

**CORRESPONDENCE
RECEIVED FOR MEETING OF
OCTOBER 24, 2005**

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October 19, 2005

Mayor Bogaard and City Council
City of Pasadena
117 E. Colorado Blvd. 6th Floor
Pasadena, Ca. 91105

*Re: Agenda item for October 24 Council meeting - Design
Review Call-up for 635 - 645 South Lake Ave.*

Dear Mayor Bogaard and all members of the City Council:

I represent Chateau de Lis, LLC, the applicant for a 12 unit town home project. Our position on the appropriate design review rules for this project is as follows:

1. Design Review is intended to "implement general plan urban design policies..." (P.M.C. Section 17.92.010)

2. Changes in a project required as a condition of design approval may include, height, density, sign requirements, open space, parking or loading **as long as such conditions are not more restrictive than those prescribed by applicable district regulations** or a valid conditional use permit or variance. Design review may require without limitation site plan revisions or different arrangements of

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permitted floor area or open space.¹ (P.M.C. Section 17.92.090)

3. The City's Tree Ordinance is such applicable district regulation, a legislative pronouncement by the City Council providing the standard of review as it relates to trees.

4. Under the existing Tree Ordinance, the liquid amber tree currently existing in the front yard of this property **is not a protected tree, is not even a good specimen, and the Applicant is fully entitled to remove the tree at any time without any further approval or permit from the City.**

5. **Thus, as part of the Design Review approval, the City may not legally require a change in the project in order to protect this tree because such a requirement would be more restrictive than that required by the applicable ordinance.**

6. Further, even if the City were to attempt to amend the Tree Ordinance to protect this tree, the Applicant would not be subject to such an amendment, because the Applicant already has an approved Vesting Tentative map for the site, which locks in the entitlement rules as of the date that the application was deemed complete, February 1, 2005.

¹The current version of this section adopted in the Revised Zoning Code reads as follows: "Changes in a project required as a condition of Design Review approval may include density, height, open space, parking or loading, and sign requirements, as long as the conditions are not more restrictive than those prescribed by applicable zoning district regulations or a valid Adjustment Permit, Conditional Use Permit, Development Agreement, Master Plan, Planned Development, Variance or other legislative or zoning entitlement. P.M.C. Section 17.61.030.I.5a Thus the prohibition on restrictive design conditions was recently reaffirmed by the City when it revised the zoning code. This very recent statement of policy on the question of acceptable design conditions would be given great weight by a court, under principles of statutory interpretation.

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The project, which is categorically exempt from CEQA, received its consolidated design review approval (February 4, 2005) and Vesting Tentative Map approval (March 9, 2005). The design review approval granted by the full Design Review Commission after extensive hearings was called up to the City Council on October 3, 2005, for hearing on October 24, 2005.

The Council also called up the Vesting Tentative Map approval to itself, and after a hearing on April 25, 2005, sustained the decision of the Subdivision Committee approving the tentative map. Thus, the rules and regulations that apply to this project are those that were in effect on the date that the application was deemed complete. (Government Code Section 66498.1-66498.9) In this case, that date is February 1, 2005. Thus the rules that were in effect on that date are the rules that apply to this project.

**DESIGN ALTERNATIVE CANNOT BE ACHIEVED
WITHOUT VARIANCES**

At the Council's request, Michael Hajar, the managing partner of CDL, LLC., met with Vincent Gonzalez of the Design and Historic Preservation staff and Design Commissioner Barker to explore a redesign option proposed by the Commissioner to attempt to work around one liquid amber tree which was Councilmember Tyler's stated reason for calling up the matter. Councilmember Tyler is interested in seeing whether a redesign which incorporates this tree is possible. The staff report will outline in detail the substance of the redesigned proposal.

In order to implement the alternate design proposed, **variances would have to be applied for and granted to deviate from the zoning code.**

The concept laid out in the proposed redesign was discussed at the hearings before the Design Review Commission and staff correctly stated then that the City cannot force an applicant to apply for variances to comply with its wishes, especially when, as here, the wishes are not grounded in any legal requirement in the Pasadena Municipal Code.

Furthermore, the staff stated in these public hearings that **the Zoning Administrator was queried, and the findings which must be made to grant these variances could not be made on our facts, according to him.**

As the Council knows, the City Council is without authority to grant variances to any requirement of the zoning code in the course of design review, nor could a variance be granted absent a complete application therefor, after fully complying with the applicable notice and hearing requirements. No application for a variance of any kind is pending on this project. Nor can the City Council authorize the staff to administratively grant variances in the course of granting a design review approval. There is no authority for such an approach anywhere in the Pasadena Municipal Code.

This project is fully compliant with all city alws and ordinances as submitted and as approved thus far by all of the City's reviewing bodies.

**ONLY ORDINANCES, RULES REGULATIONS AND POLICIES
WHICH WERE IN EFFECT ON FEBRUARY 1, 2005
CAN BE APPLIED TO THIS PROJECT**

Legally, the City Council can only apply the rules and regulations that were in existence on February 1, 2005 , the

date our vesting tentative map application was deemed complete. Thus Chapter 17,92 of the Pasadena Municipal Code, as the same existed on that date, are the rules that apply to this project. At the hearing on October 3, 2005, language from the CURRENT design review was cited. This language **does not apply to this project**, as it was enacted after February 1, 2005. The City Attorney quoted language from the purposes section of the CURRENT Design Review portions of the code which states that the purposes of Design Review are to "promote the protection and retention of..other significant landscaping of aesthetic or environmental value.(P.M.C. Section 17.61 030). The City Attorney omitted a key factor, the phrase "if feasible". The record before the Council contains only evidence that this tree is NOT of aesthetic or environmental value. The tree is not identified in the environmental clearance for the project, which was a categorical exemption, on the grounds that this is an infill project in an urbanized area. The evidence in the record to date also shows that the tree is not of aesthetic value for the reasons set forth in the arborists report, which recommends removal of the tree. (See *discussion infra*)

The **correct, applicable language** it as follows:

Design review is intended to "implement general plan urban design policies... and to **ensure that plans for the landscaping of open spaces conform with the requirements of this title** (Title 17, the zoning code) and they provide visually pleasing setting for structures on the site and on adjoining and nearby sites and blend harmoniously with the natural landscape" (P.M.C. Section 17.92.010 (C)).

