

Planning Commissioners,

The White/Wisniewski plan primarily benefits the Whites by preserving their trees and mitigating fire hazards to their house. The proposed extent of “view restoration” for the Deftos property is a narrow 6-foot window through the middle of tree 1, which is not substantial and would not be achieved for more than a year. The proposed extent of view restoration for the Michaels property is limited to the view blocked by trees 4 and 5 and waiting for tree 3 to grow and be trimmed to become a “skyline tree” in the distant future. For trees 1, 2, and 3, the plan maintains the wall of needles and branches comprising the remaining canopy at a height that maximally blocks our views. The plan would take multiple years to complete, which is contrary to the explicit requirements of the Ordinance. It circumvents the prescribed methodology of the Ordinance for hiring and financing the tree service contractor. It is a plan that prioritizes the White’s interests over the interests of their neighbors, whom they have already burdened for many years.

1. The White/Wisniewski plan will not substantially restore our views.

The proposed extent of view restoration in the White/Wisniewski plan for the Deftos property is a 6-foot window through the middle of tree #1, which will create an aesthetically unpleasing tree, and will take more than a year to achieve. The 6-foot window represents the restoration of 1/9th (11%) of our prior view, which is not substantial. The remainder of the proposed work is for fire hazard reduction and successive thinning/lowering of the canopy. Due to overlap of the canopies in the visual field, the reduction in the width of the canopies to reduce the fire hazard imposed by the trees will do nothing to restore the view from either the Deftos or Michaels properties. We previously established through unrefuted photographic evidence, mathematics, and the expert testimony of Mr. Walton that thinning the canopy 20-40% will not substantially restore our view. Tree 1 cannot be lowered enough to restore our view since the green growing tips have been removed below the level of our prior view. With interval regrowth, successive thinning/lowering of the canopy will have the counter-productive effect of maintaining the canopy in a location where it maximally blocks our view.

For the Michaels property, the White/Wisniewski plan will only preserve the view blocked by trees 4 and 5, which were recently trimmed only under pressure after we filed our applications. It will take many years of “continued regular pruning” for tree 3 to become tall enough to be a “skyline tree with framed views through the canopy,” and the successive thinning/lowering of the canopy of trees 1 and 2 will be counter-productive for the reasons given above.

The White/Wisniewski plan is further evidence that removal of tree #1 is necessary to substantially restore our views: the only view restoration related to this tree is through the 6-foot window where a portion of the tree is removed, and this only benefits the Deftos property. Indeed, Mr. Wisniewski, in contrast to Mr. Walton, seems to believe that it is not possible to promptly restore views obstructed by trees 2 and 3 by trimming, which would mean that removal of trees 2 and 3 is also necessary to restore our views.

2. The White/Wisniewski plan prioritizes fire hazard reduction over the restoration of our views.

The White/Wisniewski plan highlights that the subject trees are a fire hazard, which we previously pointed out. Like the obstruction of our view, this is due to the close proximity of the trees to the house allowed by the DRB and the subsequent improper maintenance of the trees. Remarkably, the White/Wisniewski plan prioritizes actions to mitigate fire hazards over actions to restore our views. For Winter 2022-2023, the plan limits the removal of live material to 20% and the first prioritized action is to reduce the width of the trees to achieve 10 feet of clearance to limit potential spread of fire between them. As stated above, due to overlap of the canopies in the visual field, this will not contribute to view restoration for either the Deftos or Michaels properties. Whatever is left of the 20% for tree 1 (which may be nothing) would be used to create a 5-foot view window for the Deftos property only. Similarly, for Winter 2023-2024, the first priority is to provide 10 feet of clearance from any chimney or flute pipe to reduce wildfire risk, and for Winter 2025-2026 the first priority is to provide 3 feet of clearance from the sides of the building and 5 feet above the roof to mitigate fire risk. It is completely inappropriate to incorporate trimming for fire hazard reduction in a plan that is ostensibly for view restoration, particularly when this comes at the expense of view restoration.

3. The White/Wisniewski plan is contrary to the TSVS Ordinance since the Ordinance requires prompt restorative action.

As we previously pointed out in a statement included in the Staff Report (page 148), a multi-year Restorative Action Plan is contrary to the language of the Enforcement Clause of the Ordinance [DMMC 23.51.110].

