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TO: Honorable Chair and Commissioners of the City of Capitola Planning Commission

FROM: Samantha W. Zutler, City Attorney
Leila Moshref-Danesh, Deputy City Attorney

DATE: August 12, 2022

RE: 1350 49th Avenue Amendment to Design Permit #18-0050

At the July 21, 2022 meeting, the Planning Commission considered a request to amend Design Permit #18-0050. At that meeting, the Commission requested an opinion from the City Attorney regarding whether the City could approve a design permit that includes work within an existing private encroachment, and whether an agreement between the property owners or a lot line adjustment should be required to permit the work.

As explained further below, we advise that the determination of the legal status of the existing encroachment is a private matter between neighbors. For the City's purpose of considering the subject amended design permit, a condition of approval requiring an agreement for access during construction will sufficiently demonstrate the applicant's requisite authority to perform the described work.¹

I. Procedural History

The subject property, zoned R-1, is a quadrangular lot with no equal sides or angles located at the corner of Topaz Street and 49th Avenue in the Jewel Box neighborhood.² The property is occupied by an existing nonconforming single-family residence. A portion of the existing residence appears to encroach slightly onto 1335 Prospect Avenue, the neighboring property to the south. The applicant advises that the encroachment has existed for decades, and significantly predates the applicant's

¹ Please note that the recommendations provided in this memorandum are fact-specific and based solely on the information provided by the applicant and City Planning staff, as well as the administrative record thus far. In addition, the information and recommendations contained in this memorandum do not and are not intended to constitute legal advice or establish an attorney-client relationship with any individual or entity other than the City of Capitola Planning Commission. All readers of this memorandum should contact their attorney to obtain legal advice with respect to any legal matter.

² 1350 49th Avenue in the City of Capitola.

ownership; however, both the applicant and the owner of 1335 Prospect are now aware of the encroachment.

On May 3, 2018, the Planning Commission approved Design Permit #18-0050 for the construction of first- and second-story additions to the existing single-family residence on the subject property. To our knowledge, this permit remains active, and includes a setback variance on the north side of the property.

On January 31, 2022, the applicant requested an amendment to Design Permit #18-0050 based on certain changes to the approved project, including the following work related to the encroaching portion of the existing residence:

1. Removal of an existing eight square foot rectangular projection from the encroachment;
2. Removal of an existing roof overhang from the encroachment, and replacement with a flush fascia and metal gutter that purports to direct water away from 1335 Prospect;
3. Fire-rating of the existing southerly wall; and
4. Replacement of the existing wood panel exterior finish with a stucco finish that purports to provide additional fire protection.

II. Analysis

Based on the information provided, the legal status of the encroachment is unclear. That said, the City need not require the legal status to be determined due to the following two project-specific factors:

First, according to the application materials, the encroachment already exists, and has existed for many years. The design permit application does not propose expanding the encroachment or establishing a new one. Instead, the proposed work appears to improve existing conditions by removing a portion of the encroaching structure and improving fire safety, drainage. If the project proposed expanding the encroachment, then additional measures such as a private encroachment agreement or a lot line adjustment would likely be necessary.

Second, the applicant has communicated that the owner of 1335 Prospect is willing to consent to the work being proposed. Whenever a property issue arises between

neighbors, the most ideal outcome is for the neighbors to work the issue out themselves. Here, it appears that the owners of 1350 49th and 1335 Prospect have reached an agreement with regard to this particular project.³ As a result, a written agreement that memorializes this consent would be sufficient to demonstrate the applicant's authority to do the proposed work.

III. Recommendation

We recommend that, should the Planning Commission approve the amended design permit, a condition of approval be included that requires the applicant to provide, prior to the issuance of a building permit, evidence of a written agreement with the owner of 1335 Prospect that: 1) acknowledges the existence of the encroachment; and 2) provides the applicant with permission to access the northerly side yard of 1335 Prospect to conduct the work as described in the amended permit.

³ It is possible that, at a future time, the existing or future property owners of 1350 49th or 1335 Prospect may desire to formalize or dispense with the encroachment in some manner, including but not limited to an encroachment agreement or a lot line adjustment. However, this would be up to them to pursue and negotiate as a private property matter. The City does not have the duty to determine or resolve the legal status of the existing encroachment.