**DESIGN CONDITIONS CANNOT BE MORE RESTRICTIVE
THAN APPLICABLE DISTRICT REGULATIONS,
INCLUDING THE TREE ORDINANCE**

With respect to conditions of approval which may be applied to a design review approval, the code limits the decision maker as follows:

"17.92.090 General Procedures

E. Design Conditions. Changes in a project required as a condition of design approval may include, height, density, sign requirements, open space, parking or loading **as long as such conditions are not more restrictive than those prescribed by application district regulations** or a valid conditional use permit or variance. Design review may require without limitation site plan revisions or different arrangements of permitted floor area or open space." ²

In this situation, the stated purpose of the requested redesign is to preserve a tree which the City's own Tree Ordinance does not require to be preserved, thus being more restrictive than the City's Tree Ordinance. **Even under the current language found in the Revised Zoning Code,** the purpose of Design Review is **only** to "promote the protection and retention of land mark, native and specimen

²The current version of this section adopted in the Revised Zoning Code reads as follows: "Changes in a project required as a condition of Design Review approval may include density, height, open space, parking or loading, and sign requirements, as long as the conditions are not more restrictive than those prescribed by applicable zoning district regulations or a valid Adjustment Permit, Conditional Use Permit, Development Agreement, Master Plan, Planned Development, Variance or other legislative or zoning entitlement." P.M.C. Section 17.61.030.I. 5 a. Thus the prohibition on imposing conditions which are more restrictive than the listed codes and or permits has been retained. Thus the prohibition on restrictive design conditions was recently affirmed by the City when it revised the zoning code. This very recent statement of policy on the questions of acceptable design conditions would be given great weight by a court, under rules of statutory interpretation. Restrictive design conditions are not allowed under any circumstances.

trees and if feasible mature canopy trees and other significant landscaping of aesthetic and environmental value." (P.M.C. 17.61.030 A.6.) As we stated at the previous hearing, this tree is not a landmark tree, it is not a native tree and it is not a specimen tree. Mature canopy trees are to be retained only if **feasible**. The code defines feasible as "capable of being accomplished in a successful manner within a reasonable period of time taking into account economic, environmental, social and technological factors." P.M.C. Section 17.80.020(F) Our meeting with staff and Commissioner Barker demonstrated that it is not feasible to retain this tree, because a redesign of the project that necessitates variances would be required, and variances which have no chance of being granted must be obtained. Even if such variances were granted, this would pose an economic hardship severely impacting the financial feasibility of the project. **Thus, even under the current code section, which cannot legally be applied to this project, retention of this tree cannot be required.**

**THE TREE IN QUESTION IS NOT
OF AESTHETIC OR ENVIRONMENTAL VALUE**

The arborist's report, prepared in compliance with the Tree ordinance and read into the record before the City Council on October 3, 2005, states that the tree is not in optimal health or condition. It has damaged and dead structural roots, it has branch wounds and pruning damage. The structure of the tree is rated a "C" and there are wounds with decay in surface structural roots. The arborist also found pruning damage when the tree was previously "topped off". The arborist recommends removal and replacement of the tree. Thus, under the Tree Ordinance, the liquid amber tree currently existing in the front yard of this property is not a protected tree, is not even a good specimen and the applicant is fully entitled to remove the tree at any time without any further approval or permit from

the City. Thus, as a condition of approval of design review, the City may not legally require a change in the project in order to protect this tree because such a requirement would be more restrictive than that required by the applicable ordinance - the Tree Ordinance.

Also, the City Attorney's rationale for requiring retention of the tree based on a finding that the tree is a "contributing factor to the aesthetics of the site³ WITHOUT A CONTEMPORANEOUS FINDING OF FEASIBILITY constitutes a new rule which did not exist as of February 1, 2005 and thus cannot legally be applied to this project, which has a Vesting Tentative Map.

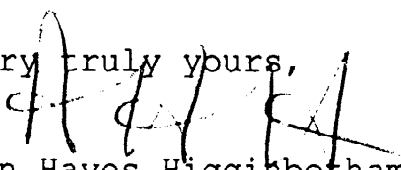
**FUTURE AMENDMENTS TO THE TREE ORDINANCE
TO INCORPORATE NEW STANDARDS FOR LIQUID AMBER
TREES CANNOT BE APPLIED TO THIS PROJECT
DUE TO ITS APPROVED VESTING TENTATIVE MAP.**

Further, even if the City were to attempt to amend the Tree Ordinance to protect this tree, the Applicant would not be subject to such an amendment, because the Applicant already has an approved Vesting Tentative Map for the site, which locks in the entitlement rules as of the date that the Application was deemed complete, February 1, 2005.

³ This is the language used by the City Attorney at the October 3, 2005 hearing, verified by listening to the tape of the meeting on the City's website.

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We hope this letter is helpful to you in your deliberations on this item. Please understand that the partners in Chateau de Lis, LLC will take every step legally available to it to protect its right to develop this project which is fully in compliance with each and every rule and regulation in effect at the time it was processed through the City.

Very truly yours,

Ann Hayes Higginbotham
Attorney for Chateau de Lis, LLC

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cc: Michael Hajar