

# Attachment A

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# ATTACHMENT A

## DISCUSSION

### **PROJECT BACKGROUND:**

On November 24, 2014, William and Susan Jordan (applicants) filed an application for two Variance requests;

1. To allow a side yard setback reduction from 20 feet to 16 feet (consistent with the existing house) and
2. To allow an increase in lot coverage from 15% to 17.2% to allow for the construction of a 715 square foot master bedroom/bath addition to an existing 3,291 square foot single story, single family dwelling. This request was to allow the applicant to install a third bedroom in the house.

Staff informed the applicant that the side yard setback Variance could not be supported, and the applicant withdrew this portion of the request. The Variance to increase coverage from 15% to 17.2% was considered in light of the 20' height limitation and being similar to other approved Variances in the neighborhood (16% to 17.4%). At the Carmel Highlands Land Use Advisory Committee in December 2014, the applicant made a correction to the Variance request. The actual existing lot coverage was 18% lot coverage and the actual proposed lot coverage was 21%. In retrospect, staff should have identified that this was inconsistent with the neighborhood and indicated to the applicant that this could not be supported.

On February 26, 2015, the Zoning Administrator considered the request for a Variance to exceed lot coverage in order to construct a third bedroom. The staff recommendation was for approval based upon the facts that the site has a 20' foot height limit, there had been other variances in the area, and the addition is in the rear yard. The subject parcel is located within the public viewshed, and Key Policy 2.2.2, states that "all future development within the viewshed must harmonize and be clearly subordinate to the natural scenic character of the area" (CLUP Key Policy 2.2.2).

Staff presented this information to the Zoning Administrator who also listened to the testimony of the applicant. It was argued by the applicant that the variance was necessary to allow the applicant to have a third bedroom consistent with other homes in the area and the variance was needed to allow the home to be of similar size to other homes in the area. The Zoning Administrator wanted to better understand the nature of the neighborhood and directed staff to research the lot sizes, size of houses, number of bedrooms, number of second stories and any granted variances that exceeded the requested 21% lot coverage. The Zoning Administrator continued the hearing on the project to March 26, 2015 to give staff time to do the research.

For the March 26 hearing staff presented information showing that:

1. There are other two story houses in the area which maintain the 20' height limit;
2. Some homes have two bedrooms;
3. The subject house was remodeled from three bedrooms to two bedrooms;
4. The coverage of other similar sized lots for which a variance has been granted is less than 18% which is the size of this existing homes; and
5. The other homes in the area are of a similar size to this home.

After reviewing the additional information presented on March 26, 2015, the Zoning Administrator directed staff to prepare a Resolution to deny the project on the basis that there

were no special circumstances to allow a variance and that a variance would create a special privilege for the applicant. The hearing was continued to April 9, 2015 to prepare a Resolution to Deny the Variance.

At the April 9, 2015 hearing, the Zoning Administrator informed staff she had not received the staff report as of that day and, therefore, was not able to make a decision. The project was continued to April 30, 2015, at which time the Zoning Administrator denied the Variance, and the remainder of the application (Zoning Administrator Resolution No. 15-028 at **Attachment D**).

The Jordan's, (Appellant), represented by attorney John Bridges, pursuant to MCC Section 20.86.030, filed an appeal (Notice of Appeal at **Attachment C**) from the April 30, 2015, decision of the Zoning Administrator. The appeal challenged the Zoning Administrator's denial of the Variance request, and contended that the findings or decision are not supported by the evidence, and the decision was contrary to law. Said appeal was filed with the Clerk of the Board of Supervisors on May 18, 2015, within the 10-day time prescribed by Monterey County Code Section 20.86.030.C. The hearing on the appeal at the Board of Supervisors is de novo. The hearing before the Board of Supervisors was duly noticed for July 7, 2015. Appellant requested a continuance because their attorney was not available for the July 7, 2015 hearing, and the Board continued the hearing to July 14, 2015.

