

**ATTACHMENT B**  
**Before the Board of Supervisors in and for the**  
**County of Monterey, State of California**

**Resolution No.**

Resolution of the Monterey County Board of Supervisors )  
to: )  
a. Deny the appeal by Barry and Tricia Smith from the )  
May 21, 2012 decision of the Monterey County RMA- )  
Planning Director approving an application (Michael )  
and Cheryl Merritt/PLN120348) for a Design )  
Approval to allow a replacement wood fence that is )  
less than 6 feet tall; )  
b. Find the project categorically exempt from CEQA )  
pursuant to CEQA Guidelines Section 15303(e); and )  
c. Approve the Design Approval to allow a replacement )  
wood fence that is less than 6 feet tall. )  
[Appeal of a Design Approval – PLN120348/Merritt, )  
24515 S. San Luis Ave., Carmel, Carmel Area Land Use )  
Plan (Coastal Zone)] )  
)

An appeal by Barry and Tricia Smith from the May 21, 2012 decision of the Monterey County RMA-Planning Director approving an application (Michael and Cheryl Merritt/PLN120348) for a Design Approval to allow replacement wood fence that is less than 6 feet tall came on for public hearing before the Monterey County Board of Supervisors on August 28, 2012. Having considered all the written and documentary evidence, the administrative record, the staff report, oral testimony, and other evidence presented, the Monterey County Board of Supervisors hereby finds and decides as follows:

**FINDINGS**

1. **FINDING:** **PROCESS** – The subject Design Approval (PLN120348/Merritt) complies with all applicable procedural requirements.
- EVIDENCE:** a) On May 21, 2012, Michael and Cheryl Merritt (“Applicant”) applied for a Design Approval to build a replacement fence not more than 6 feet tall. The fence was to be an extension of an existing 5 to 6-foot tall fence that runs along and approximately 1 foot inside the eastern property boundary, and would extend approximately 14 feet into the County right-of-way. The existing fence is made of “grapestake” style wood; the new fence to be of natural redwood boards with an approximately 4 foot long section of shorter, weathered grapestakes at the southern end.
- b) Pursuant to Section 20.44.060 of the Monterey County Code, the Director of Planning and Building Inspection (Director of RMA-Planning Department) may approve plans and submittals in Design Control districts for small structures such as structure additions, accessory structures and similar minor structures and minor modifications to approved designs. The Design Approval was approved by the Director of RMA-Planning Department on May 21, 2012.

- c) Pursuant to 20.44.080, no structure shall be constructed otherwise than in accordance with the conditions and terms of the design approval granted, nor until 10 days after the mailing of notice of granting of such design approval by the Appropriate Authority. A copy of the approved Design Approval was provided to the applicant on May 21, 2012. No public notice is required for actions taken by the Director of RMA-Planning pursuant to the Design Control District regulations. Pursuant to Section 20.44.070 of Title 20, the Director's decision is subject to appeal to the Board of Supervisors. On June 5, 2012, a Notice of the Approved Design Approval stating that any appeals from the decision must be filed on or before 5:00 PM on Thursday, June 14, 2012 was mailed to the applicant and surrounding property owners.
- d) On June 4, 2012, the applicant obtained an Encroachment Permit from the RMA-Department of Public Works to replace and replant trees that were removed without proper permits and to allow construction of a wood style fence 14 feet on the County right-of-way on the east side property line, pending the Design Approval.
- e) Pursuant to Monterey County Code Section 20.44.070, appeals to any action taken by an Appropriate Authority pursuant to this Chapter may be appealed to the Board of Supervisors pursuant to Monterey County Code Chapter 20.86.
- f) On June 29, 2012, the Appellant, Barry and Tricia Smith, filed an appeal (**Attachment C**) from the Director of RMA-Planning Department approval of the Design Approval. By e-mail on June 8, 2012, Barry Smith ("Appellant") communicated his objection to the construction of a fence on the right-of-way and requested a public hearing on the matter. On June 13, 2012, Appellant inquired whether he needed to take any formal steps like filing a form for his appeal (**Attachment F**). On June 25, 2012, the County provided Appellant with the forms to file a formal appeal from the decision and gave a deadline of Friday the 29<sup>th</sup> of June for filing the form. Appellant filed the appeal with the Clerk of the Board on Friday, June 29, 2012. Based on these facts, the Board finds the appeal timely filed.
- g) The Board of Supervisors conducted a public hearing on the appeal on August 28, 2012. Notices of the public hearing on the appeal were published in *The Herald* and were mailed to neighbors within 300 feet on August 17, 2012 pursuant to Monterey County Code Chapter 20.84.
- h) Public hearing notices for the appeal were posted in three different public places on or near the subject property by Planning Department Staff on August 17, 2012 pursuant to Monterey County Code Chapter 20.84.
- i) The application, project plans, and related support materials submitted by the project applicant to the Monterey County RMA-Planning Department for the proposed development found in Project File PLN120348.

