

## ATTACHMENT A DISCUSSION

### I. INTRODUCTION:

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 is to be of natural redwood



boards with an approximately 4 foot long section of shorter, weathered grapestakes at the southern end. The Design Approval was approved by the Director of RMA-Planning Department on May 21, 2012 and a copy of the approved Design Approval (**Attachment D**) was provided to the applicant on that date. No public notice is required for actions taken by the Director of RMA-Planning but the RMA-Director’s decision may be appealed to the Board of Supervisors pursuant to Section 20.44.070. 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.

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, staff recommends that the Board consider the appeal timely filed.

The appeal is brought on the basis that the findings or decision or conditions are not supported by the evidence. Appellant contends that the submitted plans were incomplete and as a result, the concerns and approval could not be addressed accurately by the Planning Department.

### II. ANALYSIS:

#### A. Factual Background

The project site is an approximately 0.17-acre residential lot located at 24505 S. San Luis Avenue in the developed residential neighborhood known as Carmel Woods in Carmel. The site is developed with a single family residence, wood fencing along the side and rear property lines and a metal gate at the entry to the driveway. The appellant owns the property to the east of the applicant's property and there is an approximately 6-foot tall wood "grapestake" style fence



Original fence after vegetation removal

located between the two properties. A stone retaining wall surrounds a raised, planted terrace that is located primarily in the public right-of-way and extends from the appellant's below-grade garage, out to the edge of the road, along the road and down the applicant's driveway. As of June of 2011, the terraced area was divided by an approximately 3-foot tall wood fence that jogged west from the common property line into the applicant's property for about 6 feet and then ran parallel to the common property line toward

the road for approximately 19 feet. At that time, landscaping on the eastern side of the terrace included shrubbery, a hedge and a row of mature Monterey cypress trees that extended up the western side of the common property line from near the street to the rear property line. The landscaping on the eastern side of the fence had apparently been maintained by the appellant for many years. At some point prior to the applicant's purchase of the subject property in October of 2011, the appellant removed shrubbery and Monterey cypress trees within the public right-of-way and on property now owned by the applicant and re-landscaped the entire area on the east side of the original fence. Several other Monterey cypress trees on the applicant's property were also heavily pruned. Pursuant to Monterey County Code Section 14.04.20.A.2, an Encroachment Permit should have been obtained by the appellant prior to the removal of trees within the County right-of-way.

The applicant removed the 3-foot tall original fence and replaced it with a new 5 to 6-foot tall fence connected to and running along the extension of the line of the existing 6-foot tall fence, but without the 6-foot jog into the applicant's property to the west, resulting in a smaller area on the eastern side of the fence. The site is located within a Design Control district and pursuant to the regulations in the Zoning Ordinance, a Design Approval should have been obtained by the applicant prior to construction of the fence. 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. Photographs of the fence and site submitted with the application were made prior to the removal of the fence. The applicant also obtained an Encroachment Permit from RMA-Public Works Department for the construction of the portion of the fence within the County right-of-way and for planting of trees to replace the removed trees (**Attachment E**).

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 will cure the violation. Should the Board not approve the Design Approval, the fence will need to be removed.

#### *Consistency*

The project site is not located within the “public viewshed” as shown on Map A of the Carmel Area Land Use Plan (LUP) however the proposed fence is visible from a public roadway. Staff conducted a site inspection on August 10, 2012 and found that similar wood fences exist in the immediate neighborhood, including one between the applicant and the neighboring property to the west. The proposed fence is located almost entirely within the County right-of-way. However encroachment into the County right-of-way by fences, retaining walls and landscaping is common in the Carmel Woods area. Carmel Area Land Use Plan Policy 2.2.3.6 calls for structures to be “subordinate to and blended into the environment, using appropriate materials to that effect.” In this case, over time, the proposed fence will become weathered and the color will match the color of the existing fence and other wood fences in the neighborhood. Trees that have been planted on the western side of the fence will screen the view of the fence from the west.

#### **B. Staff Response to Appellant Contentions**

The appellant challenges the Design Approval on the following grounds: the findings or decision or conditions are not supported by the evidence. Staff’s response to each of the Appellant’s contentions follows:

##### ***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.