On December 15, 2014, the Carmel Highlands Land Use Advisory Committee recommended approval (5-0 vote). The LUAC agreed with the applicant's justification letter and wanted clarification that the roof height over the new addition does not exceed 20 feet.

## **ANALYSIS**

Variations are intended to give relief to Zoning Ordinance requirements when the strict application of the provisions of the zoning code would preclude development of the property or produce a unique hardship due to a peculiarity of the particular parcel. As such the test for approval of a variance should make variances hard to obtain. Pursuant to State law and Section 20.78 of Monterey County Code, Variations can only be granted when each of the following three findings are made:

- 1. That because of special circumstances applicable to the subject property, including size, shape, topography, location or surroundings, the strict application of this Title is found to deprive the subject property of privileges enjoyed by other properties in the vicinity and under identical zone classification; and*
- 2. That the variance not constitute a grant of special privileges inconsistent with the limitations upon other properties in the vicinity and zone in which such property is situated.*
- 3. A Variance shall not be granted for a use or activity which is not otherwise expressly authorized by the zone regulation governing the parcel of property.*

The facts associated with each of the findings can be summarized as follows:

- 1. There are no special circumstances, applicable to the subject property that would deprive the subject property of privileges enjoyed by other properties in the vicinity:**
  - The subject parcel is average size compared to all the legal nonconforming lots in the vicinity; and therefore, has no special circumstance that would deprive it from any

privileges enjoyed by others. The subject parcel not only has one of the larger homes on it, but has the highest lot coverage ratio.

- The existing home has a coverage of 18% which already exceeds the size allowed by other variances.
- No other variance has been granted for a home above 18%, the applicant is requesting 21%. The subject property already enjoys a larger home than other properties in the neighborhood. The existing 18% coverage already exceeds what others enjoy, thus no special circumstance.
- Evidence has shown that the applicants can build a second story and maintain the existing legal nonconforming 18% lot coverage. There are currently 11 second story structures within the immediate vicinity. These second story structures are modest additions that do not hinder private views.

The parcel is zoned Low Density Residential/1 unit per acre-Design Control District, with a 20 foot height limit in the Coastal Zone. The parcel is approximately 18,753 square feet (.43 acres). Allowable maximum lot coverage is 15%. Existing lot coverage is 18%. When the Carmel Area Land Use Plan (CLUP) was adopted in October, 1982, many of the parcels that were less than one acre became legal nonconforming as to lot coverage. The Jordan lot is average size compared to all the legal nonconforming lots in the area.

The subject parcel is located within the public viewshed; and the Carmel Area Land Use Plan requires all future development within the viewshed must harmonize and be clearly subordinate to the natural scenic character of the area. (CLUP Key Policy 2.2.2) In 1995, CLUP Policy 2.2.5.2 was updated to include “To ensure that new development in the Yankee Point area remains subordinate to the visual resources of the area, and to ensure that visual access from Highway 1, Yankee Point Drive, and Mal Paso Road is protected, the height limit in the Yankee Point area of Carmel Highlands-Riviera, for all properties seaward of Yankee Point Drive, and for properties with frontage along the east right of way line of Yankee Point Drive that face such properties seaward of Yankee Point Drive, shall be 20 feet. In addition to such height limits, new development shall be subject to design guidelines to be adopted by the Planning Commission for the Yankee Point area. Such guidelines shall affect the visibility and design of structures in a manner so as to preserve and protect, to the maximum extent feasible, public visual resources and access described herein.”

There is a reason these parcels have a 20 foot height limit, to protect Public Viewshed to the maximum extent possible. The applicants want to preserve the privacy and views of their neighbors all of whom have expressed support for the project. The applicants also desire to maintain the architectural design integrity of the existing house (single story). However, private views are not protected in the Carmel Area Land Use Plan and the applicants have the ability to build a second story. The 11 second story homes on Yankee Point do not block private views on the street above, which is Carmel Riviera Road. Carmel Riviera Road is approximately 10 feet above Yankee Point Road and has a 26 foot height limit. Both the 10 foot elevation and the 26 foot height limit preserve the private views of homeowners on Carmel Riviera Road.