The Subject Tree owner shall comply with any work prescribed by the Planning Commission or Council no later than 90 days after final action on the Application, unless, it is determined that it is less harmful to the Subject Tree for the work to occur at a specific time of the year, in which case, the work shall be performed no later than 90 days from a date set by the Planning Commission or Council.

To be in compliance with DMMC, the work to restore our view has to occur this winter. The exception to 90 days is for the work to occur at a specific time of the year that is less harmful to the subject tree, not for the work to be drawn out over multiple years. While the Planning Commission has some discretion in interpreting and implementing the TSVS Ordinance, this discretion is circumscribed by the explicit language of the Ordinance. Approving a restorative action plan involving multiple years of successive trimming would be to disregard DMMC. It would also not be equitable. We have already been deprived of our views for many years. Making us wait multiple additional years for uncertain restoration of our view to satisfy the White's wishes to preserve all of their trees is itself unreasonable.

4. The White/Wisniewski plan is contrary to the TSVS Ordinance since it does not identify the specific method of view restoration.

Section 23.51.040 of the Ordinance requires the resolution for Restorative Action must identify the “*specific manner in which the Subject Tree is to be trimmed, pruned, removed or otherwise altered.*” Due to uncertainty about how the amount of trimming allowed for each cycle will be used, and uncertainty in how the trees will respond to each proposed trimming events,

there is a lack of specificity in the actual manner in which the trees will be altered. The proposed work schedule for Winter 2022 - 2023 limits removal of live material to 20% and prioritizes width reduction of the canopy for fire hazard reduction. Any remainder of the 20% would then be used to create a window in tree 1. Since it is not known how much (if any) of the 20% would remain, it is not specified whether the creation of the window would occur in this trimming cycle. In addition, for the subsequent trimming cycles, the plan states that *“Prior to scheduling the work, review the current conditions of the trees to determine if any modifications need to be made to the work plan.”* Again, the possibility of modifications to the plan, which is necessitated by a multi-year plan, removes the specificity of the plan required by the Ordinance.

5. The White/Wisniewski plan is contrary to the TSVS Ordinance since it circumvents the prescribed methodology of the Ordinance for hiring and financing the tree service contractor.

Section 23.51.080 of the Ordinance requires that within 30 days of the adoption of a resolution for a Restorative Action Plan, the tree owner:

“shall submit to the Applicant and the City two itemized estimates for carrying out the Restorative Work required by the Resolution. The estimates shall be supplied by licensed landscape or licensed Tree service contractors, under the supervision of a Certified Arborist, acceptable to the City, within 30 days after the adoption of the Resolution” and that *“within 15 days of receiving the cost estimates, the Applicant shall deposit with the City an amount equal to the lower cost estimate.”*

Therefore, to comply with the Ordinance, the Whites would be required to get two itemized estimates for carrying out the entire plan within 30 days and us to pay the lowest estimate 15 days later. The lack of specificity in the plan noted above and the distant time for much of the work would limit the ability to obtain estimates. Does one expect the Whites will be able to obtain two estimates for such a multi-year plan and a tree service contractor will be willing to commit to this plan per an estimate given in 30 days?

The Ordinance does not envision the development or enforcement of a subsequent document *“to lay out the details for implementation of the Restorative Action ...including addressing issues such as: Setting a schedule for additional reduction pruning in the following years, Selection of a licensed tree-care contractor to perform the work, Determining and collecting tree care service and monitoring costs, Memorializing the White’s commitment to authorize the initial and future year(s) or pruning, or a Plan for staff review and documentation on the effectiveness of the Restoration Actions,”* as proposed by Mr. Birnbaum. With such a plan, our right to appeal would expire before this separate document was finalized and we would be deprived of our ability to appeal the final specific plan. In addition, were we to be ultimately unsatisfied with the uncertain results of a multi-year plan, we would have no recourse other than to file an entirely new TSVS application with a reset of the allowed 10-year look back.

The above reasons are presumably why the Ordinance was drafted as it was and requires a resolution to identify the specific manner in which the trees are to be altered and an established process for ensuring that the work gets done in a timely fashion. Approving a

restorative action plan with a separate document to be developed at a later point in time “to lay out the details for implementation of the Restorative Action” is contrary to the Ordinance.

