Memo **HANNA & VAN ATTA**

To: **File – Gelman Griffith**

From: JPH

Date: February 3, 2023

Re: **2147-2149 Yale Street/Response to Planning and Transportation Commission Staff Report**

The Staff Report begins by describing the project as the proposal to subdivide an existing lot into two lots with one house on each lot. In fact, there are two lots now because the original recorded subdivision map has never been amended and the current legal description of the property is referred to as Lots 1 and 2 in Block 48 of the subdivision map. It is inaccurate to describe the project as a proposal to subdivide an existing lot.

The Staff Report also says that the two lots are not legally separate parcels. It is based, they say, on the fact that the lots were created in 1891 before the adoption of the first Subdivision Map Act, and that the lots are "only recognized" if they were separately conveyed, and since these lots were never separately conveyed they are not recognized. The fact remains that, whether the staff or the City recognizes lots as two lots, they are in fact two lots, have been from the beginning and to this day remain two lots.

The staff does state that the existing structures and uses are consistent with a comprehensive plan and are consistent with the policies in the comprehensive plan. As the staff indicates, the site is compliant with the zoning code even though, or despite, the fact that the site includes two separate lots which have never been resubdivided, nor merged. The Staff Report says that the two proposed lots would not meet minimum lot size requirements. The two existing lots do not meet minimum lot size requirements and approving the proposed Parcel Map would not change that. The staff reports that both of the proposed lots would exceed the allowable floor area ratio by approximately 3%. Since the approval of the Parcel Map would not physically change anything on the site, if staff is correct about the 3% overage (which I should point out is a minor exception) the same is true of the existing situation, so the approval would not in any way change the existing floor area.

The Staff Report states that if the subdivision were approved that the lots would be out of compliance for parking. If viewed logically and with common sense, the approval of a Parcel Map would not have any effect on parking. The same situation would continue, which is that each parcel has its own garage, and there is one uncovered space which is and can continue to be shared by the two owners. In discussing findings that would result in denial of the approval, staff focuses on finding #3 which is that the site is not physically suitable for the type of development, stating that the two created lots would not meet the minimum lot size requirements.

Logic and reasonable interpretation of statutory language would cause one to conclude that this particular finding is directed at a proposed new project. To say that the site is not physically suitable for the type of development is nonsense since the development is there and has been there for a number of years.

Staff does agree that the subdivision application will not change the existing residential density, so the finding that the site is not physically suitable for the proposed density cannot be made.

Staff also agrees that the design of the subdivision and the existing (rather than proposed) improvements will not cause environmental damage or injure fish wildlife or other habitat. Staff also agrees in connection with finding #6 that the design of the subdivision or the type of improvements is not likely to cause serious public health problems. In connection with finding #7, there is no finding that the approval of the project would conflict with any public easements.

Turning to the findings required for exceptions, Staff asserts that special circumstances do not exist and are not necessary to preserve an existing property right. To the contrary, the special circumstances here are there are two existing legally created subdivision lots which are not in compliance with current standards. The current owners are not responsible for this fact. The lots were created a long time ago. The special circumstance is that whoever built these two homes, with the approval of the City, did not build the homes within the existing legal but non-conforming lots, but instead built them in such a way that the boundary line between the two lots bisects each of the two homes.

This is a special circumstance which can easily be created simply by moving the lot line so that it runs between the two homes instead of through the middle of each home. The existing tenancy-in-common agreement is not by any means the vehicle of choice for property ownership. It is dictated by the special circumstance, that being the action taken by the developer of these two homes, with the approval of the City, in failing to build the two homes within the boundaries of the existing subdivision parcels. In fact, the exception is necessary for the enjoyment of a substantial property right which is the right to own your own home and be at liberty to sell and transfer title to your home to a third party without the buyer having to sign on to a tenancy-in-common agreement, with the owner of the adjoining property. The Staff Report says no property rights are affected because either or both sellers may sell their share of the property. As any realtor will tell you, and as your own common sense will tell you, there is a really significant difference in property rights between the right to own and hold title to your own home and owning a half interest in your home and a half interest in your neighbor's home. Staff concludes by saying that the granting of the exception would not be detrimental to public welfare or injurious to other property owners, and that it will not violate the requirements, goals, policies or the spirit of the law. We do of course agree with that, but take exception to the staff conclusion that granting the exception would render the existing units non-conforming. The fact is that the existing situation is non-conforming and the moving of the lot line would not create any additional non-conformity, but would merely improve the existing situation without causing any detriment. The statement in the Staff Report which asserts that granting the exception would act against the City's goals to build more housing and increase density in lower density residential neighborhoods is simply wrong. It would do nothing of the sort.