## **2. Variance not needed for property owner to enjoy privileges enjoyed by other properties in the vicinity under identical circumstances:**

- Six variances were granted in the immediate area to exceed allowable lot coverage. The highest lot coverage granted from these variances is 17.4%. The existing Jordan home has a lot coverage of 18% and the request is for 21%. Of the six variances, four of them

are to allow second stories on legal nonconforming structures. The Jordan's' request is far above any coverage allowed for other homes in the area which would constitute a special privilege.

- The applicant's variance justification stated that this a two bedroom home and the applicants are being deprived of a third bedroom and that other houses in the vicinity have more bedrooms. However, research showed that out of 24 homes within the immediate vicinity, 8 of them are two bedroom homes, 9 of these are three bedroom homes and 7 of them have 4 bedrooms. There is sufficient area within the 3,291 square foot structure to remodel with additional bedrooms. In 2013, prior to the Jordans owning the property, the previous owner obtained a building permit to remodel the interior to include enlarging the kitchen and enlarging two bathrooms by removing the third bedroom. The Jordan home was once a three bedroom home.

### **APPELLANTS' CONTENTIONS AND STAFF RESPONSE:**

The Appellant contends that the Zoning Administrator's decision and findings are not supported by the evidence, and that the Zoning Administrator's decision is contrary to law. The Appellant's contentions and staff's response to each of the Appellant's specific contentions follows:

#### **Appellants' Contention to ZA Finding #6:**

**ZA Finding #6: The Variance requested by the Jordans should be granted because of special circumstances applicable to their property including size.**

*"As noted in the staff recommendation for approval and as similarly found for others, special circumstances do exist in this case (namely the small size of the parcel) to justify the granting of a variance. Small lots like the Jordans are normally subject to MDR zoning which typically allows 25% - 35% lot coverage. The variance request is only for 21% coverage. In denying the project, the Zoning Administrator applied the wrong legal standard in Finding 6c and d by looking only to the "immediate" area and vicinity. In reviewing a variance application the correct legal standard is comparison to "other properties in the vicinity and under identical zone classification". The Zoning Administrator's consideration was overly narrow (looking only to the "immediate" area/vicinity). When this broader "vicinity under identical zone classification" is considered, it is obvious that the Jordan's house is far from being "one of the larger lots and larger homes" in the neighborhood as suggested by the Zoning Administrator. Of the 63 lots in the neighborhood, at least 25 of them are larger than the Jordan's (placing the Jordan's in about the mid-range of lot sizes). Also, the vast majority of homes in the neighborhood have 3 or more bedrooms. Therefore, the ZA's Finding 6 is both contrary to law and is not supported by the applicable evidence."*

#### **Staff's response to Appellants' Contention to ZA Finding #6:**

The subject parcel and all the parcels on Yankee Point Road are zoned "LDR/1-D (20) (CZ)", Low Density Residential/1 unit per acre-Design Control District, with a 20 foot height limit in the Coastal Zone. The parcels on Carmel Riviera Road are zoned LDR/1-D (26) (CZ)", Low Density Residential/1 unit per acre-Design Control District, with a 26 foot height limit in the Coastal Zone. These are not identical zone classifications. The zoning overlay on Carmel Riviera Road has a higher height limit; thus, allowing the homes on Carmel Riviera road to have greater bulk and mass.

