

BELVEDERE PLANNING COMMISSION

MINUTES

REGULAR MEETING

DECEMBER 18, 2007 6:30 P.M.

A. CALL TO ORDER OF THE REGULAR MEETING

Chairman Lasky called the regular meeting to order at 6:30 p.m. in the City Council Chambers of City Hall. Commissioners present: Lasky, Johnson, Wilson, Rosenlund, Lenzen, Kemnitzer. Commissioner absent: Herr. Staff present: Planning Manager Pierce Macdonald, Assistant Planner Felicia Wheaton, Building Official Lee Braun, Deputy City Attorney Riley Hurd III, City Manager, George Rodericks, and Secretary Nancy Miller.

B. OPEN FORUM

No one wished to speak.

C. CONSENT CALENDAR

MOTION: To approve the Consent Calendar consisting of the following item:

1. Draft Minutes of the November 20, 2007 Regular Meeting of the Planning Commission.

MOVED BY: Johnson, seconded by Kemnitzer.

VOTE: Ayes: Lasky, Rosenlund, Kemnitzer, Johnson, Wilson
 Noes: None
 Abstain: Lenzen
 Absent: Herr

MOTION: To approve the Consent Calendar consisting of the following item:

2. Draft Minutes of the November 26, 2007 Special Meeting of the Planning Commission.

MOVED BY: Johnson, seconded by Rosenlund.

VOTE: Ayes: Lasky, Rosenlund, Johnson, Wilson
 Noes: None
 Abstain: Lenzen, Kemnitzer
 Absent: Herr

B. PUBLIC HEARINGS

3. Use Permit for commercial catering kitchen in existing commercial space located at **1530 Tiburon Boulevard, Suite 103.** Conditional Use Permit required to establish shared parking requirement for the site. CEQA status: categorically exempt pursuant to Section 15301, Existing Facilities. Applicant: Robin and Ted Wray. Property Owner: Fred Rose and Judith Rose Trust.

Planning Manager Macdonald presented the staff report.

Open public hearing.

No one wished to speak.

Close public hearing.

Commissioner Lenzen stated that the request is for low-intensity use. He stated that the owner of the property has no objections and the hours of use would be outside the normal business hours. He can support the Conditional Use Permit.

Commissioner Rosenlund stated that there do not seem to be any parking issues, and there are no objectors. He can make the findings for the grant of a Conditional Use Permit.

Commissioner Kemnitzer stated that she is familiar with the site. She thanked staff for the thorough explanation and complicated analysis for the application. She stated she agrees with her fellow Commissioners and can support the Conditional Use Permit approval.

Commissioner Wilson stated that he agrees with his fellow Commissioners and can make the findings and support the application for a Conditional Use Permit.

Vice-Chairman Johnson stated that she can approve the request. She stated that she sees no conflict with traffic and parking required by others. She stated she agrees with the condition of approval regarding venting and noise levels.

Chairman Lasky stated he agrees with his fellow Commissioners. He approves the recommendation to the City Council for a grant of a Conditional Use Permit.

MOTION: To recommend City Council approval of a Conditional Use Permit to allow eight (8) existing on-site parking spaces where (9) standard parking spaces are required for property at **1530 Tiburon Boulevard**, pursuant to Section 19.68.020.4 of the Belvedere Municipal Code.

MOVED BY: Kemnitzer, seconded by Lenzen

VOTE: Ayes: Lasky, Johnson, Wilson, Rosenlund, Lenzen, Kemnitzer
Noes: None
Abstain: None
Absent: Herr

4. Design Review for project landscaping at **39 Belvedere Avenue** associated with construction approved by means of Resolution 2007-086, adopted by the Planning Commission on October 16, 2007. CEQA status: categorically exempt pursuant to Section 15301. Applicant: Charles C. Shin, Stanley Saitowitz / Natoma Architects, Inc. Property Owners: Christopher Foley and Chalernporn Phanthong.

Assistant Planner Wheaton presented the staff report.

Vice-Chairman Johnson asked whether it is correctly stated that the shrubs in the planter boxes will be only 6 inches tall?

Assistant Planner Wheaton replied that the landscape architect would be able to address this question.

Open public hearing.

Eric Blasen, Blasen Landscape Architecture, stated that there are five proposed planter boxes, four on the West side and one facing North. He stated that although the proposed plants for these planters can grow over 6 inches tall, they would grow over the sides of the planters and be kept low

in order to minimize impact on the applicant's views. Other significant features of the proposed design include six trees that can grow over 12 feet tall. He stated that in accordance with the wishes of the Fire Marshall, English laurel will be planted instead of the five Hollywood junipers. The applicants are also agreeable that no plants will be planted within 5 feet of the existing drain inlet.