2. **FINDING**

**CONSISTENCY** – The Project, as conditioned, is consistent with the applicable plans and policies which designate this area as appropriate for development.

**EVIDENCE**

- a) During the course of review of this application, the project has been reviewed for consistency with the text, policies, and regulations in:

- the 1982 Monterey County General Plan;
- Carmel Area Land Use Plan (LUP);
- Monterey County Coastal Implementation Plan Part 4 (CIP);
- Monterey County Zoning Ordinance (Title 20);

No conflicts were found to exist. No communications were received during the course of review of the project indicating any inconsistencies with the text, policies, and regulations in these documents.

- b) The property is located at 24505 S. San Luis Avenue, Carmel (Assessor's Parcel Number 009-041-024-000), Carmel Area Land Use Plan. The parcel is zoned "MDR/2-D (CZ)" [Medium Density Residential, 2 units per acre with Design Control overlay (Coastal Zone)], which allows residential uses and structures accessory to a residential use. Therefore, the project for the construction of a fence is an allowed land use for this site.
- c) The subject property is located within a Design Control District, which provides for the regulation of location, size, configuration, materials, and colors of structures to ensure protection of the public viewshed, neighborhood character, and visual integrity of structures. The proposed fence is built of natural redwood boards and weathered grapestakes and is similar in size and appearance to fencing on the opposite property line. The location, size and materials have been reviewed by staff and have been found to be consistent with the character of the neighborhood.
- d) The project planner conducted a site inspection on August 10, 2012 to verify that the project on the subject parcel conforms to the plans listed above.
- e) The project was not referred to the Carmel Unincorporated/Highlands Land Use Advisory Committee (LUAC) for review. Based on the LUAC Procedure guidelines adopted by the Monterey County Board of Supervisors per Resolution No. 08-338, this application did not warrant referral to the LUAC because the Design Approval met RMA-Planning Department criteria for administrative approval, and Design Approvals that do not require a public hearing are not referred to the LUAC.
- f) The subject property is not located within the public viewshed as seen from Highway 1 corridor and turnouts, Scenic Road, public lands within the Carmel segment or Carmel Beach as shown on Map A of the LUP.
- g) The application, project plans, and related support materials submitted by the project applicant to the Monterey County RMA - Planning Department for the proposed development found in Project File PLN120348.

3. **FINDING:** **APPEAL** – The appellant contends that the evidence does not support the RMA-Planning Director's findings or decision or conditions to approve the Design Approval on May 21, 2012. Upon consideration of the documentary information in the files, the staff report, the oral and written testimony, and all other evidence presented before the Board of Supervisors, the Board responds, as follows, to the Appellant's contentions:

**EVIDENCE:** *Appellant's Contention No. 1:*  
*The submitted plans were incomplete and as a result, the concerns and approval could not be addressed accurately by the Planning*

*Department because:*

- a) The submitted design drawings appear to be incomplete and do not show the front, side and rear elevations as required by Section 20.44.030.B.1.*
- b) The overall height of the proposed 6-foot fence is actually 10 feet-6 inches tall at the street and 13 feet tall at the rear of the fence.*
- c) The appellant's landscaped terrace, which has been present for more than 50 years, will lose most of its sunlight.*
- d) A compromise between the County, the appellant and the applicants should be sought since the project affects two County homeowners and is built on County land.*