The Appellant contends that a different zoning standard should be applied to this location to allow greater lot coverage than that allowed in the LDR. The lower coverage requirement of the LDR is consistent with Key Policy 2.2.2, cited above that *“all future development within the viewshed must harmonize and be clearly subordinate to the natural scenic character of the area.”* The lower coverage maintains a limit on the size of the home in the visually sensitive location where homes are required to be subordinate to the natural scenic beauty of the area. The Zoning Administrator did not apply the wrong standard, as the finding requires a comparison of the privileges enjoyed by others in the vicinity. All of the parcels on Yankee Point Road that are less than one acre became legal nonconforming. The Board of Supervisors could find that the substandard lot sizes in this area are unique circumstances which justify approval of the variance. As a matter of practice it is not good to approve a request for one property owner that the County would not approve for everyone else. When this is applied to Variances, it indicates that a zone change is warranted, this is discussed in more detail below.

The Jordan home has the highest lot coverage (18%) compared to the other nonconforming lots; meaning, the house is bigger than most, and therefore, there is no special circumstance. The information presented to the Zoning Administrator showed that in terms of variances which had been granted, the coverage of this house is already larger than the coverage for any other variance which had been granted. There are alternatives to allow the installation of a third bedroom within this 3,200 square foot home without approval of a variance.

Research of the immediate area (approximately 20 homes) shows an average sized home of 2,500 square feet with six of them being over 3,000 square feet, one of them being the Jordan home. As stated above, the Jordan home had three bedrooms at one time. The appellant would like to introduce areas with larger lots to justify the size of this home that is not the standard. The standard is “identical circumstances” which is what the Zoning Administrator considered, and found that this home already exceeds the coverage of any other variance which has been granted, so the property owner is not being deprived of privileges enjoyed by others.

It should also be noted that the six granted variances are located on both Yankee Point Road and Carmel Riviera Road, not just the immediate area.

Subsequent to the appeal map showing lot area, house size, coverage, and number of bedrooms was submitted to the County (Attachment F.) This map includes the area of second story homes within the lot coverage. Second stories are not calculated in the lot coverage, staff is working at developing a complete matrix of this information with correct calculations, but this could not be completed for this report. This will be forwarded to the Board via separate cover.

**Appellants’ Contention to ZA Finding #7: The coverage variance requested by the Jordans would not constitute a grant of special privilege.**

*“Once again, the Zoning Administrator applied an incorrect legal standard by focusing on whether the variance was “necessary to allow development of the property” rather than whether it would actually grant a special privilege. The Zoning Administrator points to the amount of coverage variance granted for other applicants and argues that the maximum of those others was only 17.4%. There are, however, two flaws in this analysis. One project the Zoning Administrator pointed to actually permitted a 2.2 increase over existing coverage. Similarly, another of the variances in the neighborhood permitted a 2% increase over existing coverage. The Jordan’s original project (a 3% coverage increase over existing) is similar to these other granted variances and the reduced project (a 1.9% coverage increase over existing) is actually less than both of these others. Second,*

*to be fair and truly compare “apples to apples”, because all of the Jordan’s development would be on the ground floor, the second story elements of the other variance properties should be accounted for as if they were ground floor additions as well. When this single-story vs. two-story differential is accounted for, total coverage for the other variance properties in the neighborhood approach up to 24% (as contrasted to the Jordan’s request for 21% or 19.9% total coverage).*

*In addition, it is also legally appropriate to account for this single-story vs. two-story differential because of the view sensitivities in the neighborhood. It is also a legitimate legal consideration in that section 20.78.050.c requires conditions be attached to variances in order to “preserve the integrity and character of the zoning district.” Neighborhood character and integrity are legitimate legal considerations, and the Jordan’s good deed toward their neighbors and the neighborhood character should not be punished with a denial. When fairly comparing the Jordan’s circumstance and their variance request in the context of the legally appropriate vicinity, it is apparent that the Jordan’s modest request for a ground floor third bedroom would not grant any special privilege.”*

**Staff Response to Appellants’ Contention to ZA Finding #7:**

For perspective, it is important to remember that the maximum building coverage at this location is 15%. Other variances have been approved which allowed variances up to 17.4% (most of them to allow second stories to legal non conforming structures.) The applicant argues that a 3% addition (18% to 21%) is similar to the 2.4% increase granted to another property. The fact that this argument ignores is that the actual increase is 6%. The request is actually an increase from 15% to 21%.

