



February 2, 2018

Via Email

Mr. Glen R. Mozingo
City Attorney
City of Carmel by the Sea
P.O. Box CC
Carmel-by-the-Sea, CA 93921
carmelcityatty@aol.com

RE: **Fink Trash Enclosure Encroachment (EN 17-67)**
File No.:3128.019

Dear Mr. Mozingo:

Our office represents David Fink on the above referenced matter. As you may know, the trash enclosure, which was previously approved by the City, has been located within Piccadilly Park without issue for the past 12 years. For reasons that we believe are primarily political, the trash enclosure has now become an issue and Staff is now recommending that the City Council effectively order Mr. Fink to remove the encroachment. Aside from the infeasibility of relocating the trash and recycle storage area to the basement, which is discussed in more detail below, there are legal implications if the City Council hears this application and chooses to deny the encroachment permit.

I. Mr. Fink is Unable to Have a Fair Hearing on his Application

California law mandates that Mr. Fink is entitled to a fair hearing on his encroachment permit application. (See attached letter from our office to you in conjunction with the Council's prior request to review Mr. Fink's roof top condominium project). However, no fair hearing is possible. Mayor Dallas in his request for review of Mr. Fink's condo project (attached as an exhibit to our prior letter) identifies the trash enclosure as a component of the project that he could not support.

In addition and of great concern are Mayor Dallas' comments to another business owner in Carmel that Mr. Fink would never get another project approved in this town, which occurred

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coincidentally after Mayor Dallas' request for review of the condominium was deemed invalid and the Planning Commission's decision was final. The date and substance of this conversation with Mayor Dallas has already been conveyed to the independent investigator, who the City has hired to investigate variety of claims against Mayor Dallas. Mayor Dallas' statements, combined with the reference to the trash enclosures in this request for review, make it impossible for Mayor Dallas to consider the encroachment permit application as a fair and impartial decision-maker. We are not aware of what other written communications, if any, there are in the record regarding the Mayor or any other Council member's issue with the Council and would urge you to look into it further. We also, not clear what oral communications or active lobbying to deny the encroachment permit has already occurred. At a minimum, Mayor Dallas must be disqualified from hearing the encroachment permit application.

II. The City Approved the Trash Enclosure in 2006 and Cannot Lawfully, 12 years later, rescind this Approval

Staff has taken the position that the City's Community Planning and Building Department ("Department") somehow violated its Code when it approved and issued a permit for the trash enclosure in 2006. However, California law presumes that "official duty has been regularly performed." (Evidence Code §664). The fact that the City might not have a record of an encroachment permit application or an official City determination on an encroachment permit is irrelevant.

In this case, the Department is presumed to have evaluated and approved the encroachment in accordance with the requirements of the Code. The Code expressly authorizes City Staff to administratively approve encroachments when the encroachment conforms to the standards of the Code. Accordingly, even if there is no documentation in the file of an approved encroachment permit, the law presumes that this approval occurred in 2006 and the City followed the law. (see *City of Sacramento v. State Water Resources Control Bd.* (1992) 2 Cal. App. 4th 960, 976 [the relevant inquiry here is not whether the record establishes compliance but whether the record contains evidence that the City failed to comply with the requirements of its code. In the absence of contrary evidence, the Court presumes regular performance of official duty]). Moreover, the City has for the last 12 years treated this trash enclosure as a properly permitted encroachment. Clearly, if the City had any doubt that the trash enclosure was lawful, the City would have demanded its removal years ago.

Because California law presumes that the encroachment was properly permitted and Mr. Fink relied upon this permit and spent thousands of dollars to construct trash enclosure, Mr. Fink has acquired a vested right to maintain the enclosure at its current location. Mr. Fink was not required to apply for an encroachment permit because of this prior approval and agreed to do so simply as a clean-up item and in the spirit of cooperation. Staff also

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improperly required this application as a condition of Mr. Fink's condominium project even though there was no nexus between the impacts of the condo and the need for this condition.

Because the law presumes that the encroachment permit was validly issued in 2006, this matter should be taken off calendar.

III. The Fire Department Has No Issue with Trash Enclosure

Staff is recommending denial of the trash enclosure, in part, because the enclosure allegedly creates a public health and safety issue and violates the Building Code. However, what Staff has omitted from Staff Report is the attached Fire Department Inspection of Cantinetta Luca's, which had no issue with the trash enclosure, except to note that a clear pathway should be maintained from the exit door the restaurant to the exit door of the enclosure. Because the Fire Department did not require removal of trash enclosure as part of this inspection or identify any fire code or building code violation, Mr. Fink was understandably surprised to received recent correspondence from the City's Building Official indicating that the trash enclosure violations the building code. Again and coincidentally, this letter from the City's Building Official was sent after the request for review was deemed invalid and after the conversation that Mayor Dallas had with the business owner referenced above indicating that Mr. Fink would never get anything approved in this town.

IV. Relocating the Trash Storage to the Basement Is Not Option and Would Create Hazard

Staff proposes that Mr. Fink remove the trash enclosure and store garbage and recycling in the basement. However, relocating and storing the volume of trash and recyclables that the restaurant generates on a weekly basis to the basement is not feasible, as at least, two members of the City's Planning Commission recognized when they visited the restaurant. Staff does not mention that there is no elevator leading from the basement to the first floor or note that the weight of the recycling container alone is approximately 200 pounds. Restaurant staff would be required to carry or pull these wheeled containers up a stairwell each week to ensure these containers are placed curb side for pick up. This creates an obvious safety issue for restaurant staff.

These are just a few of the procedural and substantive issues with the encroachment permit application that the City Council is scheduled to consider denying on February 6, 2018. At this point, we think the best course of action is take the matter off calendar and recognize that the Department's prior approval of the encroachment. If the City does not recognize the prior encroachment approval, we would request that the City staff and the City Attorney recommend that the City Council continue its hearing on February 6, 2018 in order for City staff and the applicant to meet and confer to discuss some of the issues raised in this letter.

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If the Council proceeds with the hearing, the City once again faces significant legal exposure based on the *Woody Group's* case discussed in the attached letter, particularly if Mayor Dallas does not recuse himself from hearing the application and/or the application is denied.

Please let me know if City staff is willing to recognize the Department's prior approval, and if not, whether City staff would recommend continuing the February 6 meeting. Thank you.

Very truly yours,
JRG Attorneys at Law



Jason Retterer
JSR

cc: Chip Rerig (via email)
Marc Wiener (via email)

Encl.