

## ATTACHMENT A DISCUSSION

### Project Description

This is an Appeal from a Planning Commission decision to deny an appeal by Sam Reeves of the Director of RMA-Planning determination that the owner (Signal Hill LLC/Mehdipour) is in compliance with Condition No. 4 of the Coastal Development Permit and Restoration Plan PLN100418 (Attachment D). The Planning Commission upheld the Director's decision that the project is in compliance with the conditions of approval, and Mr. Reeves is appealing that determination. The matter is before the Board of Supervisors as a de novo hearing. The after-the-fact permit was required to clear a code violation (CE090288) for the removal of two landmark size Monterey cypress trees (trunk diameters of approximately 41 inches and 30 inches), extensive pruning of three Monterey cypress trees, and dune disturbance in an environmentally sensitive habitat area.

The first part of Condition No. 4 specifies the actions required to be taken by the owner to restore the site to the pre-violation state, including monitoring and reporting to verify compliance, as follows:

- *“Planting of two replacement trees and implementation of a five-year monitoring program in order to restore the visual screening of the home from 17-Mile Drive and other public viewing areas.*
- *The replacement trees shall be Monterey cypress, minimum 48-inch box size.*
- *Two trees shall be located to the west and southwest of the existing residence, as near as feasible to the location of the trunks of the trees that were removed, as determined by the project arborist, but in no case may the trees be more than 20 feet from the location of the trees that were removed and no farther south or west than the location of the southernmost removed tree.*
- *A third tree may be planted to the southwest of the existing residence as shown on the Tree Replacement Plan to provide additional screening at the owner's discretion.*
- *Quarterly monitoring of the replacement trees by a Certified Arborist for 3 years and annual monitoring thereafter is required. The monitoring program shall remain in place for five years or until such time as the tree canopy of the replacement trees approximates the 2007 tree canopy, whichever is longer.*
- *The trees may only be removed with the approval of a Coastal Development Permit.*
- *If any replacement trees fail to survive, they shall be replaced and a new monitoring program is required.”*

The Appellant contends that the project is not in compliance with the condition because the replacement trees were not planted in the locations specified in the condition and will therefore never achieve the stated purpose of the condition, which is the visual screening of the home from 17-Mile Drive and other public viewing areas.

### History

In 2009, a code enforcement case (CE090288) was initiated in response to the illegal removal of two landmark size (41-inch and 30-inch) Monterey cypress trees. As restoration is the preferred

solution, staff initially required a restoration plan to restore the site to the original condition. That restoration plan included planting 5 seedling-size Monterey cypress trees that had been propagated from local genetic stock planted in close proximity to the trunks of the removed trees. Native stock was required because the project site is in close proximity to native Monterey cypress habitat and seedling size trees were deemed acceptable because: 1) the only available trees of native stock were seedlings; 2) it was believed that seedlings would better adapt to the site; and 3) planting seedlings would cause less disruption to the environmentally sensitive dune habitat. These trees died and the arborist reported that the root systems were infected by a decay-causing fungus that was present in the soil around the decomposing roots of the original trees and that wind and salt spray had burned the foliage.

New replacement trees were planted in a more sheltered area further from the original trees. The second set of seedling-size replacements also failed, again because of the fungus in the soil and wind-burn. The possibility of soil remediation in the area around the original trees was considered but found to be infeasible because of the large area of soil removal that would be required within environmentally sensitive dune habitat.

After two failed attempts at restoration in the immediate vicinity of the removed trees, the owner proposed restoration plantings in areas to the north and south of the house, away from the influence of the fungus infected soil. This proposal would not restore the property to the pre-violation state so the owner was required to submit an application for an after-the-fact permit consisting of a Coastal Development Permit for the removal of the trees and a Restoration Plan (PLN100418). The Coastal Development Permit was considered by the Planning Commission who found that replacement with native stock was not necessary and required three larger size (36-inch box) trees to be planted within 20 feet of the original tree trunks and no further south than the southernmost removed tree in order to provide comparable screening of the home.