As stated above, evidence has shown that the applicants can build a second story and maintain the existing legal nonconforming 18% lot coverage within the 20’ height limitation. There are currently 11 second story structures within the immediate vicinity. Of the six previously granted Variances within the neighborhood, four of them were also for 2<sup>nd</sup> story additions, thus keeping the existing legal nonconforming lot coverage to a minimum. Also, of the six, the highest lot coverage is 17.4%, with a granted variance for a second story only, thus not increasing lot coverage. Allowing a lot coverage increase to 21% would be granting a special privilege.

**Appellants’ Contention to ZA Finding #8: The variance requested by the Jordans would not grant a use not otherwise expressly authorized in the in the zone.**

*“As noted in the staff recommendation for approval, the LDR zone allows construction and use of a single family dwelling and accessory structures and associated site improvements. A third bedroom on the ground floor of the Jordan’s house is therefore a use authorized under the zoning regulations. The Zoning Administrator suggests there is evidence in the record that the applicants can build a second story on their home. First, there is no such evidence in the record other than anecdotal references in the staff report to the fact that there are other two story homes in the area (several of which preceded the 20’ height restriction). Second, such evidence is, in any event, not relevant to the nature of the use (a bedroom). Finally, as noted above, the Jordans have opted to preserve the integrity and character of their neighborhood by sacrificing their own private view opportunities in favor of their neighbors’ views.”*

**Staff Response to Appellants’ Contention to ZA Finding #8:**

As stated above, of the 20 homes located on Yankee Point Road, 11 of them are modest two story homes. There may be one structure that is over the 20 foot height limit. Of the six Variances granted, four of them were requests for two stories. Opting to protect their neighbors’ views is not a legal reason to grant a variance. Private views are not protected in the Carmel Area Land Use



Plan. In addition a recent permit has been granted to construct a two story addition to the home immediately adjacent to the proposed project.

### **III. Appellants' Conclusion:**

*"The practical effect of the Zoning Administrator's ruling would be to force the Jordan's to attempt to build a second story on their house which would certainly create ill will and conflict in the neighborhood. In light of the above, the law, facts, and equities in this case support the granting of a variance instead. We therefore, respectfully request the Board uphold the appeal and grant the Jordan's variance request in accordance with the findings and evidence recommended by staff in Attachment 4 [of the appeal] augmented as appropriate with the additional evidence presented herein."*

### **Staff's Response to Conclusion:**

The applicant is not being deprived of privileges enjoyed by other properties. When the Carmel Area Land Use Plan was adopted in 1982, many of the parcels less than one acre became legal nonconforming as to lot coverage. This lot is average size among all the nonconforming lots in the area. This lot not only has one of the larger homes on it, but has the highest lot coverage ratio. The property already exceeds allowable lot coverage by 3% which is one of the highest lot coverage percentages in the area and the request for a variance would result in a total of 6% increase. This would be more than double the percentage of any other variance. There are 11 houses on Yankee Point that are second story homes that do not infringe on the neighboring properties behind them. Carmel Riviera Road is at least 10 feet above Yankee Point Road and has a 26 foot height limit, in order to maintain private views.

A variance would constitute a grant of special privilege inconsistent with the limitations upon other properties within vicinity and same zone. A variance is for a property that has a special circumstance depriving the property owner the same benefit as others. The Jordan's property already has more lot coverage than most properties out on Yankee Point. The request for 21% lot coverage far exceeds any of the variances granted within the neighborhood. This could become the precedent.

