

Attachment B

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**Attachment B
Draft Resolution**

**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 Paul and Linda Flores from the)
Planning Commission’s decision to deny a)
Combined Development Permit)
(Flores/PLN140300) consisting of: 1) Use Permit)
to allow after-the-fact removal of approximately)
24 protected trees; 2) Use Permit to allow the)
removal of approximately 15 additional protected)
trees due to diminishing forest health; and the)
Planning Commission’s decision to find the)
Design Approval to allow the construction of a)
single family dwelling and accessory dwelling unit)
(ADU) until full site restoration has been)
completed; and)
b. Find the project Statutorily Exempt per Section)
15270(a) of the CEQA Guidelines; and)
c. Deny a Combined Development Permit)
(Flores/PLN140300) consisting of: 1) Use Permit)
to allow after-the-fact removal of approximately)
24 protected trees; 2) Use Permit to allow the)
removal of approximately 15 additional protected)
trees and the Design Approval to allow the)
construction of a single family dwelling and)
accessory dwelling unit (ADU).)
(PLN140300/Flores. 564 Monhollan Road, Carmel,)
Greater Monterey Peninsula Area Plan))
)
)

The appeal by Paul & Linda Flores from the Planning Commission’s denial of the Combined Development Permit (Paul & Linda Flores/PLN140300) came on for public hearing before the Monterey County Board of Supervisors on April 14, 2015 and May 12, 2015. 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:** **PROJECT DESCRIPTION** – The proposed project is a Combined Development Permit consisting of: 1) Use Permit to allow after-the-fact the removal of approximately 24 protected trees (20 Oaks and 4 Monterey Pines) (14CE00183); and 2) Use Permit to allow the removal of approximately 15 additional protected trees (14 Monterey Pine and 1 Oak); and 3) Design Approval to allow the construction of a 7,200

square foot one-story single family dwelling and a 1,200 square foot accessory dwelling unit (ADU).

EVIDENCE: The application, project plans, and related support materials submitted by the project applicant to Monterey County RMA-Planning for the proposed development are found in Project File PLN140300.

2. **FINDING:** **INCONSISTENCY** – The Project, as designed, is inconsistent with the applicable plans and policies.

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 2010 Monterey County General Plan;
 - Greater Monterey Peninsula Area Plan;
 - Monterey County Zoning Ordinance (Title 21);The plans and policies designate this area as appropriate for development, but conflicts were found to exist with the 2010 Monterey County General Plan and the Monterey County Zoning Ordinance, relative to policies and regulations relating to removal of protected trees.
- b) The property is located at 564 Monhollan Road, Carmel (Assessor's Parcel Number 103-071-025-000), Greater Monterey Peninsula Area Plan. The parcel is zoned RDR/10 D or "Rural Density Residential, 10 acres with a Design Control Overlay, which allows residential development and construction of accessory dwelling units as allowed uses subject to approval of a Design Approval. Therefore, the construction of a single family residence is an allowed land use for this site subject to approval of a Design Approval.
- c) The property owner removed approximately 39 protected trees (21 Oaks and 18 Monterey Pines), without acquiring appropriate permits and without disclosing the tree removal when he applied for construction and grading permits.
- d) Monterey County Code 21.64.260.D.3 (Title 21) requires the granting of a Use Permit for the removal of more than three protected trees. Oak trees are specifically identified as protected in Section 21.64.260.C.3. Section 21.64.260 states the section is to provide the regulations for the preservation and protection of Oak and other specific types of trees required in the Monterey County General Plan, Area Plans, and Master Plan. General Plan policy GMP-3.5 states: "*Removal of health native Oak, Monterey Pine and Redwood trees in the Greater Monterey Planning areas shall be discouraged...*" Under the provisions of the General Plan both native Oaks and Monterey Pines are protected.
- e) Section 21.64.260.D.5 specifies two findings which must be made to approve the removal of trees: 1) it is the minimum number of trees under the circumstances and 2) the removal will not result in risk of environmental impacts such as soil erosion, water quality, ecological impacts, noise pollution, air movement or wildlife habitat. The applicant has not demonstrated the trees already removed were the minimum necessary. Trees were clear cut from the development area without analysis or documentation. The amount of grading, size of accessory structures, and size of proposed house combined for a large development footprint, which would be reduced. The tree removal was unnecessary to allow development of the property.
- f) The removal of the trees without necessary permits is a violation of the Monterey County Code.