Staff's Response No. 1:

- a) The purpose of elevations is to show what a proposed structure will look like. In this case, photographs of the proposed fence submitted with the application clearly show the color, materials and relationship of the proposed fence to the surrounding topography and landscaping. The applicant constructed the fence without first obtaining the required Design Approval. In order to clear the resulting violation, (Code Enforcement Case No. 12CE00119), the applicant removed the fence. Once the CE case was closed, the applicant submitted the application for Design Approval to re-construct the fence in the same location using the same materials. The photographs submitted with the application, which were made prior to the removal of the fence, provided sufficient information to evaluate the application.
- b) It is the RMA-Planning Department practice to measure height of a structure from the immediately adjacent grade. The fence does not exceed 6 feet tall as measured from the immediately adjacent grade. The appellant's measurement includes the height of a portion of a stone retaining located adjacent to the appellant's driveway which leads to the appellant's below-grade-garage. The fence is located several feet away from the stone retaining wall.
- c) The terrace in question is supported by a stone retaining wall that surrounds the area between the appellant's and the applicant's driveways. The bulk of the area is located within the County right-of-way. The terrace faces south-southeast and as such, is in the sun for approximately half of the day as the sun moves from east to west. Photographic evidence in the file shows that as of June of 2011, landscaping of the terrace included large Monterey cypress trees, shrubbery and a hedge along the eastern side of the terrace adjacent to the retaining wall (above appellant's driveway). At some point between June of 2011 and April of 2012, Appellant removed previously existing landscaping including shrubbery, the hedge and at least three Monterey cypress trees, severely pruned the one remaining cypress tree and re-landscaped the area. The 6 foot tall fence will not block more sunlight than the Monterey cypress trees that were removed or pruned.
- d) It is not the role of the County to negotiate a compromise on a matter of private dispute, in this case the location of the proposed fence. The role of the County in this matter is to approve or deny

the Design Approval application. The Design Approval has been appealed to the Board of Supervisors and the hearing today is a de novo hearing on the project by the Board of Supervisors. It is within the Board's discretion to approve or deny the Design Approval or to approve the project subject to additional conditions of approval. An Encroachment Permit was issued by the RMA-Public Works Department to replace and replant trees that were removed without proper permits and the construction of a wood style fence within the County right-of-way. The subject Encroachment Permit was issued in compliance with the criteria set forth in Monterey County Code Chapter 14.04.

***Appellant's Contention No. 2:***

- a) *The submitted design plan is incomplete because the location of the current landscape and trees are not shown on the plan as required by Section 20.44.030.B.3. The landscaping is germane to the appeal because the terraced area has been landscaped for more than 50 years and the new location of the fence would disrupt the landscape.*
- b) *The original fence location was located approximately 6 feet to the west of the new location.*
- c) *The original fence was wire and only 3 feet high.*
- d) *Requests that new fence should match the existing fence (grapestake). The proposed fence is a continuation of the existing fence but it does not match.*

**Staff's Response No. 2:**

- a) The purpose of showing existing landscaping on the plans is to show the relationship between the landscaping and the proposed structure. In this case, photographs of the proposed fence submitted with the application clearly show the relationship of the proposed fence to the surrounding topography and existing landscaping (See Staff's Response No. 1 above). As noted above, the terrace had recently been re-landscaped. While the mature trees and shrubbery that were removed may have been more than 50 years old, the existing landscaping is new.
- b) The original fence consisted of two sections: 1) Section 1 is a 5 to 6-foot tall fence that extends generally along the common property line between the two properties from the rear property line to approximately 4 feet from the front property line; and 2) Section 2, which jogged west into the applicant's property for a few feet and then ran parallel to the property line and the extension of the property line within the public right-of-way for approximately 19 feet. Photographic evidence in the file shows that the original section of fence that was removed by the applicant (Section 2) was located a few feet to the west of the new location. The new fence continues along the same alignment as Section 1 of the original fence and is located approximately 1 foot west of the applicant's property line (on the applicant's property) and the extension of the property line into the public right-of-way.
- c) Photographic evidence in the file shows that the original fence was not wire but wood. The height appears to be approximately 3 feet.

