

ANTHONY LOMBARDO & ASSOCIATES
A PROFESSIONAL CORPORATION

ANTHONY L. LOMBARDO
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144 W. GABILAN STREET
SALINAS, CA 93901
(831) 751-2330
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September 12, 2024

File No. 4822.000

Michael LePage, Chair
Planning Commission
City of Carmel-by-the-Sea
P.O. Box CC
Carmel-by-the-Sea, CA 93923

Re: Request for Reconsideration (Fountain/DR 16-384)

Dear Chair LePage and Members of the Planning Commission:

The person who appeared at your Planning Commission and asked that the Commission reopen the consent agenda long after it had been voted on in order to protest the extension of the permit for the construction of the small mixed use building on the Fountain's property (DR 16-384), is the same person who has been harassing the Fountains for the better part of a decade over the City's approval of an encroachment permit for a small fence and side yard adjacent to the Fountain's home.

I have attached two letters written last year to the City Council summarizing the Fountain's 10 year ordeal.

The City Council ultimately approved the "re"issuance of the permanent encroachment permit to the Fountains on condition that they landscape and irrigate the steeply sloped right of way on the north side of 7th Avenue.

The Fountains installed that landscaping and irrigation system at a cost of over \$4,000 only to have the irrigation system and plants destroyed by vandalism (smashing and pulling up plants and tying the irrigation system into knots). They repaired the damage only to have it repeated.

They repaired and replaced the irrigation system and plants again and they also installed a surveillance camera on the south side of their home. What they discovered both shocked and saddened them. The person who asked you to reconsider your approval of the extension and opposed the issuance of the encroachment permit was videoed 14 times walking on and intentionally crushing the plants required by the City to be planted in the right of way adjacent to the Fountain's fence (see video attached). Since this person does not live anywhere near the Fountain's home, one can only assume that she comes to this area to intentionally vandalize this landscaping.

Michael LePage, Chair
Carmel Planning Commission
September 12, 2024
Page | 2

She appears to be the only person (other than a small child) trampling the vegetation in this area during a period of over 2 weeks.

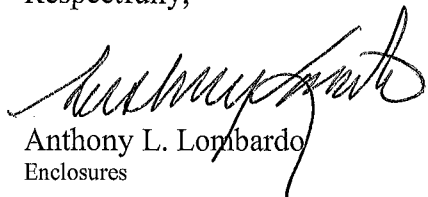
It is clear this individual is unwilling to accept last year's decision by the City Council to reissue the "lost" encroachment permit but has taken her opposition to new levels by vandalizing the landscaping designed to beautify and prevent erosion on the steep side hill right of way along 7th Avenue.

The appearance at this week's Planning Commission to object to the extension of the Fountain's permit for the construction of the small mixed-use building on the vacant lot adjacent to their home is nothing more than an attempt to further harass and damage the Fountains.

The person who appeared at this week's meeting could have written a letter to staff or to the Commission to explain why they believed the matter should have been pulled from the consent agenda. Instead, they waited until after the consent agenda had been approved Wednesday to attempt to make the Fountains suffer. This small project was approved (I believe unanimously) by your Commission and never appealed to the City Council.

The Fountains respectfully request that the Commission not allow itself to be used as an instrument of further delay and harassment by Victoria Beach and that you do not vote to reconsider your approval of the extension of the Fountain's permit.

Respectfully,



Anthony L. Lombardo
Enclosures

cc: Mayor Potter and City Council Members
Chip Rerig
Brandon Swanson
Marnie Waffle
Chief Paul Tomasi
Client

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June 1, 2023

Our File No: 4822.000

Dave Potter, Mayor
Members of the City Council
City of Carmel-by-the-Sea
P.O. Box CC
Carmel-by-the-Sea, CA 93921

RE: Fountain Encroachment Permit

Dear Mayor Potter and Councilmembers:

Next Tuesday you will consider the application of Thomas and Kristin Fountain for a “replacement” encroachment permit for their home at the corner of Junipero and 8th.

An encroachment permit was issued by the City to the prior owner of the Fountains’ home in 2005 in order to allow the construction of a small side yard fence and associated landscaping in otherwise unusable city street right of way directly adjacent to their home. In consideration for the issuance of this permit, the property owner constructed a public walking path along the entire south side of 8th Avenue between Junipero and Mission. (See Exhibit A.)

The City staff has required that the Fountains apply for this “replacement” encroachment permit because all of the documents regarding the existing encroachment permit issued in 2005 have inexplicably disappeared from the City’s files.

We do however know that an encroachment permit for this property was issued by the City for this property because we were able to locate:

1. The Planning Commission resolution approving plan changes to encroach onto City right-of-way with a fence and landscaping, abandoning construction of a sidewalk on City right of way on the north side of 8th Avenue (due to environmental and legal constraints) and requiring the owner of the Fountains’ property to construct a pathway along the entire frontage of 8th Avenue on the south side of the street. (See Exhibit B.)
2. The building plans approved by the City in 2005 to construct the Fountains’ home show the fencing and landscaping improvements as an approved encroachment in the City right of way. (See Exhibit C.)
3. A copy of the certificate of insurance naming the City as an additional insured on the prior property owners’ insurance policy (See Exhibit D) which is a requirement of the

Hold Harmless Agreement (See Exhibit E) which is a City requirement for the issuance of an encroachment permit.

This is irrefutable evidence that the Fountain's home was granted an encroachment permit roughly 17 years ago for the small grape stake fence enclosing a small area adjacent to their home.