- g) The approval of an after the fact Use Permit for tree removal where restoration is feasible is inconsistent with the intent of the Zoning Ordinance and would serve to encourage the unpermitted removal of trees, making it easier to obtain after the fact permitting than obtaining necessary permits prior to tree removal.
- h) The project planner conducted a site inspection on July 22 and August 20, 2014.
- i) The application, project plans, and related support materials submitted by the project applicant to Monterey County RMA-Planning for the proposed development found in Project File PLN140300.

3. **FINDING:**

VIOLATIONS - The subject property is in not compliance with the rules and regulations pertaining to provisions of the County's zoning ordinance relative to the un-permitted removal of protected trees. Violations exist on the property. The appropriate mechanism to correct the violation is to restore the areas impacted by unpermitted tree removal.

EVIDENCE:

- a) Staff reviewed Monterey County RMA - Planning and Building Services Department records and is aware of violations existing on subject property.
- b) On October 4, 2013, the project applicant applied for a grading permit (13CP01799) from the County's Building Services Department. The plans submitted for the grading permit did not reflect the trees present on the property or indicate that trees were being removed to allow the grading. Therefore, on January 16, 2014, the grading permit was issued without knowledge or evaluation of potential tree removal.
- c) On April 30, 2014, the applicant applied for a Design Approval to allow the construction of a new 7,200 square foot residence, 1,200 square foot Accessory Dwelling Unit (ADU) and demolition of an existing 1,200 square foot residence. During the review of the Design Approval application that it was discovered that un-permitted removal of protected trees had occurred in the area(s) of each proposed development area (residence and ADU), as well as in the location of a previously approved barn (PLN130239). Subsequently, a code enforcement case (14CE00183) was opened on the subject parcel.
- d) Under Monterey County Code Section 21.84.130, restoration of the site to its pre-violation state is required prior to consideration or issuance of discretionary permits or construction (building and/or grading) permits. Monterey County Code 21.84.130, states: *No application for a discretionary land use permit under the authority of the Director of Planning, the Zoning Administrator, the Planning Commission or the Board of Supervisors shall be deemed complete if there is a violation on said property of a County ordinance which regulates grading, vegetation removal or tree removal until that property has been restored to its pre-violation state. "Restoration" of the property shall include, but not be limited to, the revegetation of native plants and trees and the reconstruction of natural features of the land which have been removed or changed in violation of County ordinances regulating grading, vegetation removal or tree removal. Alternatives to restoration of the property shall not be considered unless the applicant can show that restoration would endanger the public health or safety, or that restoration is unfeasible due to circumstances beyond the control of the*

applicant or the property owner.

The applicant has not submitted evidence demonstrating that restoration would endanger the public health or safety, or is infeasible and beyond the control of the property owner.

- e) The application plans and supporting materials submitted by the project applicant to Monterey County RMA-Planning for the proposed development are found in Project File PLN140300.

4. **FINDING:**

CEQA (Exempt): - The project is statutorily exempt from environmental review because the County is denying the application.

EVIDENCE:

Public Resources Code Section 21080(b)(5); and California Environmental Quality Act (CEQA) Guidelines Section 15270(a) statutorily exempts projects which a public agency rejects or disapproves.

5. **FINDING:**

TREE REMOVAL – The removal of more than three protected trees required approval of a Use Permit based upon the findings that: 1) it is the minimum number of trees under the circumstances; and 2) the removal will not result in risk of environmental impacts such as soil erosion, water quality, ecological impacts, noise pollution, air movement, or wildlife habitat. The tree removal is not the minimum required under the circumstances.

