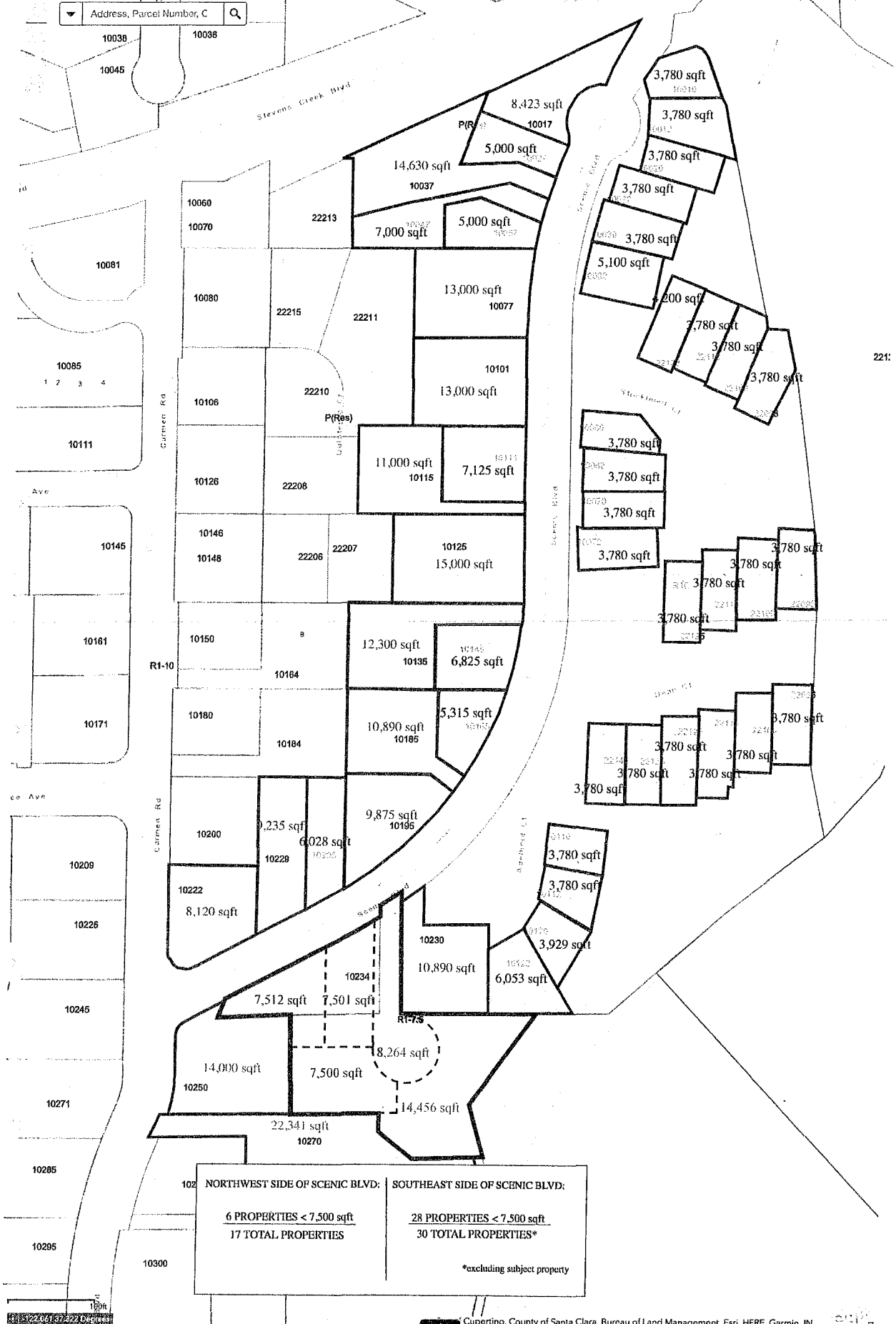


EXHIBIT "A"