Shortly after they purchased their home in 2014, the Fountains were confronted by two (now former) members of the City Council and told that they intended for the encroachment permit to be revoked so that a sidewalk could be built directly adjacent to the living room window of the Fountains' home which is further evidence that an encroachment permit had been issued.

Mr. Fountain went to the city hall after being confronted by the two City Council members and was shown the encroachment permit and related documents but did not copy them. The file subsequently disappeared from the City leaving us with the evidence described above that an encroachment permit was granted. In subsequent conversations with the prior owner/builder of the home, he confirmed that an encroachment permit had been granted and that he had done everything required of him by the City, including building the pedestrian path on the south side of 8th and naming the City as an additional insured on his liability policy as required by the City's approval of his encroachment permit.

The Fountains were informed in 2014 if they wanted to keep their side yard they would have to design and build a sidewalk on the north side of 8th and in return the City would abandon as surplus right of way the area adjacent to the Fountains' home so that they would not in the future have to be concerned about the loss of their encroachment permit and they could proceed with the development of the vacant lot behind their home. The Fountains did as instructed.

They prepared plans for an ADA compliant sidewalk on the entire north side of 8th between Junipero and San Carlos. This of course required widening the right of way at the street level, removal of several trees and the construction of retaining walls.

The Fountains also submitted a "valuation" of the surplus right of way as requested by the City.

On February 6, 2018, the City Council approved the concept plan for the sidewalk on the north side of 8th and thereafter the Fountains submitted an application to construct the sidewalk and have the City abandon the remaining right of way.

The application for the construction of the sidewalk was filed in early 2018 but was not set for hearing until early 2019.

Incredibly some of the same people who demanded that the sidewalk be built on the north side of 8th as far back as late 2014 then attacked the Fountains personally as if the sidewalk construction and abandonment of right of way was their idea or something they needed or wanted.

Of course, nothing is or could be further from the truth.

All the Fountains have ever wanted is to be left alone to enjoy the home they purchased in 2014 which has a small fenced in side yard above 8th Avenue that they could continue to use and safely enjoy.

Dave Potter, Mayor and Members of the City Council
City of Carmel-by-the-Sea
June 1, 2023
Page | 3

The Fountains have a small child and there is an almost vertical 10' drop to 8th Avenue outside of the area of their encroachment permit which is a hazardous condition for both their child and members of the public if it wasn't fenced as it has been for 18 years. This area cannot be used for a public sidewalk (as it would violate the Americans with Disabilities Act) and would be dangerous.

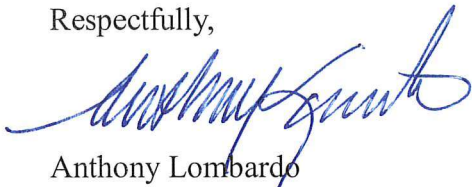
The City received an ADA compliant sidewalk path constructed at the homeowner's expense in consideration of the issuance of the encroachment permit. None of the objections to the "reissuance" of the lost encroachment permit have any legal or factual basis (as we will detail in separate correspondence).

The City is fully within its authority to reissue the 2005 encroachment permit if the City feels that is necessary as a result of the disappearance of the 2005 encroachment permit documents from the City files.

The Fountains believe in the honesty and decency of this city council and its staff and ask you to please bring this almost decade long nightmare to an end.

On their behalf, we respectfully request that the council reissue the encroachment permit based on the approval of the Planning Commission from 2003, the staff approval of the construction of the Fountains' home in 2005 and the construction of the pedestrian pathway on the south side of 8th Avenue.

Respectfully,



Anthony Lombardo

cc: Chip Rerig, City Manager
Brandon Swanson, Director of Planning
Robert Harary, Public Works Director
Client
Brian Pierik, City Attorney



EXHIBIT A

**CITY OF CARMEL-BY-THE-SEA
COMMUNITY PLANNING AND BUILDING
STAFF REPORT**

APPLICATION: DS 01-04, UP 01-24 APPLICANT: Mackey
BLOCK: 89 LOTS: 25 & 26
LOCATION: N/W Corner of Junipero & 8th

REQUEST:

Consideration of a revision to Condition #8 of Use Permit 01-24 (for a lot-line adjustment) to allow the relocation of the public walkway from the north side of Eighth Avenue between Junipero and Mission to the south side of the street.

OTHER APPROVALS REQUIRED:

1. Traffic Commission

PROJECT ISSUES:

The proposal for the walkway includes the use of a material (asphalt/concrete) which is identified in the Policy and Standards for Public Way Design as one to be avoided.

BACKGROUND:

The Planning Commission has approved a Use-Permit for a lot-line adjustment and Design Study for two single family attached homes on the NW corner of Junipero and Eighth. Also approved was a use permit for a lot-line adjustment. One of the conditions required the inclusion of a plan to "continue a pedestrian sidewalk along Eighth Avenue for use by the public on public property that will further protect the health, safety, and welfare of the community" between Mission and Junipero. The Traffic Committee at its September 3, 2003 meeting recommended modifying the condition to require the sidewalk be relocated to the south side of 8th Avenue.

PROJECT DESCRIPTION:

The applicant proposes to construct a meandering four feet wide concrete/asphalt walkway approximately 220 linear feet in length along 8th Avenue between Junipero and Mission Streets. The proposed walkway will effectively remove four existing on-street parking spaces. The proposed design will not adversely affect the existing vegetation.