EVIDENCE:

- a) The project includes an after-the-fact Use Permit for removal of 24 trees and a Use Permit to remove 15 additional trees for the removal of the removal of a total of 39 total trees; 21 oaks and 18 Monterey Pines. Monterey County Code 21.64.260.D.3 (Title 21) requires the granting of a Use Permit for the removal of more than three protected trees. Oak trees are specifically identified as protected in Section 21.64.260.C.3. Section 21.64.260 states the section is to provide the regulations for the preservation and protection of Oak and other specific types of trees required in the Monterey County General Plan, Area Plans, and Master Plan. General Plan policy GMP-3.5 states: *“Removal of health native Oak, Monterey Pine and Redwood trees in the Greater Monterey Planning areas shall be discouraged....”* Under the provisions of the General Plan both native Oaks and Monterey Pines are protected.
- b) Trees were removed from the subject property without permits. The exact number of removed trees is difficult to determine. No evidence of the trees removed remain on site; however aerial photographs obtained from the County GIS system and Google Earth, show that trees have been removed. Prior to 2013 the site was completely covered with tree canopies, but in 2013, an area of approximately 0.84 acre had the entire tree cover removed. Based upon this it is estimated that approximately 24-36 trees have been removed from the property without appropriate permits.
- c) The clear cutting of 0.84 acre is not necessary to allow an appropriate scale of development on this forested site. Normal permitting requirements would have evaluated the site design in relation to the tree canopy and health of the forest prior to authorizing removal of any trees. This process was circumvented through the unauthorized removal of trees, the sequential submittal of a grading plan and subsequent design approval neither showed trees in the project area. These circumstances result in a finding that the most appropriate remedial action is

restoration.

- d) The application, plans and supporting materials submitted by the project applicant to the Monterey County Planning Department for the proposed development are found in Project File PLN140300.

6. **FINDING:** **PROCEDURAL BACKGROUND** – The project has been processed in compliance with County regulations.

- EVIDENCE:**
- a) On April 30, 2014, the applicant applied for a Design Approval (PLN140300) to allow the construction of a new 7,200 square foot residence, 1,200 square foot Accessory Dwelling Unit (ADU) and demolition of an existing 1,200 square foot residence. During the review of the Design Approval application it was discovered that unpermitted removal of protected trees had occurred in the area(s) of each proposed development area (residence and ADU), as well as in the location of a previously approved barn (PLN130239). Subsequently, a code enforcement case (14CE00183) was opened on the subject parcel. On July 31, 2014, the applicant applied for a Use Permit for the removal of protected trees. This Use Permit request was combined with the previous Design Approval, under the same permit number (PLN140300), creating a Combined Development Permit application.
 - b) The Combined Development Permit (PLN140300) was deemed complete on October 7, 2014.
 - c) The project was brought to public hearing before the Monterey County Planning Commission on January 28, 2015. On January 28, 2015 the Planning Commission found the project Statutorily Exempt per Section 15270(a) of the CEQA Guidelines, and denied the Combined Development Permit application (PC Resolution No. 15-010).
 - d) An appeal from the Planning Commission’s denial of the Combined Development Permit was timely filed by Paul & Linda Flores (c/o Anthony Lombardo & Associates) (“appellant”), on February 17, 2015.
 - e) The appeal was brought to public hearing before the Board of Supervisors on April 14, 2015. At least 10 days prior to the public hearing, notices of the public hearing before the Board of Supervisors were published in the *Monterey County Weekly* and were posted on and near the property and mailed to the property owners within 300 feet of the subject property as well as interested parties.
 - f) On April 14, 2015 the appellant requested a continuance of the hearing on the matter to May 12, 2015 to allow time to develop and present alternatives to restoration to the Board. The continuance request was granted and the project was scheduled to return for consideration on May 12, 2015.
 - g) Staff Report, minutes of the Planning Commission and Board of Supervisors, information and documents in Planning file PLN140300.

7. **FINDING:** **APPEAL AND APPELLANT CONTENTIONS**

The appellant requests that the Board of Supervisors grant the appeal and approve the Combined Development Permit application (PLN140300). The appeal alleges: the findings or decision are not supported by the evidence and the decision was contrary to law.