The Planning Commission approval was appealed to the Board of Supervisors by Sam Reeves “Appellant”, in part on the basis that as conditioned, the permit did not provide assurance that the site would be restored to its original state in perpetuity. At the hearing before the Board, the Appellant suggested revised language for Condition 4 reducing the number of replacement trees to two specimen size trees, planted within 20 feet of the original trees and no further south than the southernmost tree, but also no further west than the southernmost tree. The Board granted the appeal and approved the project subject to the revised condition of approval, but required 48-inch box trees as replacements rather than full size specimen trees.

The stated purpose for planting replacement trees is “to restore the visual screening of the home from 17-Mile Drive and other public viewing areas.” The trees removed were mature with canopy diameters of around 40 feet each. The northern removed tree (Tree C2) was located about 13 feet west of the house and screened views of the center portion of the house from 17-Mile Drive. This tree was also approximately 20 feet west of the southernmost removed tree (Tree C1), which was located south of the house, between the driveway and the southwest corner of the house. The branches on the west side of Tree C1 screened the southwest corner of the house from 17-Mile Drive. In order to replicate the screening values of the removed trees, the replacement trees must be planted so that the canopies would be between the house and 17-Mile Drive.

The owner planted two 48-inch box size Monterey cypress trees on the site on March 21, 2013. There are several contentions brought up in the appeal about these trees, which will be addressed individually in the following discussion.

#### Replacement Tree C2 Planted too far west:

The condition restricted planting the replacement trees no further west than the location of the original southernmost tree. This provision would have resulted in replacement Tree C2 being planted within the footprint of the house which is not feasible. The prohibition on planting to the west was requested by the Appellant at the Board of Supervisors hearing. Staff allowed replacement tree C-2 to be planted further west, outside of the footprint of the existing house. Staff determined that the language of the condition stating “*as near as feasible to the location of the trunks of the trees removed as determined by the project arborist*” provide the ability to assess field conditions and place the trees in the most appropriate location. Staff determined that planting the tree as near to the western limit as practical complied the condition, because it is not the intent to write a condition which cannot be implemented. The replacement tree is no further west than the original tree and it will provide screening of the house from 17-Mile Drive.

#### Replacement Tree C-1 Planted too far South

It was noted in the arborist’s report dated April 1, 2013 (**Attachment J**) and verified by staff that the southernmost replacement tree (Tree C1) had been planted further south than the original tree and that the location did not comply with the requirements of the condition. The County then required that Tree C1 be moved to a new location no further south than the original tree in order to comply. The owner attempted to relocate the tree on April 30, 2013 but during excavation for the tree, previously unknown buried electrical conduit was damaged and the relocation stopped for safety reasons. The electrical conduit was later moved and the tree was relocated 5 feet to the north of the March 21, 2013 location. The location of replacement tree C1 is still 4 feet south of where the condition required it to be.

Staff accepted the planting location based upon the circumstances associated with the site and the condition language which allows the location to be adjusted to account for the recommendations of the arborist. The area that replacement Tree C1 would have to be planted as required by the condition is an approximately 14-foot wide by 20-foot long rectangular area adjacent to the house. To avoid conflicts with the existing house, the tree must be planted far enough away from the house to allow for an eventual canopy radius of at least 10 feet, leaving a strip only 4 feet wide available for planting. According to information submitted by the owner, the original tree was located 11 feet west of the edge of the driveway. An underground electrical line runs under the center of the driveway and turns to the north at a right angle toward the electrical meter located on the south wall of the house just west of the entrance to the garage. PG&E does not allow excavation within 5 feet of high voltage supply sources and the arborist states that it is not advisable to install trees where eventual root development can damage the underground utility line. This further limits the available area to the east for replanting. Based on physical inspection of roots of the original tree, soil conditions and past failed attempts to plant

replacement trees in the immediate vicinity of the original tree, the project arborist recommended that the replacement tree not be placed near the location of the original tree due to the presence of *Phytophthora* fungus in the soil.