DISUSSION OF ISSUES:

The City's Policy and Standards for Public Way Design recommend a standard urban sidewalk be made of a material allowing for percolation of water, avoiding the use of blacktop and plain concrete. Recommended instead are sand-set pavers. The Public

EXHIBIT B

DR 01-04
Staff Report
8 October 2003
Page 2

Works Director and the Building Official reviewed the proposed walkway and determined that due to its proximity to the tour parking area and adjacent commercial areas, the path would be a major destination used by numerous people and should be constructed of a more durable material. The proposed surface would allow ADA accessibility and avoid a loose footing and erosion from heavy foot-traffic.

SUMMARY:

The proposed design meets the criteria set forth in section 12.04 of the Municipal Code and the Residential Design Guidelines which call for preserving the forest character while allowing safe public access. The sidewalk will be ADA accessible and will allow the continuation of the existing public walkway from Junipero.

RECOMMENDATIONS:

As recommended by the Traffic Committee, staff recommends approval of the revision to Condition #8 of Use Permit 01-24.

CITY OF CARMEL-BY-THE-SEA
PLANNING COMMISSION
AGENDA CHECKLIST

MEETING DATE: 8 October 2003

BLOCK: 89 LOT: 25/26

FIRST HEARING: X CONTINUED FROM: n/a
ITEM NO: DS 01-04/ UP 01-24 OWNER: Don Mackey
DESIGNER: Charles Mandurrago
STREAMLINING: 10/9/03

SUBJECT:

Consideration of a revision to Condition #8 of Use Permit 01-24 to allow the relocation of the public walkway from the north side of Eighth Avenue between Junipero and Mission to the south side of the street.

ENVIRONMENTAL REVIEW:

Exempt (Class 3 new construction)

LOCATION:

N/W corner of Junipero & 8th

ZONING:

R-1

ISSUES:

Does the proposed walkway comply with Municipal Code Section 12.04 (Sidewalk Construction and Repair), Policy and Standards for Public Way Design, and Residential Design Guidelines?

OPTIONS:

1. Approve the application as submitted with amended conditions.
2. Continue consideration of the application with a request for design changes.
3. Deny the application and adopt the attached Findings for Decision.

RECOMMENDATION:

Option #1 (Approve the application as submitted with revised conditions.)

ATTACHMENTS:

1. Staff Report dated 8 October 2003.
2. UP 01-24 Conditions of Approval.
3. Plans.
4. Traffic Committee Meeting Draft Minutes dated September 3, 2003

STAFF CONTACT: TJ Wiseman, Contract Planner

3. DR 03-24/UP 01-24
Don Mackey
NW corner Junipero and 8th
Block 89, Lots 25 and 26

Consideration of a revision to Condition #8
of Use Permit 01-24 to allow the relocation
of the public walkway from the north side of
Eighth Avenue between Junipero and
Mission to the south side of the street.

Commissioner Cunningham had three questions: what is the motivation for moving the sidewalk from the north side to the south side; what responsibility does the City have to the property owners on the south side of Eighth to advise them of the City's intentions so that they have an opportunity to comment; and how much consideration should losing four parking spaces be given in approving the change?

Chairman Strick asked whether Condition 8 reflected the change of location and Director di Iorio responded that it did not and that it would be changed.

Director di Iorio noted that the Director of Public Works, the Police Chief, the Building Official and City Forester looked at the site and recommended that the walkway be moved to the south side of Eighth due to extreme site conditions and significant trees. The proposal was taken to the Traffic Committee and the decision was that the need for pedestrian access outweighed the need for four parking spaces. Condition 8 should read "...that require the applicant to continue a pedestrian sidewalk along the south side of Eighth Avenue between Junipero and Mission Streets for use by the public on public property..."

Commissioner Cunningham was concerned that the property owners be notified and have an opportunity to respond before approving the application.

Commissioner Culver agreed with Commissioner Cunningham's comments and noted that the diagram in the packet showed a cross walk at Eighth and Junipero but the site visit showed no crosswalk. A crosswalk crossing Eighth is proposed and should be a condition. Read "pedestrian walkway and crosswalk."

Motion of HEWER/CULVER TO APPROVE THE AMENDMENT TO THE USE PERMIT WITH THE ADDED CONDITION THAT THE APPLICANT BE RESPONSIBLE FOR THE CROSSWALK AND THAT THE PROPERTY OWNERS ON THE SOUTH SIDE OF EIGHT AVENUE BE NOTIFIED OF THE PROJECT AND ENCOURAGED TO RESPOND IN WRITING CARRIED ON THE FOLLOWING ROLL CALL VOTE:

City of Carmel-by-the-Sea
COMMUNITY PLANNING AND BUILDING DEPARTMENT
POST OFFICE DRAWER G
CARMEL-BY-THE-SEA, CA 93921
(831) 620-2010 (OFFICE)
(831) 620-2014 (FAX)

October 9, 2003

Mr. Don Mackey
In care of Charles Mandurrago
Post Office Box R
Carmel, CA 93921

Dear Mr. Mackey:

Re: DR 03-24/UP 01-24
NW corner Junipero and 8th
Block 89, lots 25 and 26

At its meeting on October 8, 2003, the Planning Commission approved the revision to Condition #8 of Use Permit 01-24 to allow the relocation of the public walkway from the north side of Eighth Avenue between Junipero and Mission to the south side of the street.

Enclosed is an amended staff report reflecting the additional condition made at the Planning Commission meeting.

If you have any questions or require additional information, please call the office at 620-2010.