The contentions are contained in the Notice of Appeal (**Attachment C of the May 12, 2015 Board of Supervisors Staff Report**) and listed below with responses. The Board of

Supervisors finds that there is no substantial evidence to support the appeal and makes the following findings regarding the appellant's contentions:

Contention 1 – The Findings or Decision are not supported by the Evidence.

The appellant contends that information contained in Evidence 2 (Inconsistency) is not correct because the Planning Commission found that the Flores application was inconsistent with the General Plan essentially because the site had not been restored to its pre-violation state. The appellant contends that under the circumstances of this particular case, the site is not required to be fully restored prior to the application being determined complete and heard by the Planning Commission. The appellant further contends that alternatives to restoration can be considered (pursuant to MCC 21.84.130) if the “restoration would endanger the public health or safety, or if restoration of unfeasible due to circumstances beyond the control of the applicant or the property owner”. The appellant contents that restoration is not required because:

- a) *A Forest Management Plan (FMP) was prepared and reviewed by the County and found to be adequate. Additionally, Page 3 of the Planning Commission staff report (discussion section) states “it was the opinion of the Forester, that full restoration of the project site would potentially involve significant environmental impacts, due to the placement/return of heavy grading equipment required to remove/relocate the vast quantities of fill placed and compacted onsite and recommended partial restoration (replacement planting) of the project site.*

Response:

Monterey County Code Section 21.64.260(D)(3), requires that applications (Use Permits) for the removal of more than 3 protected trees be accompanied by a Forest Management Plan (FMP), prepared by a qualified Forester, as selected from the County's list of Consulting Foresters. The preparation of the FMP for this project, as stated in the Planning Commission staff report discussion was completed to assist in the determination of remedial actions and look at the long-term health of the forest. The recommendations of the FMP and Forester were presented to the Planning Commission during the hearing.

The recommendations of the FMP were considered, and based upon the facts of the matter the Commission felt that removal of the placed fill material could be accomplished without damaging trees or causing significant environmental impacts, which would endanger the public health and/or safety. For example, protective fencing could be installed around the limits of the grading to

protect remaining trees, and straw waddle could be placed on the ground to limit the potential for erosion and water run-off.

The removal of three or more protected trees requires approval of Use Permit by the Monterey County Planning Commission [(MCC 21.64.260(3)(a))], and the purpose of the public hearing is to allow the appropriate hearing authority to receive information from the applicant, County staff, other agencies, and the public. In this particular case, the appropriate process was followed and the appellant was afforded due process.

The Planning Commission held a public hearing on the project and received information and presentations from county staff and the project applicant, followed by testimony and presentations from the public. Upon the close of the public hearing, staff responded to questions from the Planning Commission. Following these responses, the Planning Commission then discussed the facts and merits of all evidence received. The Planning Commission determined that full site restoration was feasible and in the control of the property owner, and would not endanger the health or safety of the public, and denied the Combined Development Permit, and ordered full site restoration.

b) Staff prepared an Initial Study/Negative Declaration, which was circulated through the State Clearinghouse and locally. During the review of the IS/ND, no evidence was submitted to contradict staff's determination regarding restoration.

Response:

The purpose of preparing an Initial Study/Negative Declaration is to analyze potential impacts from the proposed project. The baseline (starting point of evaluation) for the environmental review document includes the violation (unpermitted tree removal) and prior grading activities.

The contention that evidence (comments) were not presented during the public circulation period of the IS/ND is not accurate. Staff received comments from neighbors expressing concerns over potential impacts from mass removal of trees, large quantities of grading, and development of a large house. Specifically, the neighbors expressed concerns over the potential of increased site run-off (drainage/flooding), use of additional groundwater (lowering of groundwater levels), and soil erosion (exposed areas of soil). The comments expressed by the neighbors requested that the site be fully restored prior evaluation of impacts so a full analysis of potential impacts could be completed, and not starting with a baseline for evaluation including the on-site violations. These same concerns were presented to the Planning Commission.