Mr. Blasen stated that the existing Monterey Pine tree will be retained, and protected during construction. The removal of one branch would be made to address safety concerns.

Vice-Chairman Johnson stated that the neighbors, the Chamberlains, discussed their desire for trees that would shield the applicants' lower bedroom window. However she does not see that they are shown on the plans.

Assistant Planner Wheaton replied that those screening plants would be the five evergreen shrubs that Mr. Blasen just described that will be changed to be English laurels.

Close public hearing.

Commissioner Kemnitzer stated that she has visited the property and studied the plans. She stated that in the absence of any objections from the neighbors, she can support the project.

Commissioner Rosenlund stated that he agrees. He stated he is very supportive of the proposed removal of the Scotch Broom, which is clearly a nuisance shrub everywhere. He stated that there is reference in the conditions of approval that the landscaping will conform to the plans, but he would like to see an added condition of approval that Scotch Broom shall be cleared from the property on a regular basis.

Planning Manager Macdonald stated that staff would support the addition of such an amendment to condition of approval c).

Commissioner Lenzen stated that he has visited the property in the past and was present at the previous discussions. He stated he notes that the Chamberlains are not present and have presented no objections to the final landscape plan. He stated he is concerned as to how there would be enforcement of conditions of approval when the property is owned by future owners; for example, in condition n) it is required that the existing oaks and Monterey pine not be windowed, topped, cut back or thinned.

Deputy City Attorney Hurd replied that the conditions of approval run with the land, not the owners, so the termination of ownership would not terminate that condition of approval.

Commissioner Lenzen replied that this would mean that should there be a change of ownership, the Chamberlains could rely on the document approved in December of 2007, and that there are therein conditions that would still apply. He stated he can support the project. He stated that this is a well-written report and he can support the adoption of the resolution as amended with respect to the Scotch Broom.

Commissioner Wilson stated that he concurs with his fellow Commissioners. He stated he commends the applicant for the quality and clarity of the landscape drawings. He stated he can support the project with the amended condition of approval.

Vice-Chairman Johnson stated she can also support the project and the amended resolution. She stated that this is a well thought out landscape plan and a lot of care has been put into the drawings and in meeting with the neighbors.

Chairman Lasky stated that he agrees with his fellow Commissioners that this is an excellent landscape plan. He agrees that the English laurel is a great solution because it would be much better for screening the windows. He agrees with Commissioner Rosenlund that efforts should be made for elimination of any type of foliage that would create a fire hazard. He stated that this may be one of the most heavily analyzed Monterey pine trees in Belvedere and it appears that it would be monitored during the project. He stated he can support the applications.

MOTION: To adopt the Resolution granting Design Review approval for project landscaping, as amended at tonight's meeting, at **39 Belvedere Avenue.**

MOVED BY: Lenzen, seconded by Rosenlund

VOTE: Ayes: Lasky, Johnson, Lenzen, Rosenlund, Kemnitzer, Wilson
Noes: None
Abstain: None
Absent: Herr

5. Design Review and Revocable License for new iron fence at the street frontage adjacent to **49 Belvedere Avenue.** Fence would be partially located within the public right-of-way of Belvedere Avenue. CEQA status: categorically exempt pursuant to Section 15301. Applicants and Property Owners: David E. and Jean Bordon 1988 Revocable Living Trust.

Planning Manager Macdonald presented the staff report.

Vice-Chairman Johnson asked whether the proposed iron driveway gate would open inwards.

Planning Manager Macdonald replied that is correct.

Commissioner Rosenlund stated that the Design Review chapter discourages chain-link fences. He asked whether it is correct that the proposed fences are in areas not generally viewed by the public and would be screened.

Planning Manager Macdonald replied that they would be located in wooded areas of the property, downhill from the public right-of-way. Staff does not believe that they would be visible from the public right-of-way.

Vice-Chairman Johnson asked whether it is correct that the chain-link fence along Belvedere Avenue, behind the retaining wall, would not exceed the height of the wall.

Planning Manager Macdonald replied that is correct; this fence would be located lower down on the hillside. She stated that the Commission could add a condition of approval regarding the height chain-link fence to the resolution.

Open public hearing.

Dave Bordon, applicant, stated that this project is related to a problem with deer. He stated that there currently are about 3 families of deer that are destroying the garden. He stated that the proposed gate would open downwards, and the chain-link fence along Belvedere Avenue would be below the stone wall. The chain-link fence on the side would be black and obscured by vegetation, which is the reason why both of the neighbors support the fence. He stated that the curb was put in by the City. The fact is that there is a 2-foot gap between the curb and the iron fence. He stated that

a pedestrian could stand on the curb and hold on to the new fence which would prevent them from falling down the slope.

