



**COMMUNITY DEVELOPMENT DEPARTMENT  
PLANNING DIVISION**

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**CITY COUNCIL STAFF REPORT**

Meeting: August 21, 2018

Subject

Petition for Reconsideration of the City Council decision rendered on May 15, 2018 denying a tentative map application (TM-2015-01) to allow the subdivision of three (3) parcels into five (5) parcels, four (4) residential and one (1) common (private road), and denial of a tree removal permit (TR-2016-28) to allow the removal and replacement of seven (7) protected trees. Application No. TM-2015-01 and TR-2016-28; Appellant: Richard K Abdalah; Applicant Welkin International (Cai Xing Xie); Location 10234 Scenic Boulevard; APN#357-08-014 and 357-08-047. City Council denied the project by concurring with the Planning Commission Resolution No. 6856.

Recommended Actions

That the City Council:

1. Adopt Resolution No. 18- (Attachment A) denying the petition for a reconsideration hearing, since it does not meet the requirements of Cupertino Municipal Code (CMC) Section 2.08.096 or, in the alternative;
2. If the Council determines the Petition meets the criteria, conduct a hearing on the merits of the petition and make final determination on the project.

Discussion

*Background:*

The following is a summary of the events that occurred regarding this project leading up to the reconsideration request:

October 19, 2017	Environmental Review Committee recommended adoption of a Mitigated Negative Declaration on a 4-0 vote (Chang absent), with minor modifications.
April 10, 2018	Planning Commission recommends denial of the Tentative Map (TM-2015-01) and Tree Removal Permit (TR-2016-28) applications on a 3-2 vote to the City Council.

May 15, 2018	City Council upholds the Planning Commission recommendation, and denies the project.
May 29, 2018	Petition for Reconsideration filed by Richard K. Abdalah (Attachment B).

The City of Cupertino's Municipal Code (CMC), Section 2.08.096, provides procedures for interested parties to petition the City Council to reconsider its decisions. A petition for reconsideration shall specify in detail, each, and every, ground for reconsideration. Failure of a petition to specify any particular ground or grounds for reconsideration precludes that particular omitted ground or grounds from being raised or litigated in a subsequent judicial proceeding. The grounds for reconsideration are limited to the following:

1. An offer of new relevant evidence which in the exercise of reasonable diligence, could not have been produced at any earlier city hearing.
2. An offer of relevant evidence which was improperly excluded at any prior city hearing.
3. Proof of facts which demonstrate that the City Council proceeded without, or in excess of its, jurisdiction.
4. Proof of facts which demonstrate that the City Council failed to provide a fair hearing.
5. Proof of facts which demonstrate that the City Council abused its discretion by:
  - a. Not proceeding in a manner required by law; and/or
  - b. Rendering a decision which was not supported by findings of fact; and/or
  - c. Rendering a decision in which the findings of fact were not supported by the evidence.

#### *Reconsideration Petition*

The submitted Petition for Reconsideration presents one ground for reconsideration: that the City Council abused its discretion by: (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.

*Ground for Reconsideration (Section 2.08.096 (B) (5) (a)) – Not proceeding in a manner required by law:* The petition does not identify how the City Council abused its discretion by not proceeding in a manner required by law. A duly noticed public hearing was held for the project as required by law. All aspects of the Brown Act were respected in the conduct of the public hearing, including allowing public testimony.

Finding: The petition has not offered evidence that the City Council did not

proceed in a manner required by law. Therefore, the petition does not meet the requirements of Cupertino Municipal Code Section 2.08.096 on the basis of this assertion.

*Ground for Reconsideration (Section 2.0896 (B) (5) (b) and (c)) – Council’s decision was not supported by facts and/or findings of fact were not supported by the evidence:* Projects that request a Tentative Subdivision Map may be denied by the decision making body if it makes any of the findings identified in CA Government Code Section 66474. The project was denied because the Planning Commission and City Council made the finding that the “site is physically unsuitable for the intensity of development contemplated under the approved subdivision.”

The Property Owner’s main contention is *“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”* (see page 4 of Attachment D).

Finding: The Petitioner only identifies the Planning Commission’s findings as “not being supported by any evidence.” It does not identify deficiencies in the City Council’s findings. The petitioners have not provided any proof of facts that demonstrate the Council abused its discretion by not preceding in a manner required by law, rendering a decision which was not supported by findings of fact, or rendering a decision in which the findings of fact were not supported by the evidence. Therefore, the Petition for Reconsideration does not meet the requirements of Cupertino Municipal Code Section 2.08.086 on the basis of this assertion.

Should the City Council find merit in the Petition for a Reconsideration and conduct a reconsideration hearing, a discussion of additional details in the petition and responses are detailed in the table below:

Petition		Response
Quoted Finding	Petitioner Comment	
<p>A. <i>"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 the unsafe driving and road conditions on Scenic Boulevard."</i></p>	<p><u>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.</u></p> <p><i>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.</i></p> <p><i>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.</i></p> <p><i>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.</i></p> <p><i>The proposed subdivision will have two parcels bordering Scenic Boulevard, each</i></p>	<p>The three existing legal lots on the site are currently served by two driveways. There is one driveway curb cut on Scenic Boulevard serving one legal lot (APN#357-08-014), and one driveway curb cut serving two legal flag lots (APN#357-08-047).</p> <p>The proposed project would have two lots with street frontage on Scenic Boulevard, requiring two driveway curb cuts, and a third driveway curb cut serving two lots in the rear. The proposed project would increase the number of curb cuts on Scenic Driveway from two to three.</p> <p>Therefore, the Petition wrongly identifies that with, or without, the subdivision application being approved there would be three driveway curb cuts on Scenic Boulevard.</p> <p>Regardless of the street improvements proposed, the Planning Commission</p>