Sincerely,

Anne Morris
Planning Services Coordinator

Enclosure

ASITAS RESIDENCES

EL BY THE SEA, CALIFORNIA

BLOCK 89
LOT 24

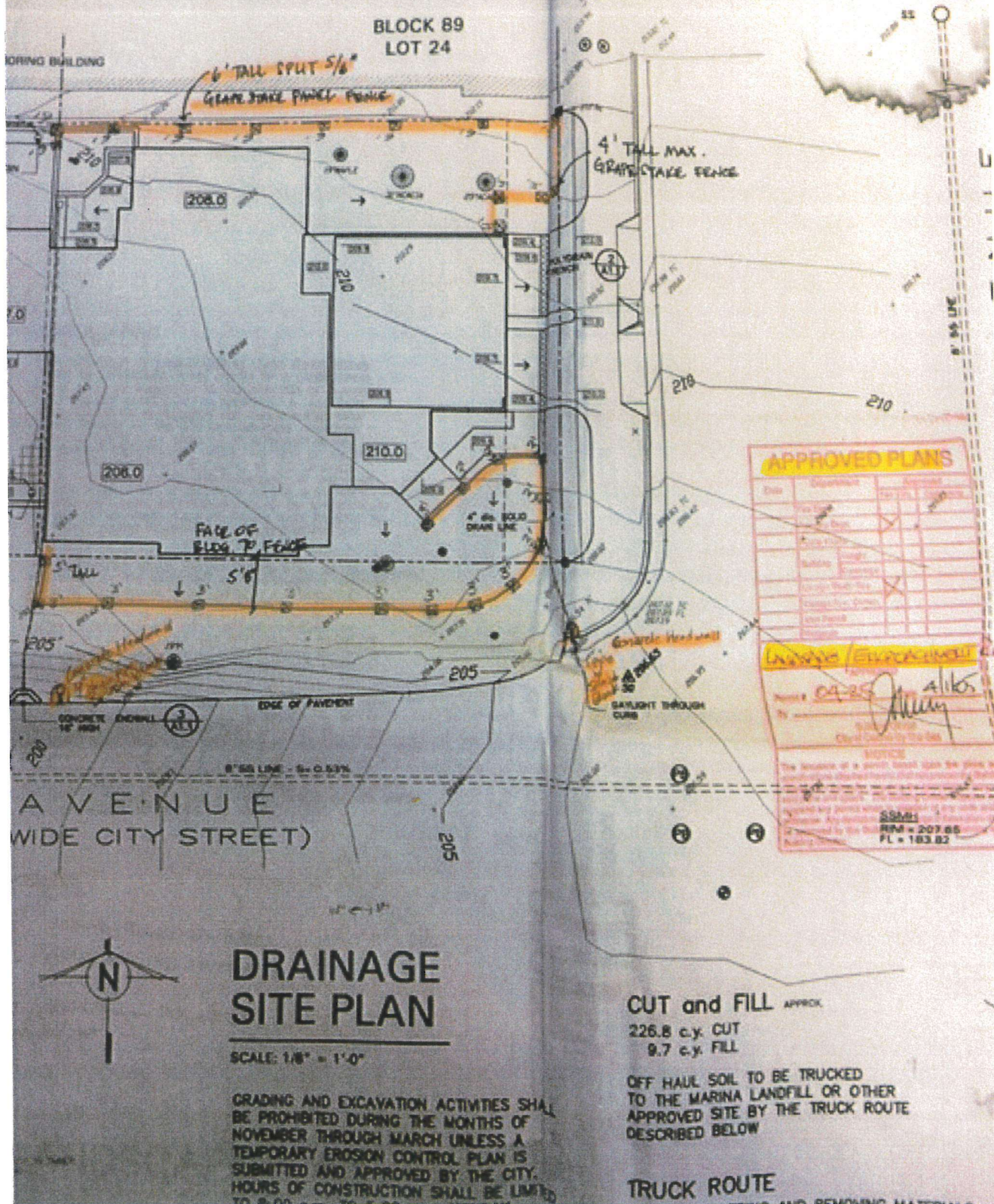


EXHIBIT C



COPY

JANUARY 27, 2006

TIM MARONEY
CITY OF CARMEL BY THE SEA

FAX NO. 831-620-2014

IN REGARD TO THE CERTIFICATE OF INSURANCE, MR. MACKEY'S AGENT IS LAURIE PIKE (FARMERS INSURANCE) IN MONTEREY. WE REQUESTED THE NEW CERTIFICATE AND SHE ADVISED THAT THE CITY OF CARMEL IS LISTED IN THE POLICY AND IT IS AN ON GOING LISTING.

LAURIE'S PHONE NUMBER IS 831-373-2925, SHE WILL BE CALLING YOU REGARDING THIS ISSUE. SHOULD THERE BE ANY OTHER PROBLEM YOU CAN CALL ME AT [redacted] AND I WILL GET BACK INVOLVED.

BEST WISHES!

JOHN H. ATWELL
ASSISTANT TO DON MACKEY

EXHIBIT D

ACORD CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YY)

4/18/2005

PRODUCER

Jankovsky General Insurance Agency
 1131 N Country Club Rd
 Tucson, Az 85716
 520-325-5000

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

INSURERS AFFORDING COVERAGE

INSURED

Mackey, Donald
 815 West Auto Mall Drive
 Tucson, AZ 85705

INSURER A: Farmers Insurance Exchange
 INSURER B: Truck Insurance Exchange
 INSURER C:
 INSURER D:
 INSURER E:

COVERAGES

THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

ISR TR	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	LIMITS
A	GENERAL LIABILITY	926746592 <i>9/16/05 20:4</i>	11/04/04	11/04/05	EACH OCCURRENCE \$100000
	<input type="checkbox"/> COMMERCIAL GENERAL LIABILITY				FIRE DAMAGE (Any one fire) \$
	<input type="checkbox"/> CLAIMS MADE <input checked="" type="checkbox"/> OCCUR				MED EXP (Any one person) \$ 1000
	<input checked="" type="checkbox"/> <u>Comp Pers Liab</u>				PERSONAL & ADV INJURY \$100000
	GEN'L AGGREGATE LIMIT APPLIES PER:				GENERAL AGGREGATE \$100000
	<input checked="" type="checkbox"/> POLICY <input type="checkbox"/> PRO.JECT <input type="checkbox"/> LOC				PRODUCTS - COMP/OP AGG \$
	AUTOMOBILE LIABILITY				COMBINED SINGLE LIMIT (Ea accident) \$
	<input type="checkbox"/> ANY AUTO				BODILY INJURY (Per person) \$
	<input type="checkbox"/> ALL OWNED AUTOS				BODILY INJURY (Per accident) \$
	<input type="checkbox"/> SCHEDULED AUTOS				PROPERTY DAMAGE (Per accident) \$
	Garage Liability				AUTO ONLY - EA ACCIDENT \$
	<input type="checkbox"/> ANY AUTO				OTHER THAN AUTO ONLY: EA ACC \$ AGG \$
B	EXCESS LIABILITY	60272-30-89 <u>Personal Umbrella</u> <i>C 6/21/02 9/15/0</i>	09-01-04	09-01-05	EACH OCCURRENCE \$5000000
	<input checked="" type="checkbox"/> OCCUR <input type="checkbox"/> CLAIMS MADE				AGGREGATE \$5000000
	<input type="checkbox"/> DEDUCTIBLE				\$
	RETENTION \$	\$	\$	\$	\$
	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY				WC STATUTORY LIMITS OTHER \$
					EL EACH ACCIDENT \$
					EL DISEASE - EA EMPLOYEE \$
	OTHER				EL DISEASE - POLICY LIMIT \$

DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLES/EXCLUSIONS ADDED BY ENDORSEMENT/SPECIAL PROVISIONS

Residence: Lot 25 Block 89, Carmel by the Sea, Carmel, Ca 93922
 AKA: Northwest Corner of 8th & Junipero, Carmel. Ca 93922

CERTIFICATE HOLDER

ADDITIONAL INSURED, INSURER LETTER:

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO DO SO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.

AUTHORIZED REPRESENTATIVE

[Signature]

COPY

WHEN RECORDED, MAIL TO:

CITY OF CARMEL-BY-THE-SEA
BOX CC
CARMEL-BY-THE-SEA CA 93921

COPY

THIS SPACE FOR RECORDER'S USE ONLY

HOLD HARMLESS ENCROACHMENT AGREEMENT

AGREEMENT made this _____ day of _____, 20____, between the CITY OF CARMEL-BY-THE-SEA, hereinafter called CITY, and _____ hereinafter called OWNER, with reference to the following facts:

OWNER is in possession of and owns certain real property in CITY known as Block _____, Lot(s) _____, Assessor's Parcel No. _____, Zoning District _____, street location _____.

OWNER has requested from CITY permission to construct and maintain a structural encroachment on CITY street or sidewalk area adjacent to or near the property, described as follows:

NOW, THEREFORE, the parties, in consideration of the mutual covenants contained herein, agree as follows:

1. CITY grants permission to OWNER to construct and maintain a structural encroachment on CITY street or sidewalk area adjacent to or near OWNER'S property, as described above. Said permission is subject to the following conditions:

- a. Execution of this Hold Harmless Agreement and compliance with the provisions of paragraph 3 below.
- b. _____

2. OWNER, his successors and assigns, agrees to name CITY an additional insured and to hold CITY harmless from any and all claims, actions and demands of third parties of any kind, character and description arising out of or due to any accident or mishap in, on, or about said structural encroachment so constructed or so maintained or any error or omission resulting in personal injury or property damage.

3. OWNER agrees to provide CITY and maintain a certificate of insurance from an insurance carrier acceptable to CITY certifying that OWNER has public liability and property damage insurance with limits of not less than \$500,000 combined single limit for personal injury and/or property damage for property located in the R-1 zoning district and limits of not less than \$1,000,000

for property located in all other zoning districts. The certificate must indicate this insurance is primary over any other valid or collectible insurance CITY may have, insures owner's performance of this Hold Harmless Agreement and that the Carrier will notify CITY in the event of any material change in the policy, including the nonrenewal thereof. Said Certificate of Insurance must name CITY, its elected officials, officers, agents and employees as additional insured insofar as the insurance pertains to this encroachment. Owner further agrees to maintain said insurance as long as said encroachment remains on CITY property.

In the event of cancellation or nonrenewal, the insurance company will give thirty (30) days' written notice to CITY. The Certificate must be signed by an authorized employee of the insurance carrier and mailed to : City Clerk, Carmel-by-the-Sea, P. O. Box CC, Carmel-by-the-Sea, CA 93921.

4. CITY may terminate and revoke this Agreement at any time that it is determined by the City Council to be in the best interests of City and necessary to promote the public health, safety or welfare. Any expense caused to OWNER, his successors or assigns, by termination of this Agreement shall be borne by OWNER, his successors or assigns.

5. The parties agree that this contract is for the direct benefit of the land in that it makes the property more usable and increases its value, as such, agree that the covenants herein shall run with the land, and the parties agree that the covenants shall bind the successors and assigns of OWNER.

CITY OF CARMEL-BY-THE-SEA:

By: Richard Guillen, City Administrator

ATTEST:

Karen Crouch, City Clerk

OWNER(S)

[Handwritten signature]
[Handwritten date: 4/18/05]

COPY

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California
County of Monterey

ss.