Staff accepted the location of Tree C1 as being in conformance with the condition because: 1) the location met the other criteria (no further west and not more than 20 feet from the tree that was replaced); 2) the owner submitted evidence from the arborist showing that there is not a feasible location for the tree that would better comply with the condition due to site constraints; and 3) moving the tree 4 feet further north would not, in staff's estimation, better achieve the goal of visual screening of the home. The appeal is partially based upon the replacement tree being 4 feet too far south. It could be moved to the north but this would not better achieve the screening objectives, and it would place the tree in danger of being compromised by fungus in the soil. For those reasons, staff determined this location satisfies the condition.

#### Screening Provided by Replacement Tree Canopy

There is some concern about the quality of screening provided by 48-inch box size nursery-grown replacement trees. These trees may never be the same as the original trees that grew to maturity in the windy coastal environment. Trees grown in a protected nursery environment have a more columnar shape and may never achieve the shape or diameter of the original trees. However, the condition requires monitoring for a minimum of 5 years or until the canopy of the replacement trees approximates the canopy of the 2007 canopy, whichever is longer. In order to define measurable performance criteria to determine when monitoring can cease, staff and the owner agreed to use a calculation of the volume of the canopies in 2007 as the criteria for finding that the replacement tree canopies have reached the required size. The owner's engineer calculated that the estimated volumes of the original trees were 28,882 cubic feet and 32,061 cubic feet. The owner's arborist estimated that in 5 years time, the volume of each replacement tree canopy will be 9,100 cubic feet. It will take far more than 5 years to replace the canopies of 50 year old trees. Thus, monitoring of the trees may extend well beyond the minimum of 5 years. The condition allows the owner to plant an additional tree to the southwest of the house, at her discretion. If an additional tree is planted in a location that contributes to the screening of the house and the volume of the canopy, monitoring time could be greatly reduced.

#### Relationship to Combined Development Permit

It must also be noted that the property owner has an active application for a Combined Development Permit (PLN100338) to allow the demolition of the existing residence and the construction of a new residence. The condition of approval clearly states that the replacement trees may only be removed with a Coastal Development Permit. Staff understands from the owner that the replacement trees have been located such that they would not have to be removed for the construction of the new residence and no Coastal Development Permit has been submitted for their removal.

## Timeline

- August 29, 2012: After-the-fact Coastal Development Permit and Restoration Plan (PLN100418) approved by the Planning Commission.
- September 17, 2012: Sam Reeves filed an appeal from the decision of the Planning Commission approving the Coastal Development Permit and Restoration Plan.
- February 5, 2013: The Board of Supervisors granted the appeal and approved the project with modified Conditions of Approval (Resolution No. 13-021/**Attachment D**).
- September 24, 2013: Appellant requests a Director's Decision (**Attachment E**) on several questions related to project condition compliance pursuant to Monterey County Code Chapter 20.88 (Appeals to Administrative Determinations).
- October 4, 2013: Mike Novo, Director of RMA-Planning provided a Director's Decision with responses to all of Appellant's questions (**Attachment F**).
- October 14, 2013: Appellant submitted a written request to Novo to extend the deadline to file an appeal to the Director's Decision from October 18, 2013 to October 28, 2013.
- October 15, 2013: Mike Novo granted the request for extension of deadline to file an appeal to October 28, 2013.
- October 28, 2013: Appellant appeals Director's Decision outlined in the October 4, 2013 (**Attachment G**).
- February 12, 2014: Planning Commission denied the Appeal and upheld the Director's Decision that the project is in substantial compliance with the conditions of approval.
- February 24, 2014: Appeal of the Planning Commission Decision upholding the Director's Decision (**Attachment H**).