Commissioner Kemnitzer stated that she visited the site. She stated that the plans show topographical lines but she does not see that they show elevation. She stated that in her site visit it appears to her that the chain-link fence would in fact be higher than the existing retaining wall. She stated is that she is concerned that it would be visible from the street. She stated that the section of chain-link fence to the right of the gate would not be below the retaining wall. She asked if the applicant can verify that this is the case, so the Commission might understand if it needs to amend the Resolution to require that the applicant lower the height of the chain-link fence so that it would not be visible.

Mr. Bordon stated that his discussions with staff included an agreement that when the fence is installed, it would be sited so that its height would be lower than the rock wall.

Commissioner Kemnitzer replied that there would be two ways to ensure that the fence does not exceed the height of the wall, either to lower the height of the fence, or to locate the fence lower on the slope.

Mr. Bordon replied that he would prefer to move the fence lower down the hill, because shortening the fence height would be an incentive for the deer to jump over. Therefore, the fence would still be 6-foot tall fence, but not visible behind the rock wall.

Commissioner Kemnitzer asked whether the 6-foot height is only a theoretical solution, or does the applicant know that siting the fence lower than the retaining wall would actually keep the deer out. She stated that if the 6-foot fence is lower than the street, it might result in an expensive futile endeavor to keep the deer out.

Mr. Bordon stated that for the deer, this would be like a steeplechase; they would have to jump over the rock wall, then go down a 45 degree downslope, and then have to jump again over the chain-link fence. He stated that the entire lower part of his property is fenced and that 6-foot fence has been effective to deter the deer.

Commissioner Wilson stated that the chain-link fence that runs parallel to the gate just to its right would potentially be visible.

Mr. Bordon stated that where the chain-link fence comes up the hill, that would be correct, but it would not be very obvious. He stated that he understands that chain-link fences are frowned upon, however many other similar fences exist next to streets or on sides of properties which necessarily have to link up to front iron fences.

Close public hearing.

Vice-Chairman Johnson stated she visited the site twice. She stated that she applauds the applicant for the attractive design of the front gate and the iron fence. She stated that because the chain-link fences would not be visible and are necessary to deter the deer, she can fully support the project with the condition that the chain-link fence not rise above the retaining wall.

Commissioner Lenzen stated that this is an excellent design. He stated he appreciates stated concerns regarding pedestrians on Belvedere Avenue, but he believes that the City Engineer has

evaluated these issues and finds them to be outweighed by the interests of the applicant to fence his property.

Commissioner Rosenlund stated that he also visited the site. He agrees with his fellow Commissioners that the Design Review findings can be met. He stated that the iron fences and gate would be attractive. He stated that he appreciates the desire to get rid of the deer. He stated that this may be a part of a bigger problem that requires bigger solutions, although that is not what is currently before the Commission.

Commissioner Wilson stated that he concurs with his fellow Commissioners and that the black chain-link fence should tie in nicely with the black iron fence. He stated he can support the project.

Commissioner Kemnitzer stated that the iron fence portion of the design is very attractive and she commends the applicant for seeking an attractive fence that would not obstruct the views of the water and across the bay. She stated she is very concerned that any chain-link fencing in Belvedere be avoided, but if this fence can be made completely invisible from the street that she believes that would be consistent with the City Code. As a result she would like to consider an amendment to the Resolution. She proposed that in subsection e) the word 'iron' should be added before 'fence' to clarify that the fence that should remain free of vegetation is the iron street-front fence. That is, this subsection e) should not apply to the chain-link fence.

Secondly, she is concerned that neither the plans nor the story poles were adequate, to indicate that the fence at its topmost point would be below the street level. She would like staff to comment as to whether subsection a) could be appropriately amended to provide that the drawings of David Bordon be changed to provide that information.

Planning Manager Macdonald asked whether the siting of the chain-link fence along Belvedere Avenue is the only area of the Commissioner's concern?

Commissioner Kemnitzer replied that it is.

Chairman Lasky stated that the applicant is spending a great deal of money to build the iron fence, and where it will connect to the chain-link fence is down a very steep hill. He stated that on the drawing the fence jogs a short distance and then hooks up to the chain-link fence.

Commissioner Kemnitzer stated that her concern is that there is no indication of the topography on the plans that indicate that the degree of the slope. She stated that when she visited the site it was not actually clear that the top of the fence was below the street.

Planning Manager Macdonald stated that the topographic contour lines in the plans appear to be at 5-foot intervals. She stated that perhaps the Chairman could reopen the public hearing to question the applicant. She stated that staff could recommend a condition of approval that the top of the chain-link fence not rise above the level of the stone wall at Belvedere Avenue. This would give staff an opportunity to enforce that condition when the building plans are submitted.