### **ADDITIONAL CONSIDERATION -- ZONING**

In situations where there are multiple variances, the question needs to be asked whether the zoning is appropriate for the given context. In this particular case the Low Density Residential District is typically intended for larger lots with a higher percentage of open space around the structures. In this case the lot sizes are smaller than one acre and several variances have been approved in the past. Variances are intended to grant relief where there are unique circumstances precluding development of the property. Variances should be the exception and not the rule. Where multiple variances are granted, it warrants consideration of whether the Zoning District is appropriate for the location. In this context it would be preferable to change the zoning in the neighborhood to allow a higher percentage of coverage on these lots rather than to process variances to allow homes to exceed lot coverage. Much of the applicant's justification for the variance is focused on the small size of the lot which is more appropriately addressed through zoning since all the lots in the immediate area share that constraint.

It may have been that the LDR district was chosen for this location to preclude further subdivision of the parcels, and a resulting increase in the number of units. The property could be rezoned to a MDR which could have a minimum lot size of 6,000 square feet, but when combined with a B-6 overlay, no further subdivision would be allowed.

**ENVIRONMENTAL REVIEW:**

California Environmental Quality Act (CEQA), Public Resources Code Section 21080 (b) (5) and CEQA Guidelines Section 15270 (a), statutorily exempts projects which a public agency rejects or disapproves. If the Board were to desire to grant the variance and application, then the project could be categorically exempt pursuant to CEQA Section 15301 (e), additions to existing structures provided that the addition will not result in an increase of more than 50 percent of the floor area of the structure before the addition, or 2,500 square feet, whichever is less.

**SUMMARY:**

In order to make a finding that there are special circumstances applicable to subject property that deprive subject property of privileges enjoyed by other properties in the vicinity, there must be something restrictive about the property that other properties are not encumbered by. The subject lot size is average among the existing nonconforming lots that were created in 1982, and has one of the larger homes on it. No other variance has been granted for a home above 17.4%, the applicant is requesting 21%. The existing 18% coverage already exceeds what others enjoy. The special circumstance associated with the lot is that it is non-conforming, like all the other lots in the neighborhood.

In order to find that the applicant is being deprived of privileges enjoyed by other properties, there must be something about the property which precludes the applicant from the enjoyment of their property consistent with other property in the neighborhood. The subject home already exceeds the allowable lot coverage by 3% which is one of the highest lot coverage percentages in the area and this request would increase the coverage to 6% above that allowed by zoning. There are 11 houses on Yankee Point that are second story homes that do not infringe on the neighboring properties behind them. In fact, Carmel Riviera Road is at least 10 feet above Yankee Point Road and has a 26 foot height limit, in order to maintain private views. The request for 21% lot coverage far exceeds any of the variances granted within the neighborhood. This could become the precedent.

Therefore, staff recommends that the Board of Supervisors adopt a resolution to:

- a. Deny an appeal by William and Susan Jordan from a decision of the Monterey County Zoning Administrator denying an application (Jordan/PLN14034) for a Variance to increase lot coverage from 15% to 21%; and a Coastal Administrative Permit and Design Approval for the construction of a 715 square foot master bedroom/bath addition to an existing 3,291 square foot single story single family dwelling, and
- b. Find the project Statutorily Exempt per Section 15270 (a) of the CEQA Guidelines; and
- c. Deny the Variance to increase lot coverage from 15% to 21%; and a Coastal Administrative Permit and Design Approval for the construction of a 715 square foot master bedroom/bath addition to an existing 3,291 square foot single story single family dwelling.

**Alternative:**

As an alternative if the Board of Supervisors as a policy decision would like to allow higher lot coverage in this area, the most appropriate action would be to direct staff to undertake a modification to the zoning to a district which allows smaller lot sizes and/or a higher coverage. Or if the Board of Supervisors finds that the small lot sizes are a unique circumstance which precludes normal development of the property, then the Board could uphold the appeal.

Should the Board want to uphold the appeal, the Board would need to adopt a motion of intent and continue the hearing to a date certain to enable staff to return with a resolution to approve the appeal and approve the Variance.

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