- d) The existing fence is made of weathered “grapestake” type wood and the proposed fence is redwood boards with horizontal wood members at the top and bottom, with an approximately 4-foot long section of 3-foot tall “grapestake” section at the southern (street) end. The proposed fence will eventually weather to be the same color as the existing fence. The proposed fence does not match the connecting fence on either end but does match the fence on the applicant’s western side property line. Materials for the proposed fence are subject to Board approval.

***Appellants Contention No. 3:***

- a) *The application states that applicant is replacing a portion of a fence when in fact, they want to create a new fence line 6 feet away from the fence they say they want to replace.*
- b) *The previously existing fence was 3 feet high, made of wire, barely noticeable, located 6 feet to the west and had been in existence for more than 50 years.*
- c) *The new fence would go through an established landscaped terrace. The plan does not show location of fence being replaced. Appellant would not object to fence in same location as original fence.*
- d) *Appellant questions the need for a fence on County property when applicant could build a fence along the east-west (front) property line to their driveway gate that would provide needed security and would not encroach on County property or Appellant’s landscaped garden. Appellant suggests that whenever there is a proposal seeking structures on County property, that consideration should be given to each property owner’s concern(s). Appellant also suggests that each party should submit a fence design and if no compromise is reached, that nothing should change (original fence remain in original location).*

**Staff’s Response No. 3:**

- a) The application states that the purpose of the fence is for security. The original fence was located partially on the applicant’s property and partially within the public right-of-way. Since the original fence is gone, it is not possible to verify its exact location, however photographic evidence in the file shows that it was located a few feet to the west of the new fence. The original fence created a division of the terrace that made it appear that a portion (approximately 16 to 20 square feet) of the applicant’s property was part of the appellant’s property and created a fenced off area on and in front of the applicant’s property within the public right-of-way where the appellant maintained landscaping. The new fence location divides the terraced area along the common property line and its extension into the public right-of-way. The result is that a portion of the terraced area upon which the appellant has maintained landscaping in the past, including the 16 to 20 square foot section of the applicant’s property and a strip of public right-of-way, is now on the applicant’s side of the fence.
- b) The original fence was approximately 3 feet tall, made of wood and was located a few feet to the west as noted above in Staff’s

Response No. 2. The age of the original fence is unknown but photographic evidence in the file shows that it was not new. The original fence was barely noticeable prior to the removal of the original terrace landscaping, which included mature Monterey cypress trees, shrubbery and a hedge. After removal of the landscaping, the original fence was in full view.

- c) The plan submitted with the application does not show the location of the fence being replaced, however photographs of the original fence were submitted and it is evident in the photographs that the original fence was located a few feet to the west of the proposed fence. As noted in Staff's Response 1(c) above, the terraced area in question was recently re-landscaped. The one remaining mature Monterey cypress tree in the public right-of-way was located to the east of the original fence and is located to the west of the new fence.
- d) The applicant states in the application that the purpose of the fence is for security. It may be that a fence along the applicant's front property line would provide the needed security. However, the applicant did not propose such a fence and the fence that is proposed by this application is consistent with the standards of Title 20 and Carmel Area Land Use Plan Scenic Resources policies. Staff's recommendation for approval of the Design Approval is based partially on the fact that the proposed fence would be located within the applicant's property line and in the public right-of-way along the same alignment as the portion of the original fence that remains standing. Approximately the first 4 feet of both the new and the replacement fences are located entirely on the applicant's property and as stated above in Staff's Response 3(a), approximately 16 to 20 square feet of Appellant's landscaped garden was on the applicant's property. As stated above in Staff's Response 1(d), the role of the County in this matter is to approve or deny the Design Approval. The hearing process allows for consideration of each property owner's concerns. To the extent that the appellant is requesting a compromise with the applicant, this is a matter for them to resolve between themselves. If a compromise that is acceptable to both parties is reached, applicant and appellant could seek approval of an Amendment of the Design Approval.

4. **FINDING:** **NO VIOLATIONS** - The subject property is in not compliance with all rules and regulations pertaining to zoning uses, subdivision, and any other applicable provisions of the County's zoning ordinance. Approval of this application cures the violation that exists on the property.