Commissioner Kemnitzer stated that is consistent with her request and the consensus of the Commissioners.

Vice-Chairman Johnson asked whether that requirement would defeat the purpose of the fence to keep deer from jumping over that low section.

Planning Manager Macdonald stated that the fences would join at the existing 6-foot tall stone pillar. She stated there might be a small triangular portion of chain-link that would be visible which might be screened with vegetation. Staff would recommend that the motion be changed to read: "To adopt the resolution approving Design Review to allow the construction of a 6-foot tall open metal fence within the public right-of-way and along the side yards of property at **49 Belvedere Avenue** with the condition that the top of the chain-link fence parallel to Belvedere Avenue not rise above the level of the existing stone wall."

Commissioner Kemnitzer stated she can fully support this project with those two minor amendments.

Chairman Lasky stated that he can also make the findings for Design Review. He stated that he discussed the fact that the berm was built by the City with Dr. Rothman, and explained to him that this was not an item of discussion before the Planning Commission. He stated he agrees that the new fence would be a good place to hold on, if a pedestrian had to step up on the curb.

MOTION: To adopt the resolution approving Design Review to allow the construction of a 6-foot tall open metal fence within the public right-of-way and along the side yards of property at **49 Belvedere Avenue** with the condition that the top of the chain-link fence parallel to Belvedere Avenue not rise above the level of the stone wall, and to add the word "iron" before "fence" in condition of approval e).

MOVED BY: Kemnitzer, seconded by Lenzen

VOTE: Ayes: Lasky, Johnson, Kemnitzer, Rosenlund, Lenzen, Wilson
Noes: None
Abstain: None
Absent: Herr

6. Retroactive Design Review, Design Review and Revocable License for new iron fence at street frontage adjacent to **144 Bella Vista Avenue** and other landscape and hardscape changes. Requested front yard fence would be located within the public right-of-way of Bella Vista Avenue. CEQA status: categorically exempt pursuant to Section 15301. Applicant and Property Owner: Emile Chapot.

Assistant Planner Wheaton presented the staff report. She stated that a correction should be made to the staff report to correct the name of the adjacent lane to Woodland Lane, rather than Woodwardia Lane.

Commissioner Rosenlund asked whether a Building Permit is required for a retaining wall less than 4 feet tall?

Building Official Braun replied that the Building Code states that retaining walls less than 4 feet tall do not require a Building Permit unless they retain a surcharge. He stated that he determines that a surcharge is other than a normal lateral load against the wall. He stated that in his opinion, this wall does have a minor surcharge. In addition, there has been a history of earth movement in the area. As a result of those two conditions, the Building Department is requiring not only a Building Permit, but that a structural engineer review the existing wall to make recommendations to strengthen it.

Commissioner Lenzen stated he would like to understand the basis for the assessment of double fees.

Assistant Planner Wheaton replied that there have been a number of approvals for this project. The first administrative approval was granted in January. The second administrative approval granted in February was a retroactive approval for landscape stairs that had been commenced without Design Review approval for that project scope. At this time the applicant is requesting Design Review approval for additional items, some of which are also retroactive.

Vice-Chairman Johnson asked for clarification of the height of the privet hedge in front of the fence.

Assistant Planner Wheaton replied that the Texas privet hedge would reach a height of 6-8 feet tall in maturity.

Open public hearing.

Emile Chapot, applicant, stated that he would like to thank staff for all their support through this difficult project. He stated that the home was built in the 1940s and maintenance was very deferred. He stated he has been working very hard at the remodeling project, and has made some inadvertent procedural mistakes, but has been learning a lot. He stated that his problem with the deer is extensive. He stated that at one time he had five adult bucks grazing in his back yard. Currently he has no fences, which has also encouraged trespassing by humans, as well as deer, lost dogs and then their owners looking for them, etc. He stated his property resembles a public space and he very much needs fences. He appreciates the fact that staff is concerned about the retaining wall and will comply with the Building Official's request for a review by a structural engineer. He stated that insofar as the Texas privets are concerned, he is aware that they have the potential to grow up to the stated height, but in this case, where they are now planted there is a lot of rock and they are growing very slowly. Mr. Chapot stated that he would like to keep the privets behind the proposed iron fence to protect his privacy from the street. He stated that anyone can look right into his house from the road. The proposed 4-foot iron fence is very open and there would be no privacy without foliage.

Chairman Lasky stated that it appears that the City Engineer is proposing that the hedge be removed, but it is the applicant's position that this will cause him to lose his privacy.

Mr. Chapot replied that is correct.

Planning Manager Macdonald stated that as a point of clarification, the City treats hedges as a living fence or living wall, and walls and fences have to meet a 2-foot distance from edge of pavement. In this case, if the privets were to be allowed, these would have to meet a 2-foot separation between their location and the edge of pavement.