## Appeal

### **Staff's Response to Appellant's Contentions**

The Appeal is brought on the basis that the Director's Decision that the project is in compliance with the terms of Condition No. 4, is not supported by the evidence. Staff's responses to each contention are as follows:

*Appellant's Contention No. 1: Replacement Canopy – The condition is to “...restore the visual screening of the home from 17-Mile Drive and other public viewing areas...” and required monitoring for “...five years or until such time as the tree canopy of the replacement trees approximates the 2007 tree canopy, whichever is longer.” These requirements were discussed and agreed to by Ms. Mehdipour's representatives John Bridges and David Armanasco. We were told in Mr. Novo's determination that “it is unlikely that the replacement trees will ever replicate the screening that was provided by the original trees.” This is in direct contradiction to the Board's requirements.*

*The Planning Commission found, contrary to the Director's earlier statements that it was “...premature to make the determination that they [the trees] will never provide screening for the house or that the project is not in compliance with the condition. The trees will not look the same, but monitoring will not be complete until the performance criteria are achieved.” There is however no performance criteria other than approximation of the 2007 canopy. That canopy is clearly shown in aerial photographs and photographs from 17-mile drive (sic). The*

*“performance criteria” is apparently an agreement between the staff and that the owner (sic) to use some sort of a volumetric calculation rather than the screening and canopy replacement criteria required by the Board.*

Staff Response No. 1: The purpose of the condition is to restore the visual screening of the home. The success criteria specified in the condition is “five years or until such time as the tree canopy approximates the 2007 tree canopy, whichever is longer.” The owner submitted a contract with a Certified Arborist to provide care and monitoring of the replacement trees for a minimum of 5 years with a provision for the contract to be renewed in the event of mortality of any of the trees. As required by the condition, cash bonds in the amount of \$16,000 (the cost estimate for the entire restoration and monitoring), were posted by the owner on April 3, 2013. As noted in the Director’s Decision, the C1 replacement tree would have provided better screening had the owner been allowed to plant it further west where it would have been between 17-Mile Drive and the house. Planting of a third replacement tree would provide additional screening, however, at the Appellant’s request, the condition adopted by the Board of Supervisors requires only two. These trees may never be the same as the original trees that grew to maturity in the windy coastal environment. Trees grown in a protected nursery environment have a more columnar shape and may never achieve the shape or diameter of the original trees. It will take far more than 5 years to replace the canopies of 50 year old trees. The use of the calculated volume of tree canopy will provide the “performance criteria” needed to determine when the trees have sufficiently grown to satisfy the conditions of approval. The County will continue to require monitoring until the volume of the canopies is equivalent to the volume of the original trees.

*Appellant’s Contention No. 2: Location of the Southernmost Tree: The Board’s condition stated “...in no case may be (sic) the trees be more than 20 feet from the location of the trees that were removed and no farther south or west than the location of the southernmost removed tree.” The planted trees fail to meet this requirement on two points:*

- *The southernmost tree is farther south than approved by the Board. During the board’s hearings the Board was shown a plan with the north arrow parallel to the western walls of the house. The Board based their decision on that plan. Now the Department has agreed to use what we are told is “magnetic north” which is approximately 20 degrees off the north arrow on the Board’s plan. Plans showing that polar shift are attached to this appeal.*
- *The northernmost tree is clearly much farther west than the “...southernmost removed tree...” as approved by the Board.*

Staff Response No. 2: The arborist report received by the County states that the southernmost replacement tree (Tree C1) was relocated 17 feet directly east of the original stump location. The owner has confirmed that the compass used in the field to determine the location of the replacement tree measured “magnetic north”. It was not the type that could be adjusted to account for magnetic declination, which is approximately 13.5 degrees in Pebble Beach. This did result in the tree being planted approximately 4 feet further south than it would have been had the compass been adjusted and the measurement made using “true north”. The condition language requires that the replacement tree be planted as near as feasible to the location of the

original tree *as determined by the project arborist*, but no further than 20 feet from the original tree or further south or west than the original tree. The original tree was located approximately 14 feet south of the house, between the driveway and the southwestern corner of the house, leaving a very limited area available for the replacement tree. The arborist determined that it was necessary to plant the tree the maximum possible distance away from the original stump to avoid the *Phytophthora* fungus in the soil. To plant the tree further east would block access to the garage and would conflict with underground electrical utilities. The stated intent of the condition is to “restore the visual screening of the home from 17-Mile Drive and other viewing areas.” Staff accepted the location of Tree C1 as being in conformance with the condition because: 1) the location met the other criteria (no further west and not more than 20 feet from the tree that was replaced); 2) the owner submitted evidence from the arborist showing that there is not a feasible location for the tree that would comply with the condition due to site constraints; and 3) moving the tree 4 feet further north would not better achieve the goal of visual screening of the home.