On _____, 20____, before me, _____, Notary Public,
personally appeared _____, personally known to me or _____ proved to
me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the
within instrument and acknowledgment to he/she/they executed the same in his/her/their authorized
capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon
behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal:

Signature of Notary

ANTHONY LOMBARDO & ASSOCIATES

A PROFESSIONAL CORPORATION

ANTHONY L. LOMBARDO
KELLY MCCARTHY SUTHERLAND
JOSEPH M. FENECH
CODY J. PHILLIPS

144 W. GABILAN STREET
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June 1, 2023

Our File No. 4822.000

David Potter, Mayor
Members of the City Council
City of Carmel-by-the-Sea
P.O. Box CC
Carmel-by-the-Sea, CA 93921

Re: Fountain Encroachment Permit EN 21-272 (APN 010-087-019)

Dear Mayor Potter and Members of the City Council:

In a separate letter we provided some of the relevant historical facts regarding the construction of the Fountains' home, the existing encroachment permit issued by the City and what the Fountains have endured for almost a decade. In this letter we are going to describe the legal and factual issues surrounding the issuance of a "replacement" encroachment permit to the Fountains as a result of the unexplained disappearance of the previous encroachment permit issued to this property for the fence and landscaping that have existed for more than 15 years.

The Fountains have a Vested Right to Maintain the Encroachments

As a preliminary matter, the Fountains have a vested right to maintain the encroachments in their current location as a result of a previously issued encroachment permit. The Fountains' predecessor-in-interest, Don Mackey, obtained an encroachment permit in 2005 to allow for the fence and landscaping on a small sliver of land adjacent to the home he was going to construct on the corner of Junipero and 8th Ave. In consideration of the encroachment, Mr. Mackey was required to construct a pedestrian pathway along the entirety of the south side of 8th Avenue.

It is well-settled law in California that if a party performs substantial work or expends substantial funds in good faith reliance on a permit issued by an administrative agency acquires a vested right in the permit (*Griffin v. County of Marin* (1958) 157 CA2d 507, 513)). In particular, development rights have been found to vest once a building permit has been issued for the work in question. This rule was restated in *Congregation ETZ Chaim v. City of Los Angeles* (9th Cir. 2004) 371 F.3d 1122 as follows, "[a] developer's right to develop property pursuant to its proposed plans vests when: (1) a valid building permit issues, and (2) the developer performs substantial work and incurs substantial liabilities in good faith reliance on the permit." *Id.* at 1125.

Here, Mr. Mackey constructed the home on the corner of Junipero and 8th as well as a pathway on the entire south side of 8th Avenue in reliance on the Planning Commission's permit approvals and the encroachment permit that the City issued. This work and expenditure of funds vested the rights conferred by the 2003 and 2005 permit under California law. Mr. Fountain therefore has a vested right to maintain the encroachments pursuant to the 2005 encroachment permit.

**Approval of a Replacement Encroachment Permit Would Be
Consistent with the City Standards**

Despite the issuance of an encroachment permit in 2005, the City has requested that the Fountains apply for a replacement encroachment permit due to the disappearance of the prior encroachment permit records.

A member of the public has previously argued that an encroachment permit application could not be approved (forgetting for the moment that one was approved in 2015) because it does not meet the standards in City Code Section 12.08.060. This is a misrepresentation of what the municipal code section says. Compliance or non-compliance with these standards is only determinative of whether or not the encroachment permit can be approved by the City Administrator or is referred to the City Council for action. (Section 12.08.050 (D)¹.)

Notwithstanding the fact that there is an existing and vested encroachment permit on the property from 2005 as well as the fact that we have seen no evidence in the materials presented to us through a Public Records Act request that the City typically adopts any findings for applications for permanent encroachments in the RC zone district, we believe the Fountains' request for the "replacement" encroachment permit is nonetheless clearly consistent with the City's standards as shown below.

**City Standards
(Contained in Municipal Code Section 12.08.060)**

A. Need. The applicant shall be determined to have a justifiable need for the encroachment, and the encroachment shall not be contrary to the public interest. The need for the encroachment was established in 2003 when the design of the Fountains' home and its yard improvements were changed to incorporate the small encroachment onto the hilltop adjacent to their home to create the small yard for their privacy and safety. Since the right of way has no other use, the issuance of the encroachment permit could not be contrary to the public interest. In addition, as a result of the previously approved permit amendment and encroachment permit, a public pathway was constructed on the south side of 8th between Junipero and Mission Streets as

¹ The staff report suggests that the standards provided in Section 12.08.060 are required findings for the approval of an encroachment permit. However, it is clear that based on the preceding Section 12.08.050(D), the standards are not required findings, as the City Administrator can refer the permit to the City Council if the City Administrator determines that the permit does not conform to the standards. Section 12.08.050(D) provides that "If the proposed encroachment does not conform to these standards, or it is the opinion of the City Administrator that the nature of the encroachment is contrary to the public interest or should be referred to the City Council for determination, then the application shall be scheduled for action by the City Council."

a condition of the approval of the permit. The construction of safe, legal pedestrian access is clearly in the public's interest.

B. Safety. The granting of an encroachment permit shall not create a hazard to public health or safety. The reapproval of the Fountains' encroachment permit would in fact enhance public health and safety. As a result of the issuance of the encroachment permit, the improvements to the right of way (fence and landscaping) will discourage members of the public from attempting to climb on this steep slope above the street and has already resulted in the construction of a safe pedestrian access path along 8th Avenue which has in fact eliminated a hazard to public health and safety created by the prior lack of a pedestrian path along 8th.