Catherine Bishop, 241 Bayview Avenue, stated that her property is located below the applicant's property. She stated that he has done a beautiful job on the home. She is concerned only about the retaining wall and agrees that it should be checked by an engineer. She stated that there was one slide that came down in that area in the early 1980s. She stated that with the retaining wall plus the fence on top, would be about 9-10 feet tall. Although she is not very happy about that, she can live with it, and she believes there can be the addition of greenery and vegetation in front of the wall to soften it. She stated that she was happy with having the fence there, because there used to be one there in the past, however the wall makes a new problem for her. She stated that her main concern is that the wall is safe and has good drainage. She stated that the privet hedge would help Mr. Chapot with his privacy. She asked whether a 4-foot tall front fence would be sufficient to keep out the deer. She stated that the deer that live in Mr. Chapot's property also live at her property, because

her fences are also down. She is aware of at least seven deer that live on her carport roof and on her property. She is sure that as soon as Mr. Chapot's fences are built all of them will be in her yard. She stated as to what would happen if the deer would come over the front 4-foot fence and then get caught in the back yard. She asked whether anyone can verify whether they would be unable to get out over the 6-foot fence.

Chairman Lasky stated that he wanted Ms. Bishop to know that there is a condition of approval in the Resolution that requires that a strengthening plan prepared by an engineer be submitted to the Building Department.

Ms. Bishop stated that she thanks the Commission for their help and attention. She stated that this is a sweet house and the renovation by Mr. Chapot is wonderful.

Commissioner Kemnitzer asked how high is the combined retaining wall and fence from Ms. Bishop's property?

Ms. Bishop replied that the highest point of the retaining wall would be 4 feet with a 6 foot fence on top.

Commissioner Kemnitzer asked whether Ms. Bishop would approve having to look up at a 10-foot structure?

Ms. Bishop replied that she would be all right with this reasonable fencing, because there are many existing 60 year old rambler roses there that will grow back. She stated that she understands the need, as long as there is this herd of deer, to have some reasonable fencing. She stated that she does not understand how Mr. Chapot will manage to keep the deer out if he is only allowed a 4-foot fence at the front. Also, she believes there might be a need for a gate between properties, or at the corner by Woodland stairs, to allow for the release of the deer, so they don't have to jump over a 6 foot fence and landing a long way down with potentially disastrous results.

Vice-Chairman Johnson asked whether by moving the privet hedge back 2 feet would place it on the downslope, and then by allowing it to grow 6 feet high this would alleviate the applicants' privacy issues.

Mr. Chapot replied that at this point the privet hedge is about 3 feet high and is already more than 2 feet back from the edge of pavement. He stated that he would be agreeable to move the privets back as long as he can keep them for privacy.

Planning Manager Macdonald stated that the area of right-of-way to be enclosed by the proposed fence is approximately 25 feet wide and over 50 feet long. As a result, staff had encouraged as low a fence as possible so as not to give the appearance that the public right of way was being reserved for private use only. However, if the applicant would like to put in a higher deer fence on his own property, for deer protection he could apply to do so, by placing it lower down the hill.

Mr. Chapot replied that in conversation with staff he agrees it would be best to leave the proposed fence in the current location. He stated that although the deer might be able to jump over this fence, this would be the most attractive design. He stated that he would not be sure about what to do with the deer but he likes the design of the iron fence.

Vice-Chairman Johnson stated that if there were a privet hedge behind the fence that was 6 feet tall, then that might deter the deer.

Chairman Lasky stated that if the deer cannot see beyond the fence they probably won't jump over it.

Mr. Chapot stated that now that the story strings were erected, the front fence seems fairly high, and, with foliage behind it on the downslope, that might be sufficient. He stated that he would have no problem adding a gate at the rear of the property to alleviate concerns of Ms. Bishop about letting out any deer that did get into the property.

Commissioner Kemnitzer would like to clarify one matter. She stated that Vice-Chairman Johnson was suggesting that the privet hedge be moved from outside the fence to inside the fence. She asked if the applicant would be amenable to this request.

Mr. Chapot stated the currently the hedge is already inside the fence; it is not between the fence and the street. He stated that the fence is 2 feet back from edge of pavement and the privet is inside the fence.

Vice-Chairman Johnson stated that the plans show the hedge outside the fence, which apparently is incorrect.

Commissioner Kemnitzer replied that normally the Commission approves the plans before them. She stated that if something else is being asked, then they would need clarification.

Mr. Chapot replied that it does not matter to him whether the privets are inside or outside the fence, as long as he can keep them.

Assistant Planner Wheaton stated that staff could make a recommendation that the Texas privet hedge as shown on the plans be moved behind the fence.