The original northernmost tree (Tree C2) was located approximately 13 feet west of the house and approximately 20 feet west of the original southernmost tree (Tree C1). Planting the replacement for Tree C2 no further west than Tree C1 would place the replacement tree within the footprint of the existing house which was clearly not the intention of the Board. It is planted as close as feasible to the specified location. Replacement tree C2 was planted no further west than the tree being replaced and will screen the house from 17-Mile Drive. Moving the tree 20 feet further west, would not better achieve the goal of visual screening of the home.

*Appellant’s Contention No. 3: In both cases, the Board of Supervisors were given assurances by staff and the owner that the replacement trees would be located as directed by the Board and that the canopy and screening would be replicate (sic) that which was illegally removed. Now we are told that it will not. Nonetheless, Mr. Novo and the Planning Commission have determined the conditions are being met.*

*The condition is not and apparently cannot be met based on the tree location approved by staff. Therefore, the restoration required by the Code and Board has not and cannot be accomplished and the violation still exists on the site.*

*Find that the condition of PLN100318 (sic) have not been met and direct Mehdipour to do the restoration she committed to do and achieve the canopy and screening required by the Board; or*

- *Set a public hearing pursuant to Section 20.70.060 to consider revocation or modification of PLN100418.*

*We also ask that the Planning Commission find that the property has not been restored and direct that all work on PLN100318 (sic) be suspended until such time as the restoration occurs.”*

Staff’s Response No. 3: As discussed in Staff’s Response Nos. 1 and 2 above, the County finds that the project is currently in compliance with the Conditions of Approval for PLN100418. There may have been statements made by the owner about the quality of screening achieved in a certain time period, but these statements are not reflected in the condition language. The owner at this time is proceeding with satisfying the conditions with the concurrence of staff. If the

Board disagrees with staff and finds that the permit conditions are not in compliance then the appropriate action would be to approve the appeal and identify the corrective actions that would be necessary to comply with the permit. It is very important to focus on the actual requirements of this permit. The condition including the planting requirements and monitoring are the technical points upon which compliance at this phase is determined. The Appellant may want the restoration to look exactly like the original trees, but as stated in Response No. 1, trees are living things that may not grow as expected. As such, condition compliance needs to take this into account and identify criteria that identify success. In this case canopy volume has been identified as the operative criteria. Under current circumstances this will take more than 5 years but the monitoring requirements of the condition allow this. As long as progress is being made to fulfill the condition it is hard to argue that the owners efforts do not constitute compliance with the condition.

Modification of the condition as proposed by the appellant is not before the Board at this time. To modify the condition in the absence of an application by the owner to amend the condition, the Appropriate Authority would need to hold a separate public hearing and would need to find that one of the conditions are not being complied with or that the Coastal Development Permit was granted on the basis of false material or information. The false information would be either written or oral and must be fully or negligently be provided by the applicant (Title 20, Section 20.70.060.) Normally in situations where a condition is not being complied with the first step would be to identify what needs to be done to bring the project into compliance and give the owner the opportunity to comply with the condition. If the Board finds that the condition is not in compliance staff recommends that the Board state clearly what needs to be done to bring the permit into compliance with the condition.

The application for a Combined Development Permit (PLN100338) to allow the demolition of the existing residence and the construction of a new residence was appropriately deemed complete after restoration was implemented, monitoring agreements were in place and Code Violation Case No. CE090288 was closed. Since the code enforcement action is closed, there is no limitation to processing additional permits.

#### Environmental Review

This appeal does not meet the definition of a project under Section 21065 of the CEQA Guidelines and is therefore exempt.

#### Recommendation

Staff recommends that the Board of Supervisors deny the appeal (REF140032) and uphold the Director's Decision that the project (PLN100418) is in compliance with the conditions of approval based on the findings and evidence.