6. Precedent of enforcing the TSVS Ordinance as it is written.

Mr. Birnbaum states in his letter:

“I cannot recall a single instance during my nearly 30-year tenure with the City, nor in the years since, when the City required, either through a DRB review or a TSVS review, that a protected Torrey Pine tree be completely removed. We think it would be inappropriate and would set an unfortunate precedent for that practice to start here.”

This statement seems to be, in part, misleading. Why would a DRB review process, which is evaluative rather than quasi-judicial, ever order anything? Certainly, DRB reviews allow the removal of Torrey pine trees, as we previously documented. Mr. Birnbaum’s objection seems to be not the actual removal of Torrey pine trees, but the ordering of removal of a Torrey pine tree against the wishes of a property owner. But ordering the removal of a Torrey pine tree to restore an unreasonably obstructed view is clearly allowed and anticipated by the TSVS Ordinance as well as the Trees Ordinance. Whether it has ever previously happened is irrelevant to the specific facts of our case. Mr. Birnbaum seems to be arguing that you should not do this because ordering the removal of a Torrey pine tree to restore unreasonably obstructed views would, in his opinion, somehow harm the City. If Del Mar’s elected City Council agrees with this, the appropriate course of action is for them to amend the TSVS Ordinance through the legislative process. Were the Planning Commission to enforce the Ordinance with this goal in mind in a quasi-judicial hearing it would be “legislating from the bench.” The only role of the Planning Commission in this hearing is to impartially apply the Ordinance as it is written to the facts of our case to make its decisions.

7. Mr. Birnbaum and the City are entangled in our conflict.

As City Planning Manager at the time, Mr. Birnbaum played a central role in the development of the White’s lot. The house was designed and the building plans appear to have been first approved by him for the prior property owner, the Rosengartens on October 26, 1999. Shortly before that, a Torrey pine tree in the middle of the current footprint of the house was cut down without a permit under questionable circumstances. Even after this, to achieve the desired outcome of squeezing a house into the canyon floor, it had to be built very close to the remaining Torrey pine trees. So close that the trees were less than 12 feet from the exterior walls of the house, as documented in the approved building plans for the White’s house, which seem to be largely the same as the plans approved for the Rosengartens. This made the trees exempt from protection by the Trees Ordinance. Mr. Wisniewski, who was the arborist consulted on the project, said the proximity of the house to the trees would severely compromise their health. One of the Torrey pine trees very close to their house subsequently fell down in wind storm, likely in part due to poor root structure related to its proximity to the house.

In a recent telephone conversation, Mr. Birnbaum volunteered to us that he played a role in the drafting of the amendment to the Trees Ordinance that implemented the 12-foot rule just a couple of years earlier (Ordinance 683, April 7th, 1997) then the building plans were first

approved. Mr. Birnbaum must have known or should have known that construction of the house would remove the trees from protection by the Trees Ordinance and that the Whites and any future owners would be free to cut the trees down after completion of lot development. Nevertheless, according to Sheryl White's testimony on December 7th, 2021, Mr. Birnbaum told the Whites they would be fined a large amount of money if any of the trees "were killed.":

We worked with the City Planner at the time...Adam...we were told from day one...how we were not to harm the trees...we were told at the time..I'm almost positive this is true...that if we killed one of the trees..it was going to cost us \$40,000...I just remember it was a hefty fee...

The Whites subsequently told the Deftos and Michaels families that they could not trim the trees more substantially to preserve their view because they were afraid of harming the trees. In addition, the close proximity of the trees to the house, and their subsequent improper maintenance, made them a fire hazard to the Whites and the neighborhood. Mr. Birnbaum is now paid by the Whites to advocate for their interests and the preservation of their trees. In advocating for the Whites, he is now arguing it would be inappropriate and set an unfortunate precedent to order the removal of a Torrey pine tree to restore unreasonably obstructed views despite the fact that the Ordinance clearly anticipates and allows for this. He is now urging approval of a plan that prioritizes fire hazard mitigation to benefit the Whites over the restoration of our views. He is now arguing that more severe trimming of trees 2 and 3 should not be allowed since it might compromise the health of the trees, whereas he appears to have previously approved the building plans for the White's house when Mr. Wisniewski said it would severely compromise the health of the trees. If this argument is applied, it would seem to be a double standard applied by the City.