C. Drainage. The proposed encroachment shall not adversely affect the normal drainage of surface water, unless an acceptable mitigation is included that will be advantageous to the general public and meet the standards herein. The encroachment has no effect on the drainage pattern of surface water. If anything, the encroachment permit request ensures that the surface drainage will continue in its current configuration. If the City were to try and do anything else with this right of way area in question, it would alter the surface drainage pattern.

D. Circulation and Parking.

1. The proposed encroachment shall not adversely affect vehicular and/or pedestrian traffic nor the parking of vehicles. Neither the existing encroachment permit or the replacement encroachment permit had or will have a negative effect on vehicular or pedestrian access. In fact, quite the opposite is true. As a result of the issuance of the encroachment permit the City obtained safe pedestrian access on 8th Avenue which did not exist prior to the approval of the encroachment. This is a result of the amended condition of approval from 2003 to route Pedestrian access safely along the south side of 8th Avenue instead of the north side of 8th Avenue. As for vehicular traffic and parking, the encroachment does not extend into the roadway or any street parking spaces, and therefore does not interfere with vehicle traffic or parking.

2. The proposed encroachment shall not adversely impact existing rights-of-way nor preclude or make difficult the establishment or improvement of existing or potential streets or pedestrian ways. The encroachment has no effect on the existing right of way nor does it interfere with the improvement of potential street or pedestrian ways. As the public works director has stated on several occasions on ADA compliant sidewalk cannot be built in the area of the encroachment and the City Council has already rejected the only ADA compliant sidewalk that could be built on the north side of 8th which would require removal of trees, grading into the hillside and the construction of a large retaining wall.

E. Public Use and Enjoyment.

1. The proposed encroachment shall not diminish public use or enjoyment, either visual or physical, of the City property or public right-of-way to be encroached upon. The encroachments do not diminish the public's visual or physical use of the property in question because there is no public use of the encroachment area due to the steep terrain which makes it nearly inaccessible and unsafe for public use and the narrow strip adjacent to the Fountains' home is not visible from the street. In fact, the Fountains have historically maintained the

vegetation on the right of way both in the encroachment area and outside the encroachment on the adjacent right of way which improves the public's visual enjoyment of the right of way. The Fountains are willing to plant and maintain additional vegetation to screen the approved grape stake fence adjacent to their home in addition to the vegetation on the hillside above 8th Avenue.

Furthermore, through a Public Records Act request, I was able to obtain examples of encroachments that have been approved by the City since 2015 and all of them involve a more significant physical intrusion into the City's right of way, and many of them are clearly visible from the street (see the attached Exhibit 1 for copies of other encroachment permits provided by the City through a Public Records Act request and their descriptions) and would per se have a greater potential impact on the physical and visual public use and enjoyment of the City right of way than the small grape stake fence adjacent to the Fountains' home located 10 or more feet above 8th Avenue.

2. The encroachment and enjoyment shall be in the public interest. The encroachments in question are in place as a result of a 2005 encroachment permit which permitted the construction of a fence and landscaping and which required the construction of a pedestrian path on the south side of 8th Avenue. In addition to this path, the encroachment permit has and will result in the Fountains' landscaping and maintaining the right of way adjacent to their home on 8th Avenue. Both the creation of the public path and the maintenance of the landscaping are in the public interest.

3. The length of time an encroachment has existed shall not by itself prejudice a decision. While this standard makes it clear that a long-standing encroachment should not be approved just because it has been in place for a long time, this encroachment was approved by the City at the time the home was built and was given in consideration of the construction of a pedestrian path on 8th Avenue.

F. Compatibility.

1. The proposed encroachment and its mitigation shall be consistent with the General Plan and the adopted ordinances of the City. Particular attention shall be given to Section P1-48 of the General Plan, which prohibits the construction of sidewalks and concrete curbs in the R-1 district, unless necessary for drainage and/or pedestrian safety. This parcel is not located in an R-1 district, but in any event, the existing encroachment permit and the proposed replacement encroachment permit are not inconsistent with the general plan and adopted ordinances.

2. The encroachment shall not create, extend, or be reasonably likely to lead to an undesirable land use precedent. The issuance of this replacement encroachment permit would not set an undesirable precedent for the City and would be consistent with many other encroachment permits that have been issued throughout the City for the benefit of single family residences. These other encroachments include retaining walls, steps, and landscaping, similar to the encroachments on the Fountains' property (see Exhibit 1 for examples of other encroachments). In addition, the encroachment has and will result in a desirable precedent which was the construction of the pedestrian path and landscaping in the City right of way.

3. Granting of a permit shall not adversely affect the usability or enjoyment of one or more adjoining parcels. The encroachment permit would have no impact on any adjacent parcels.

4. The proposed encroachment and its mitigation shall be compatible with the surrounding area and adjoining properties. The encroachment permit is compatible with the surrounding area and adjoining properties has existed for nearly 20 years.

G. Public Property/Greenbelt.

1. The proposed encroachment shall not adversely affect any public property, including existing vegetation or its root structure, and shall not significantly reduce greenbelt area that may be used for tree planting. The previous and proposed encroachment permit positively impacts the public right of way by having constructed a pedestrian path on 8th Avenue and providing for landscaping on the north side of 8th Avenue.

2. Significant trees which would be affected by the proposed encroachment shall be identified by the Director of Forest, Parks and Beach and approval for removal shall follow City policy. No trees will need to be removed as a result of the encroachment permit.