Chairman Lasky asked whether that would create any problems for the City Engineer.

Assistant Planner Wheaton stated that the City Engineer had recommended that the plants in front of the fence be kept very low.

Planning Manager Macdonald stated that the City Engineer's recommendation that the planting in the 2-foot separation between the fence and the edge of pavement be low-growing. However, if the proposed fence as shown on the plans is 2 feet from the edge of pavement, and the Texas privet hedge is behind the fence, then there would be no problem.

Commissioner Wilson asked if that hedge were relocated, would it still be required to exceed 6 feet in height.

Planning Manager Macdonald replied that all living fences, fences, and walls are required to be maintained at 6 feet unless all adjacent neighbors agree to heights greater than 6 feet.

Close public hearing.

Vice-Chairman Johnson stated she visited the property. She stated she is very pleased to see a 4-foot-tall iron fence as opposed to a 6-foot-tall solid wall. She stated she agrees with the applicant's desire for some privacy, so she would be in favor of moving the privet back behind the fence and having its height maintained at 6 feet, while leaving the metal gate at 4 feet. She stated that the fences along the stairway and back are attractive. She stated that gates could be problematical and she would not want the Commission to impose that as a condition, but rather to leave that up to the applicant. She stated she can support this project.

Commissioner Lenzen stated he would like to address the issue of the fine. He stated he believes that the applicant did not act in bad faith and the minimum fine of \$500 should be imposed. He stated that he agrees with Vice-Chairman Johnson that the privet hedge location should be approved to be behind the fence and it should be maintained at a height of 6 feet. He stated that this will satisfy everyone's needs. He stated he can make the findings for Retroactive Design Review and Design Review for the 4-foot-tall fence which would be aesthetically recommended. He commends the City and the applicant for working together.

Commissioner Wilson stated that he agrees with his fellow Commissioners and the comments in reference to the findings. He recalled that at a previous meeting the policy regarding height limits was discussed. He would like to require that the fence on top of the retaining wall conform to the setback requirements that were described. He stated that with that requirement, he can support the project.

Commissioner Kemnitzer stated that she visited the property and met with the applicant. She stated she shares her fellow Commissioner's views that the construction was done in good faith and recommends the minimum fine. She thanked staff for their thorough report. She stated that this property is very exposed from Bella Vista Avenue and understands the applicant's desire for privacy. She stated that she can approve the project and make the findings with the exception that the privet hedge should be located on the inner side of the fence. She stated that because that area has a very steep slope, this should solve the deer problem, the height problem, and the proximity to the street. She stated that subsection b) might be appropriate for amendment.

Vice-Chairman Johnson suggested that subsection b) be deleted and to amend subsection a).

Assistant Planner Wheaton stated that subsection b) could be deleted, and subsection a) could be amended to read: "Construction shall conform to the drawings of F&G, Design and Drafting Service, stamped received by the City of Belvedere on December 12, 2007 with the exception that the Texas privet hedge within the Bella Vista Avenue public right-of-way be located downslope of the approved fence."

Commissioner Kemnitzer stated that she agrees with Commissioner Wilson regarding adding a condition of approval to address the requirements for the fence at the top of the retaining wall so that it would have be setback from the retaining wall to eliminate the appearance of a single 10 foot tall wall. She stated this would be valuable for precedent purposes as well as for the needs of this particular property and the neighbor.

Assistant Planner Wheaton replied that staff has considered those concerns and, on Sheet A.5, detail 8, of the plans, there is an indication that the new fence will be located a minimum of 18 inches from the constructed wood retaining wall. She stated that this would be for the purpose of allowing landscaping to be added between the retaining wall and the new fence as well as to avoid any structural impacts that the new fence might have on the retaining wall.

Commissioner Wilson asked whether the required offset measurement is not 24 inches?

Planning Manager Macdonald replied that for the purposes of measuring height, a 12 inch offset is required, and an 18 inch offset is preferred.

Commissioner Kemnitzer replied that, with that clarification, no additional amendment to the Resolution would be necessary. She stated she can support the applications.

Commissioner Rosenlund stated that he has little more to add. He stated that a lot of work has been done by the applicant and staff and he can support what is now proposed.

Chairman Lasky stated he agrees with his fellow Commissioners on the findings for Retroactive Design Review and the recommendation to the City Council for a revised Revocable License, with the Resolution amended as discussed in the meeting. He stated he agrees to a minimum \$500 fine.