8. The Whites had a responsibility to maintain their trees so they did not become a fire hazard and obstruct their neighbor's views

We are not hear to litigate the past. The history of the trees and the DRB approval process for the White's house does not negate the fact that the Whites had an opportunity and responsibility to maintain their trees appropriately. When Del Mar enacted the TSVS Ordinance, it gave property owners a legal right that their primary scenic views would not become unreasonably obstructed by the growth and/or improper maintenance of their neighbor's trees/landscaping. A corollary is that it gave property owners a legal responsibility to maintain their trees/landscaping such that they do not unreasonably obstruct their neighbor's views. The Whites did not meet this responsibility, despite the repeated requests of multiple of their neighbors for years. Prior to submitting our applications, the trees were never trimmed with the specific intent of preserving or restoring our views. At our December 7th, 2021 hearing, Sheryl White seemed to lay blame for this on her prior arborist. But the responsibility is the homeowner's, not their arborist's. It is unreasonable to now subjugate our established right to view restoration to their desire to keep all of their trees. We were accused of putting our own, narrow financial interests above the interests of the community as a whole. Instead, we think the Whites are putting their own, narrow interest in a single tree in their backyard, one of five of their Torrey pine trees, above the interests of the neighborhood as a whole. Consistent with this,

Sheryl White said at our hearing on December 7th, 2021, *“I would pick my trees over their views.”*

It has been suggested that it would be unfair to require the Whites to cut down any of their trees since they were previously told they must keep them. We think it is more unfair to allow them to keep tree 1 when it has been determined to unreasonably obstruct our view and removal is the only way to substantially restore our view in accordance with the Ordinance. The Whites had an opportunity to maintain their trees in a way that would not obstruct our views and in a way that would not make them a fire hazard. Mr. Birbaum seems to excuse their failure to do this when he states that the trees are “thriving specimen(s).” To us, this instead supports that the White’s ability to properly maintain their trees was not limited by the health of the trees.

9. Asserting our rights and asking for enforcement of Del Mar Municipal Code does not make us greedy and selfish.

The Subcommittee Recommendation ends with the following:

In short, to the extent that we deplete our urban forest, we do so at our peril – climatically, ecologically, aesthetically, and financially. To the extent that any of us in Del Mar place our own, narrow financial interests above the interests of the community as a whole, we very clearly risk “killing the goose that laid the golden egg.”

This statement is clearly directed at us since the crux of our case is whether ordering the removal of a Torrey pine tree (“depleting the urban forest”) is necessary and appropriate to restore our scenic views. It maligns our character by implying we are greedy and selfish individuals placing “our own, narrow financial interests above the interests of the community as a whole.” This is reinforced by the reference to Aesop's fable about individuals motivated by greed who destroy a valuable resource. The comment implies that in asking the City to impartially enforce DMMC 23.51, in pursuing our right to seek restoration of our extensively unreasonably obstructed views, and in advocating for ourselves with careful research and reasoned arguments, we are greedily and selfishly pursuing our own, narrow financial interests to the detriment of Del Mar as a whole. Our primary interest in restoring our view is to restore our aesthetic and sentimental enjoyment of our property, not our “narrow financial interests.” Tree 1 arguably does not benefit the community. Regardless, it is hurtful and we believe very inappropriate for a quasi-judicial body to malign the character of a party to a dispute it is adjudicating. How can we have faith in the impartiality of this hearing when we have been publicly maligned as greedy and selfish individuals threatening to harm the community in a published City document when we are merely asking for enforcement of the Del Mar Municipal Code?

10. Mr. Walton vs. Mr. Wisniewski.

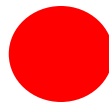
At our December 7th hearing, one of the Planning Commissioners stated that he did not want to *“end up here a month from now...debating which arborist should be used.”* Unfortunately, you now find yourself in exactly that position. Mr. Birbaum refers to Mr. Walton as “the applicants’ arborist,” which mimics City staff’s attempt to recharacterize Mr. Walton as our chosen arborist instead of the third-party, City-approved arborist the City referred us to. Mr.