When the owners first approached the City staff with the proposal to take advantage of SB-9, which would enable them to create two legal lots, they were informed by the City staff that SB-9 is applicable only in single-family residential districts, and does not apply in the RMD (NP) zone. They were advised to apply for a Preliminary Parcel Map with exceptions.

The original developer of the project acquired title to the parcel in an auction sale in 2010. The development ignored the boundary lien between the two lots and marketed the

two homes as separate single-family homes. The homes were first sold in 2011 and a tenancy-in-common agreement was entered into between the two owners.

In the recent past, at least six buyers have made offers to purchase 2147 Yale Street, but in each case they refused to complete the sale because of the tenancy-in-common structure. In addition, a concern about the neighbors sharing a 50% interest in the home created a problem with lenders, most of whom were unwilling to work with tenancy-in-common properties.

To say that in an R-1 District a lot can be divided into two parcels to allow two homes to be built and be separately owned, but that within the RMD District (which allows two separate single-family residences) separate ownership of each residence is not allowed, does not make any sense. This is particularly so here in this case where the two single-family homes, one on each lot, are already there. Approving the application would reconcile the existing situation with the past history of the property, which was in the beginning two parcels and is still, based on the record, two parcels (Lots 1 and 2). Approving the application would be totally consistent with the requirements of SB-9, the only obstacle being that the parcel is not located within a single-family residential zone. It remains to be seen whether the legislature will address that loophole in the SB-9 legislation, but the City should not wait for the legislature to make that change and the City has full authority to do that without waiting for Sacramento to act.

What is simply involved here is a request to reorient the boundary line between the two lots so that it runs between the two homes rather than running through the middle of both homes.

We had suggested to the City Attorney's office that the best procedure here would be to record a lot line adjustment map, followed by the issuance of a Certificate of Compliance, with the undersized lots being grandfathered in. The advantages of proceeding in that fashion include that it would be categorically exempt from CEQA, no survey would be required, no Parcel Map would be required, the Permit Streamlining Act applies to lot line adjustments, and it can be done by recording a deed and save everyone, including the City staff, a lot of time and expense. The City Attorney's office responded that because

the tract map which created these lots was recorded in 1891, before the adoption of the first Subdivision Map Act, the lots are only recognized if they were separately conveyed.

Government Code Section 66412(d) provides that a lot line adjustment between four or fewer existing adjoining parcels does not require a Parcel Map where a greater number of parcels than originally existed is not created, and if the lot line adjustment is approved by the local agency. The local agency shall limit its review and approval to a determination whether or not the parcels resulting from the lot line adjustment will conform to the local General Plan and any applicable Specific Plan. The staff in this case states in attachment C (Findings for Approval) that the project is consistent with the policies in the comprehensive plan. The City Attorney has taken the position that Lots 1 and 2 of Block 48 should not be recognized because the map creating them was recorded in 1891, two years before the adoption of the first Subdivision Map Act. The authority for that statement is a 2003 case (Gardener v. County of Sonoma (2003)) decided by the Supreme Court of California. It should be noted that in that case, the map in question had been recorded in 1865 and consisted of 90 rectangular lots in a grid superimposed on over 1,000 acres of open land west of Sebastopol. The map did not show any interior roads or other subdivision infrastructure. On the other hand, the map of College Terrace which created Parcels 1 and 2 creates all of the streets in College Terrace, all of the infrastructure, each street being named for a different college, and the map remains as an accurate depiction of the streets, blocks and lots as they were originally created and as they remain today, as a matter of record. Lots 1 and 2 have continually been referred to in all legal descriptions as two separate lots. They have never been described as a single lot by a metes and bounds description. Moving the lot line so that it runs between the two homes rather than through the middle of the two homes is simply recognizing a situation that exists, is not creating a new rule of broad application, nor is it opening the door to a flood of new applications. It is simply correcting an existing anomaly by recognizing and accepting what is and what has been for 10 years and making sense out of an unfortunate situation which the current owners have nothing to do with creating in the first place. We believe that the City has the legal authority to approve the reorientation of the lot line, either by means of a Parcel Map or a lot line adjustment, and that it is the right thing to do.