Petition		Response
Quoted Finding	Petitioner Comment	
	<p><i>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.</i></p> <p><i>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.</i></p>	<p>and City Council found that the addition of a third driveway will contribute an increased number of unsafe movements at this location on Scenic Boulevard.</p>
<p>B. "The size, location, and slope of the proposed parcels does not support the proposed density."</p>	<p><u>No facts of evidence were cited to support the conclusions of the three-person majority of the Planning Commission.</u></p> <p><i>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.</i></p> <p><i>The three members of the Planning Commission who voted to deny the project failed to cite any fact or</i></p>	<p>The Petition points to a deficiency in the Planning Commission's findings. It does not point to deficiency in the City Council's findings of fact. Therefore, this does not constitute grounds for reconsideration.</p> <p>However, the Planning Commission was concerned about the large quantities of grading required to implement the project, including required drainage and infrastructure improvements and retaining walls required to stabilize the slope in order</p>

Petition		Response
Quoted Finding	Petitioner Comment	
	<p><i>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.</i></p>	<p>to support the future improvements on the site (including any homes.)</p>
<p>C. <i>“While the zoning designation allows up to four (4) dwelling units with (four) 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.”</i></p>	<p><u>Nothing in the record supports the assertions that grading, drainage or infrastructure were not adequately addressed.</u></p> <p><i>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.</i></p>	<p>The Petition points to a deficiency in the Planning Commission’s findings. It does not point to deficiency in the City Council’s findings of fact. Therefore, this does not constitute grounds for reconsideration.</p> <p>The Planning Commission and City Council did not make a finding that grading, drainage or infrastructure were not adequately addressed or that these were not technically feasible. They were concerned about the large quantities of grading required to implement the project, including required drainage and infrastructure improvements and retaining walls required to stabilize the slope in order to support the future improvements on the site (including any homes.)</p>

Petition		Response
Quoted Finding	Petitioner Comment	
	<p><u>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.</u></p> <p><i>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 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.</i></p>	<p>The construction of Accessory Dwelling Units (ADUs) were not denied since they were not a part of the project. The denied project was for the subdivision of the site into five (5) parcels, four (4) residential and one (1) common, and the associated tree removals.</p> <p>The reference to ADUs was a statement of fact that four ADUs could be built along with four residences on the site.</p> <p>The City would implement its existing ADU ordinance, regardless of the subdivision application. The property owners of the three legal lots could construct three ADUs on the project site with a ministerial approval as required by state law.</p>
	<p><u>Denial of a proposed subdivision because ADUs may be erected in the future is an attempt by the City to thwart state law.</u></p>	<p>See response above.</p>

Petition		Response
Quoted Finding	Petitioner Comment	
	<p><i>Whether an ADU is permitted is no longer within the discretion of the City.</i></p> <p><i>In addition, nothing in the City's regulation says the possibility of construction of an ADU will be a factor in deciding whether to approve or disapprove.</i></p>	
<p><i>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."</i></p>	<p><u>Again, Staff concluded that the Owner was taking reasonable steps to preserve this tree and identified the steps.</u></p> <p><i>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</i></p>	<p>While City Staff and the applicant continued to work with the Fire Department to identify improvements and steps necessary to attempt to preserve Tree #39, the Planning Commission and City Council, at its discretion, determined that the improvements necessary would negatively impact the tree.</p> <p>Additionally, despite the attempts to relocate structures, and mitigate the grading, drainage, retaining wall and other improvements necessary to accommodate the tree, the Planning Commission and City Council found that preservation of the mature</p>



Petition		Response
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	<i>tree. The arborist reported this change would ensure the survival of this tree.</i>	specimen trees, including Tree#39, was not certain.

## Noticing

The following table is a brief summary of the noticing done for this project:

Notice of Public Hearing, Site Notice & Legal Ad	Agenda
<ul style="list-style-type: none"><li>▪ Site Signage (<i>14 days prior to the hearing</i>)</li><li>▪ Legal ad placed in newspaper (<i>at least 10 days prior to the hearing</i>)</li><li>▪ 53 notices mailed to property owners within 300 feet (<i>at least 10 days prior to the hearing</i>)</li></ul>	<ul style="list-style-type: none"><li>▪ Posted on the City's official notice bulletin board (<i>five days prior to the hearing</i>)</li><li>▪ Posted on the City of Cupertino's Web site (<i>five days prior to the hearing</i>)</li></ul>

## Conclusion

Based on the above findings the petitioners do not provide relevant grounds/evidence for the reconsideration, Staff recommends that the City Council deny the petitions for reconsideration. In the alternative, conduct a hearing on the petition for reconsideration, and make a final determination.

## Next Steps

City Council decision is final, as they would have exhausted all of the available administrative remedies.

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Prepared by: Erick Serrano, Association Planner

Reviewed by: Piu Ghosh, Principal Planner

Benjamin Fu, Assistant Director of Community Development

Approved for Submission by: Amy Chan, City Manager

## ATTACHMENTS:

A - Draft Resolution

B - Petition for Reconsideration filed by Rich K. Abdalah

C - City Council Staff Report

D- Planning Commission Resolution No. 6856

E - Plan Set

F - ERC Recommendation, IS/MND including Technical Appendix

G - Arborist Report