MOTION: To establish a retroactive fine of \$500 for the construction of a 3-foot and 10-inch tall retaining wall built without the benefit of Design Review or Building Permits at **144 Bella Vista Avenue.**

MOVED BY: Kemnitzer, seconded by Johnson

VOTE: Ayes: Lasky, Johnson, Kemnitzer, Rosenlund, Lasky, Wilson
Noes: None
Abstain: None
Absent: Herr

MOTION: To adopt the resolution approving Retroactive Design Review for a retaining wall and Design Review to construct a 4-foot-high fence in the public right-of-way along Bella Vista Avenue and 6-foot-high side yard and rear yard fences at **144 Bella Vista Avenue,** as conditioned and as further amended consistent with the Minutes of tonight's meeting.

MOVED BY: Kemnitzer, seconded by Johnson

VOTE: Ayes: Lasky, Johnson, Kemnitzer, Rosenlund, Lasky, Wilson
Noes: None
Abstain: None
Absent: Herr

MOTION: To recommend City Council approval of a revised Revocable License for a new, 4-foot high fence and hedge not to exceed 6 feet tall, downslope of the fence in the public right of way at **144 Bella Vista Avenue.**

VOTE: Ayes: Lasky, Johnson, Kemnitzer, Rosenlund, Lasky, Wilson
Noes: None
Abstain: None
Absent: Herr

Commissioner Kemnitzer stated she must recuse herself because she owns property within 500 feet of the subject application.

7. Design Review and Revocable License for new fence within the public right-of-way adjacent to property located at **112 Bella Vista Avenue.** CEQA status: categorically exempt pursuant to Section 15301, Existing Facilities. Applicants and Property Owners: Peter and Marla Newell.

Assistant Planner Wheaton presented the staff report. She stated that a correction should be made to change the 4th paragraph of page one, first sentence, to read: In October of 2005, the **Newell's** requested clarification....” In addition to the staff report, staff recommends an additional condition of approval that limits the granting of the approval to the restrictions of the existing easement

agreement. She stated that proposed language was distributed to the Planning Commission prior to this meeting.

Open public hearing.

Peter Newell, 112 Bella Vista Avenue, stated that the fence in question is between his and the property at 110 Bella Vista Avenue owned by the Newberry's. He stated that in the interest of good relations with the neighbors, he would like to request a change to the wording of condition b) because in the draft resolution it seems unclear as to who is to remove, save, and maintain the ivy on his guardrail fence that sits on top of his retaining wall at 112 Bella Vista Avenue. He stated that the fence that is to be replaced sits on top of the wall. He stated that one side of this fence faces his driveway, and the other side faces the Newberry's yard, approximately 4 to 12 feet below the level of his driveway. Mr. Newell stated that the ivy in question is so entwined, attached and wrapped around the existing fence that there would be no way to remove the fence without causing damage to the ivy. He stated this is the heart of the problem, that is, who shall determine what has damaged the ivy, who determines what ivy is to be removed, and who determines where the liability lies. He stated that it would be prudent to define this issue more in detail because the ivy originates on the Newberry side of the fence, and is part of the landscaping, that the Newberry's wish to preserve for future use.

Mr. Newell proposed that he would invite the Newberry's be given the opportunity to remove this ivy from the fence to try to save it for later. The ivy can then be stored down below in the public right of way and out of the area of the job site for later use. He proposes that after the Newberry's have removed whatever they wish to keep, any remaining ivy can be removed by the Newell's and disposed of without any further dispute.

Chairman Lasky replied that the Planning Commission is not in the position to adjudicate between the Newell's and the Newberry's on the issue of the ivy. He stated that this condition cannot be incorporated into the resolution. He stated that all that can be said is that the Commission can make a finding regarding a request to make an improvement on the applicant's property.

Mr. Newell replied that a discussion of the ivy is already inserted in the draft Resolution.

Deputy City Attorney Hurd stated that he might suggest the possibility that a condition of approval be added by the Commission to the Resolution that within a certain specified number of hours prior to removal of the fence, such as 48 or 72 hours, etc., that the applicants notify the residents of 110 Bella Vista Avenue that if they desire to do anything with the ivy, they should take this time as their opportunity to do so.

Chairman Lasky asked whether this would be legally binding.

Deputy City Attorney Hurd replied yes, it would be a condition of approval to require the applicant to give notice.

Chairman Lasky stated that would be no problem for the Commission to consider that requirement.

Mr. Newell stated that he was planning to provide an even longer notice period.

Chairman Lasky stated that his point is that the Commission cannot put anything in a document to compel the neighbor to do something. However, if the condition were limited to the applicant providing notice, that would be sufficient.

Mr. Newell suggested that there be 3 weeks notice from the date of a letter sent to the neighbor. He asked whether there still could be modification to subsection b). He asked whether it would be possible to add language to the effect that whatever future landscaping is proposed to be placed adjacent to that wall, that it would not be attached to the wall.