- EVIDENCE**
- a) Staff reviewed Monterey County RMA - Planning Department and Building Services Department records and is aware of one violation existing on subject property.
  - b) Staff conducted a site inspection on August 10, 2012 and researched County records to assess if any violation exists on the subject property.
  - c) There was a violation on the subject property (Code Enforcement Case No. 12CE00119) for the replacement of a grapestake fence with a redwood board fence without the required Design Approval. The applicant removed the fence and Code Enforcement Case No. 12CE00119 was closed on May 21, 2012.

- d) On May 21, 2012, the applicant submitted an application for Design Approval to allow construction of a 14 foot-long fence not more than 6 feet tall and a 4-foot long connecting fence not more than 4 feet long. The application was approved administratively by the Director of RMA-Planning Department on May 21, 2012.
- e) On June 4, 2012 the RMA-Public Works Department issued Encroachment Permit No. 12-275 to allow the replacement and replanting of trees that were removed without proper permits including construction of wood style fence 14 feet on County right-of-way on the east side property line pending design approval of Design Approval PLN120348.
- f) The acceptance of the appeal by the County vacated the approval of the Design Approval pending a de novo hearing on the application by the Board of Supervisors.
- g) Pursuant to Monterey County Code Section 20.44.080.A, no structure may be “constructed otherwise than in accordance with the conditions and terms of the design approval granted, nor until 10 days after the mailing of notice of granting of such design approval by the Appropriate Authority, or by the Board of Supervisors in the event of an appeal.” The applicant reconstructed the fence after the filing of the appeal from the Director of RMA-Planning’s approval of the design approval and prior to a decision on the matter by the Board of Supervisors and is therefore in violation of this section. Approval of the Design Approval by the Board of Supervisors cures the violation.

5. **FINDING:** **CEQA (Exempt):** - The project is categorically exempt from environmental review and no unusual circumstances were identified to exist for the proposed project.
- a) California Environmental Quality Act (CEQA) Guidelines Section 15303(e) categorically exempts the construction of accessory structures such as fences.
  - b) The proposed project consists of the construction of a wood fence.
  - c) No adverse environmental effects were identified during staff review of the development application during a site visit on August 10, 2012.
  - d) Staff conducted a site inspection on August 10, 2012 to verify that the site is suitable for this use.
  - e) The application, project plans, and related support materials submitted by the project applicant to the Monterey County RMA - Planning Department for the proposed development found in Project File PLN120348

6. **FINDING:** **APPEALABILITY** – The decision on this project may not be appealed to the California Coastal Commission.
- a) Pursuant to Section 20.86.080.A.3 of the Monterey County Zoning Ordinance, the project is not subject to appeal by/to the Coastal Commission because the project does not fall into any of the categories subject to appeal by/to the California Coastal Commission.



**DECISION**

NOW, THEREFORE, BE IT RESOLVED, that the Board of Supervisors does hereby:

- a. Deny the appeal by Barry and Tricia Smith from the May 21, 2012 decision of the Monterey County RMA-Planning Director approving an application (Michael and Cheryl Merritt/PLN120348) for a Design Approval to allow the replacement of a wood fence that is less than 6 feet tall;
- b. Find the project categorically exempt from CEQA pursuant to CEQA Guidelines Section 15303(e); and
- c. Approve the Design Approval to allow a replacement wood fence that is less than 6 feet tall, in general conformance with the attached sketch and subject to the conditions, both being attached hereto as Exhibits 1 and 2 and incorporated herein by reference.

PASSED AND ADOPTED on this 28<sup>th</sup> day of August, 2012, by the following vote, to-wit:

AYES:

NOES:

ABSENT:

I, Gail T. Borkowski, Clerk of the Board of Supervisors of the County of Monterey, State of California, hereby certify that the foregoing is a true copy of an original order of said Board of Supervisors duly made and entered in the minutes thereof of Minute Book\_\_\_ for the meeting on \_\_\_\_\_.

Dated:

Gail T. Borkowski, Clerk of the Board of Supervisors  
County of Monterey, State of California

By \_\_\_\_\_  
Deputy