Birnbaum states that we “originally considered employing (Mr. Wisniewski) before they retained Mr. Walton as their arborist.” To clarify, we attempted to recruit all three arborists the city referred us to, as is documented in correspondences with City staff. Two of them, Mr. Wisniewski and Holmes Landscaping, ultimately declined our request saying that they did not have the time. Mr. Birnbam states that “*none of the previously submitted arborists’ reports offered a detailed assessment of the trees,*” which seems to question the quality of Mr. Walton’s report. The primary difference between Mr. Walton and Mr. Wisniewski is that Mr. Wisniewski was told up front that he was restricted to restorative actions that did not involve tree removal. In contrast, as we documented, Mr. Walton was only told that this was a preference of the Planning Commission, not a predetermined absolute requirement.

11. Removal of tree 1 is necessary to substantially restore our views in a manner consistent with DMMC.

The Whites have been given much more than an adequate opportunity to argue their side of the case and to propose a plan that meaningfully restores our view in a manner consistent with DMMC. The subcommittee has certainly “made every effort” to preserve the subject trees. It is abundantly clear that the only way proposed so far to substantially/meaningfully restore our views in a manner consistent with DMMC is Mr. Walton’s plan, including the removal of tree 1. The removal of Torrey pine tree(s) to restore scenic views can be mitigated by requiring replacement plantings at a 1:3 ratio of removed to planted trees. Such replacement plantings will contribute to the age diversity of the urban forest and can be planted at a more appropriate distance from the White’s house such that they are not a fire hazard and could become protected upon reaching a mature size, which would represent a net gain to the long-term population of protected Torrey pine trees in Del Mar, not a depletion of the urban forest. We hope the Planning Commission will make its final decision in an impartial fashion, that the decision will substantially restore the extensively unreasonably obstructed views from both the Deftos and Michaels properties, and that the decision will be consistent with the requirements of the TSVS Ordinance as it is written.

Michael and Angela Deftos
Carly and Hal Michaels



Madeline Shute

From: Dolores Jamison <doloresdj@gmail.com>
Sent: Sunday, August 7, 2022 5:46 PM
To: Planning Mail Box
Subject: Red Dot re: August 9 Agenda, Item 1 & 2

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Planning Commission Members
City of Del Mar
Re: Applications TVS21-002 and 003 August 9, 2022 Agenda

Dear Planning Commission Members:

We wish to register our concern with the treatment of the Torrey Pines on Sheryl and Harvey White's property recommended by arborist Robert Walton. The Torrey Pine is not only a protected tree and the emblem for our city, but this rare, "narrow endemic" tree is also classified as an endangered (rank 1B.2) plant by the California Native Plant Society. Goal 3.B.3 of the Community Development section of the Del Mar Community Plan encourages "judicious" pruning of mature trees to restore view corridors. Therefore, a Torrey Pine should not be removed to enhance another property owner's view, especially in a super sensitive planning area like the Carmel Valley Precise Plan. There is another issue that is especially relevant at this time, when we find ourselves facing a severe climate crisis. Large, mature Torrey Pines—such as the ones on the White's property— sequester significant amounts of carbon. Removing such a tree simply releases all that carbon back into the atmosphere, something we urgently need to avoid. Opening up ocean views for private homeowners must be balanced with the need to preserve and maintain our urban forest—and especially our Torrey Pines—and views of community-wide importance.

While we largely support the more moderate and phased recommendations for view restoration espoused by the arborist, Mark Wisniewski, we believe a 40 percent crown reduction is too extreme and could undermine the health of the tree. This seems outside the ISA limits in the Public Tree Policy Manual, which is the best reference document that exists in Del Mar for avoiding excessive pruning. Torrey Pines are naturally open in form, which allows them to be identified as such from a long distance away. With all these tip heading cuts proposed, we are concerned that these trees will no longer appear distinctive but will appear to have been "clipped" and "manicured" to serve some vague standard that will be repeated endlessly across town.

As the Planning Commission Subcommittee observed, your "responsibility is two-fold:

1) to interpret and implement the applicable City of Del Mar ordinance (TSVS) so that preexisting views we deem to have been obstructed are, to a significant though not necessarily total extent, restored; and 2) in the process, make every effort actually to protect such trees as the City of Del Mar has designated as being protected, among others but especially, Torrey Pine trees." Allowing for the removal of a Torrey Pine or aggressive pruning that would undermine the health of the trees would clearly not honor your responsibility.

Sincerely,

Richard and Dolores Jamison
Crest Road
Del Mar