H. Mitigation. When deemed appropriate by the City, the applicant shall include those measures appropriate to compensate the City for the loss of the use of City property or the public right-of-way, or to repair damage thereto. The relocation and construction of the sidewalk on the south side of 8th Avenue were deemed sufficient to compensate the City when the approved encroachment was approved in 2005. The Fountains are willing to agree to further conditions on the reissuance of this permit requiring them to plant and maintain vegetation on the City right of way adjacent to their home.

Based on the foregoing, it is clear that the encroachment is consistent with the City's standards.

Conclusion

The Fountains have a vested right to maintain the fence and landscaping pursuant to the 2005 encroachment permit that was issued by the City to Mr. Mackey. The replacement encroachment permit requested by City staff complies with the standards of the municipal code and has and will continue to result in a public benefit. The Fountains respectfully request that the City Council approve the replacement encroachment permit for the already permitted encroachments appurtenant to their home.

Respectfully,



Cody J. Phillips

Enclosures

cc: Chip Rerig, City Manager
Brian Pierik, City Attorney
Robert Harary, Public Works Director
Brandon Swanson, Director of Planning



ENCROACHMENT PERMIT

Applicant	Michael & Frances Henkel
Case or Building Permit No.	190159
Project Location	NE Corner Monte Verde & 9th
APN	010193009000
City Contact	Rob Culver, Public Works Superintendent, 831-620-2074
Date Approved	02/11/2020

The City of Carmel-by-the-Sea has approved a project at this location. The scope of the project is described below. Questions regarding this project may be directed to the city contact listed above.

Project Description:	Installation of 3 concrete paving pads located in right-of-way for walkway to front door of new residence. Contact: McNamee Construction 831-625-5033
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This notice must remain posted in visible sight of the street for the duration of the project.

EXHIBIT 1



ENCROACHMENT PERMIT

Applicant	Cordano Family Trust
Case or Building Permit No.	170151
Project Location	Carmelo 4 SE of Ocean Ave.
APN	010266010000
City Contact	Rob Culver, Public Works Superintendent, 831-620-2074
Date Approved	08/06/2018

The City of Carmel-by-the-Sea has approved a project at this location. The scope of the project is described below. Questions regarding this project may be directed to the city contact listed above.

Project Description:	Existing Carmel stone retaining wall.
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This notice must remain posted in visible sight of the street for the duration of the project.



ENCROACHMENT PERMIT

Applicant	OSBT Investments/Torres Hafnia West
Case or Building Permit No.	150038
Project Location	7TH AVE
APN	009201013000
City Contact	Rob Culver, Public Works Superintendent, 831-620-2074
Date Approved	09/29/2016

The City of Carmel-by-the-Sea has approved a project at this location. The scope of the project is described below. Questions regarding this project may be directed to the city contact listed above.

Project Description:	Repair existing stone steps on 7th ave. side of lot
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This notice must remain posted in visible sight of the street for the duration of the project.



ENCROACHMENT PERMIT

Applicant	Harinarayan & Neelakantan
Case or Building Permit No.	170122
Project Location	SCENIC RD
APN	010312010000
City Contact	Rob Culver, Public Works Superintendent, 831-620-2074
Date Approved	01/29/2018

The City of Carmel-by-the-Sea has approved a project at this location. The scope of the project is described below. Questions regarding this project may be directed to the city contact listed above.

Project Description:	Permanent Encroachment for existing stone wall.
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This notice must remain posted in visible sight of the street for the duration of the project.



ENCROACHMENT PERMIT

Applicant	Oceanview Ventures
Case or Building Permit No.	180171
Project Location	26174 DOLORES ST
APN	009381008000
City Contact	Rob Culver, Public Works Superintendent, 831-620-2074
Date Approved	03/25/2019

The City of Carmel-by-the-Sea has approved a project at this location. The scope of the project is described below. Questions regarding this project may be directed to the city contact listed above.

Project Description:	Continued use of encroaching stairs, retaining walls & gravel parking pad. Removal of low boulder planters in the right of way. Contact: Stocker & Allaire: 375-1890
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This notice must remain posted in visible sight of the street for the duration of the project.



ENCROACHMENT PERMIT

Applicant	Karen and Scott Munro
Case or Building Permit No.	180132
Project Location	Carmelo 2 NW of 7th
APN	010267004000
City Contact	Rob Culver, Public Works Superintendent, 831-620-2074
Date Approved	02/04/2019

The City of Carmel-by-the-Sea has approved a project at this location. The scope of the project is described below. Questions regarding this project may be directed to the city contact listed above.

Project Description:	Permit to legalize stairs in the right of way in addition to changing from stone to brick. Contact: Steele Tape Construction (831) 682-0470
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This notice must remain posted in visible sight of the street for the duration of the project.



ENCROACHMENT PERMIT

Applicant	Cheryl & Paul Sallomi
Case or Building Permit No.	210009
Project Location	Carmelo 4 NW of Ocean
APN	010253021000
City Contact	Rob Culver, Public Works Superintendent, 831-620-2074
Date Approved	12/16/2021

The City of Carmel-by-the-Sea has approved a project at this location. The scope of the project is described below. Questions regarding this project may be directed to the city contact listed above.

Project Description:	Construct new driveway to access garage, replace (e) wood retaining walls with stone walls, replace (e) brick steps with stone steps, install new flagstone entry walk, repour (e) sidewalk to conform to new drive, replace (e) light fixtures with new LED lighting. Contact: Eric Miller Architects (831) 372-0410
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This notice must remain posted in visible sight of the street for the duration of the project.