Deputy City Attorney Hurd replied that would not be possible. He would suggest that subsection b) be stricken in its entirety and replaced with the addition of a condition to give notice. He stated that he assumes that the other side of the wall is the Newberry property.

Mr. Newell replied that the wall and the fence are his property. The adjacent property is partially the Newberry's and also partially City-owned property.

Planning Manager Macdonald stated that any future change to the public right-of-way or any modification to landscaping or structure would be subject to Design Review. At such time, the City would have an opportunity to review the application to see how it is proposed to be constructed, and where it would be located. The City would be aware that the fence and retaining wall are a part of the Newell's Revocable License.

Mr. Newell replied that he is applying for a new Revocable License, including a supporting concrete retaining wall for the driveway, and for a new fence on top of that retaining wall. He stated he is trying to get clarity as to who would be responsible for any damages.

Deputy City Attorney Hurd replied that the Commission is limited to considering the application currently before it, in terms of whose behavior they can condition. Should the applicant believe that the neighbor has done something that encroaches on his property, then you have a civil cause of action against them. He stated that should the neighbor's behavior encroach on the City's property, then it would be reported to the City for the City to take action.

Mr. Newell asked does this mean that his retaining wall and fence would belong to the City?

Deputy City Attorney Hurd replied that if there is a portion of something you own that is on your property and your neighbor does something to your property, then you can sue them. However, the Commission cannot place any conditions on someone else's actions other than those of the applicant.

Mr. Newell asked who owns improvements that are built on an area of City property, when that owner has been granted a Revocable License.

Deputy City Attorney Hurd replied that the improvements, in this case the fence and wall, belong to the applicant.

Chairman Lasky stated that there is an easement.

Assistant Planner Wheaton replied that the proposed fence straddles private property, public property, and a portion of that private property is on an easement.

Mr. Newell replied that the easement portion is not at issue here tonight; it is the portion that is on the City property.

Commissioner Rosenlund stated that he understands counsel to have stated that if the fence is built on City property as to which the adjoining landowner has a Revocable License, the holder of that license who built the improvement, that is, the fence, is the one who owns the fence and has the

right to control the fence, and if somebody does something to that fence, then the owner has a right against whomever has damaged that fence.

Close public hearing.

Vice-Chairman Johnson stated that she visited the property and met with the applicants. She stated that the fences on both sides are in great need of repair. She stated that a new fence would be a great improvement which she can support. She stated that she would favor complete deletion of subsection b) and to replace it with wording to the effect, "applicant shall give 15 days notice to the Newberry's prior to demolition of the fence, and they, the Newberry's will be given the opportunity to detach the ivy."

Commissioner Rosenlund stated that he agrees with the proposed changes to the resolution as stated by Vice-Chairman Johnson, and he can make the findings for the Design Review and Revocable License.

Vice-Chairman Johnson asked whether the additional language distributed tonight to the Commission should be added to the Resolution.

Planning Manager Macdonald replied that it should be added to the Resolution as subsection j). She read the new language, "The approval of this application is without regard to any private easement or easements that may exist on the applicant's property. Compliance with the terms or limitations of any private easement or easements that may exist on the applicant's property is the sole responsibility of the applicant."

Commissioner Lenzen stated that he agrees with the two changes as proposed by Vice-Chairman Johnson and the addition of subsection j) as read, to be added. He stated he can make the findings to support the applications.

Commissioner Wilson stated he agrees with his fellow Commissioners and to the changes to the Resolution of approval. He can make the findings for Design Review and to recommend the Revocable License.

Chairman Lasky stated that he can make the findings for Design Review and the recommendation of the Revocable License to the City Council. He asked whether the proposed motion should be modified to exclude the last phrase beginning, 'with the exception...'

Assistant Planner Wheaton replied that would be correct.

MOTION: To adopt the resolution approving Design Review as amended and revised in accordance with the Minutes of tonight's meeting, to allow the construction of two 6-foot-high fences flanking the existing carport approach at **112 Bella Vista Avenue**

MOVED BY: Lenzen, seconded by Johnson

VOTE: Ayes: Lasky, Johnson, Lenzen, Rosenlund, Wilson
Noes: None
Abstain: Kemnitzer
Absent: Herr

MOTION: To recommend City Council approval of private improvements located within the public right-of-way adjacent to **Bella Vista Avenue**.

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MOVED BY: Lenzen, seconded by Johnson

VOTE: Ayes: Lasky, Johnson, Lenzen, Rosenlund, Wilson
 Noes: None
 Abstain: Kemnitzer
 Absent: Herr

ADJOURNMENT

The meeting was adjourned at 8:30p.m.

APPROVED:

Michael Lasky, Chairman

//ATTEST:

George J. Rodericks, City Clerk