The appellant is correct in stating that no public agencies submitted comments on the IS/ND. However, this does not restrict the

Planning Commission from considering the facts of the case, or information presented by the public.

In this particular case, the Planning Commission decided to deny part of the project and hold the remainder of the application incomplete, which does not require adoption of the IS/ND. The Planning Commission also found that restoration would not endanger public health and/or safety and that full site restoration was appropriate under the standards of Title 21.

c) The determination regarding restoration rests with the Department (Planning), not the Planning Commission. The appellant cites a 2004 memorandum addressing the question of who may approve an alternative to restoration. That memo states, "alternatives to restoration plan may only be approved by the Director, Chief Assistant Director, or Assistant Director." The appellant contends that the Director made the determination regarding restoration based on the forester's recommendation, and there was no appeal filed regarding the determination. Therefore, the issue of restoration was not properly before the Planning Commission.

Response:

The appellant contends that the decision relative to site restoration was not appropriately before the Planning Commission, and such decision is lies within the discretion of the Director of Planning. Restoration can be approved by Staff. The applicant/appellant chose not to restore, but requested an after-the-fact Use Permit to allow tree removal. The Planning Director processed the request to allow the after-the-fact tree removal for consideration by the Planning Commission, who is the appropriate authority to consider such a request. The Planning Commission found the applicant had not made the required showing to enable consideration of alternatives to restoration. Section 21.84.130 sets the standards for that showing and does not confine the determination to the Director of Planning. Rather, in order to approve the Combined Development Permit under the circumstances of this application, the Planning Commission would have had to find that "restoration would endanger the public health or safety or that restoration is unfeasible due to circumstances beyond the control of the applicant or the property owner." The Planning Commission found that the evidence did not support these findings. Accordingly, the Planning Commission did not approve the permit. Regardless of whether it is the Planning Commission or Director of Planning who ultimately "orders" the restoration, the Planning Commission acted well within its authority in determining whether alternatives to restoration could be considered, and the end result is that restoration is required.

County Staff prepared an IS/ND and staff report which would have allowed the approval of an after-the-fact permit, but the Planning

Commission, as the Authority given responsibility to act on these action by the County Code, voted 10-0 that that an after-the-fact permit is not appropriate, and that restoration is the correct action to resolve this violation.

d) The appellant contends that information contained in Evidence 5 (Tree Removal) is not supported by the Evidence for the following because the project included the removal of 39 total trees, and the staff concluded that "removal of 39 total trees can be considered to the minimum required under the circumstances" and no evidence to the contrary was submitted.

Response:

The analysis presented with the January 28, 2015 (page 3, paragraph 2, line 3-5) stated: "However, with the trees already removed it is difficult to determine if the number of trees removed was the minimum required for removal." Furthermore, the discussion later states (page 3, paragraph 5, line 6-9): "Due to the fact that the trees were removed without proper permits, it is impossible to determine the previous health/condition of those tree specimens. Therefore it is difficult to determine how many trees were removed as part of the grading (cut and fill areas)."

This evidence and analysis was presented to the Planning Commission for consideration. It is true that the initial staff recommendation was for approval of the Combined Development Permit, and the initial resolution did conclude that the trees removed can be considered to be the minimum required under the circumstance. However, the Planning Commission had discretion to weigh the evidence and make its own determination. After considering all the evidence presented, the Planning Commission did not concur with staff the recommendation, and rejected the initial draft resolution.

A recommendation by staff does not lock the hearing authority into one set decision point. It is up to the decision maker to weigh the evidence and determine whether the standard is met. In this particular case, the Planning Commission found that the complete (clear-cut) removal of 39 protected tree specimens (Oaks and Monterey Pine) was not the minimum tree removal required to allow potential development on site. Therefore, without being able to make the required tree removal finding (minimum tree removal required for the circumstance), the Planning Commission was unable to approve the requested tree removal permit (Use Permits); and subsequently trailed the hearing to enable staff to return with a resolution for denial.

e) The staff report overstates the number of trees for which a permit is required prior to removal. The appellant contends that the correct number is 21 Oaks, and no permit is required for the removal of Monterey Pines. The appellant

acknowledges that Monterey County Code Section 21.64.260 (Preservation of oak and other protected trees) requires a Use Permit for the removal of protected trees, however argues that only Oak trees are protected by this section. Additionally, the appellant contends that although the removal of Monterey Pines is “discouraged” by Policy GMP 3.5 in the 2010 General Plan, Greater Monterey Peninsula Area Plan, this policy does not prohibit the removal of Monterey Pines.

Response:

Monterey County Code, Section 21.64.260 (Preservation of Oak and other protected trees) provides guidelines for the protection and preservation of oaks and other specific types of trees as required in the Monterey County General Plan, area plans, and master plans (Underline added). Greater Monterey Peninsula Area Plan, a part of the 2010 General Plan, Policy GMP-3.5 states:

“Removal of healthy, native oak, Monterey Pine, and redwood trees in the Greater Monterey Peninsula Planning Area shall be discouraged (underline added). An ordinance shall be developed to identify required procedures for removal of these trees. Said ordinance shall take into account fuel modification needed for fire prevention in the vicinity of structures and shall include:

- a. Permit requirements
- b. Replacement Criteria
- c. Exceptions for emergencies and governmental agencies.”

While Policy GMP-3.5 does not specifically state that Monterey Pines shall not be removed, it does state that removal of this tree species shall be discouraged, and groups Monterey Pines into the same protection status as Oaks. Thus Monterey Pines also have a protected status under County regulations.

While GMP-3.5 requires adoption of a new ordinance, Monterey County Code Section 21.64.260 specifies permitting requirements for Oaks and other tree protected within Area Plans. Monterey Pines fall into this category and are thus protected by this section of the Monterey County Code.

f) At the same January 28, 2015 Planning Commission hearing, during a hearing on another matter (Monterey Peninsula County Club-PLN140077 and PLN140432), the Planning Commission was told specifically that Monterey Pines are not protected outside of the Coastal Zone. This particular hearing followed the Flores hearing.

Response:

Another project involving tree removal (Monterey Pines) was presented to the Planning Commission on the same day, January 28, 2015. Additionally, during the other hearing a staff planner did make a statement regarding the protection status of the Monterey

Pines outside of the Coastal Zone, and within the Greater Monterey Peninsula Area Plan (GMPAP). The statement made during the subsequent hearing regarding an “unprotected” status of the Monterey Pines with the GMPAP was incorrect. In any event, the decision maker must make its determination based on the merits of the particular application before it.

See discussion above under contention (e) for the protection status of Monterey Pines.

Contention 2 – The Decision was Contrary to Law.

The appellant checked the box on the appeal form denoting that a reason for the appeal was that the decision was contrary to law. .

Response:

No evidence demonstrating that the Planning Commission decision was made contrary to law was presented as part of the appeal

DECISION

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

- a. Deny the appeal by Paul and Linda Flores from the Planning Commission’s decision to deny a Combined Development Permit (Flores/PLN140300) consisting of: 1) Use Permit to allow after-the-fact removal of approximately 24 protected trees; 2) Use Permit to allow the removal of approximately 15 additional protected trees due to diminishing forest health; and the Planning Commission’s decision to find the Design Approval to allow the construction of a single family dwelling and accessory dwelling unit (ADU) until full site restoration has been completed; and
- b. Find the project Statutorily Exempt per Public Resources Code Section 21080(b)(5) and Section 15270(a) of the CEQA Guidelines; and
- c. Deny a Combined Development Permit (Flores/PLN140300) consisting of: 1) Use Permit to allow after-the-fact removal of approximately 24 protected trees; 2) Use Permit to allow the removal of approximately 15 additional protected trees; and 3) Design Approval to allow the construction of a 7,200 square foot single family dwelling and 1,200 square foot accessory dwelling unit (ADU).

PASSED AND ADOPTED upon motion of Supervisor _____, seconded by Supervisor _____ and carried this 12th day of May, 2015, 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 resolution 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

