



BOARD OF SUPERVISORS  
AGENDA LETTER

Agenda Number:

Clerk of the Board of Supervisors  
105 E. Anapamu Street, Suite 407  
Santa Barbara, CA 93101  
(805) 568-2240

Department Name: Planning &  
Development  
Department No.: 053  
For Agenda Of: 9/6/2011  
Placement: Departmental  
Estimated Time: 1.0 hour  
Continued Item: No  
If Yes, date from:  
Vote Required: Majority

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**TO:** Board of Supervisors  
**FROM:** Department Glenn Russell, Ph.D., Director, Planning & Development  
Director(s) (805) 568-2085  
Contact Info: Alice McCurdy, Deputy Director, Development Review South  
(805) 568-2518  
**SUBJECT:** Bagdasarian Appeal of Montecito Planning Commission Denial of 10APL-00000-00016 and 09LUP-00000-00256 (Case No. 11 APL-00000-00009)

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**County Counsel Concurrence**

As to form: Yes

**Other Concurrence:** N/A

As to form: No

**Auditor-Controller Concurrence**

As to form: N/A

**Recommended Actions:**

That the Board of Supervisors consider the appeal filed by Ross Bagdasarian, Jr. and Janice F. Karman of the Montecito Planning Commission's denial of the Bagdasarian appeal, 10APL-00000-00016, and *de novo* denial of the Bagdasarian Land Use Permit, 09LUP-00000-00256, for existing unpermitted pedestrian bridges, grading and retaining walls within an Environmentally Sensitive Habitat, located at 1192 and 1194 East Mountain Drive, in the Montecito area, First Supervisorial District, and take the following actions:

1. Deny the appeal, Case No. 11APL-00000-00009, thereby upholding the Montecito Planning Commission's denial of 10APL-00000-00016 and denial of Case No. 09LUP-00000-00256;
2. Make the required findings for denial of the project, 09LUP-00000-00256, including CEQA findings, as provided in Attachment 2 of this Board Letter;
3. Determine the denial of the project is exempt from CEQA pursuant to CEQA Guidelines Section 15270 as provided in Attachment 3 of this Board Letter; and
4. Deny, the project Case No. 09LUP-00000-00256.

**Summary Text:**

A Land Use Permit application (Case No. 09LUP-00000-00256 - Bagdasarian-Karman Site Alterations/Retaining Walls/Bridges) was filed on June 24, 2009 to abate a Zoning Violation reported on February 10, 2009 (Case Nos. 09ZEV-00000-00042, 09ZEV-00000-00115 and 09BDV-00000-00021). The zoning violation constituted unpermitted development within Environmentally Sensitive Habitat (ESH), as identified by the P&D Biologist in the field, and specifically included the following:

- Construction of two pedestrian bridges within a tributary of Hot Springs Creek (on and below the top of bank);
- Grading and installation of approximately 792 linear feet of retaining walls approximately four to six feet high (approximately 410 linear feet lining the east bank of the tributary to Hot Springs Creek);
- Removal of an estimated 11 mature Coast Live Oak trees (*Quercus agrifolia*), impacts to at least six of the remaining oaks, and removal of six Western Sycamore trees (*Platanus racemosa*);
- Construction of 12 tree wells, numerous at grade stone borders and patios;
- Installation of 0.5 to 0.7 acres of irrigated lawn in the area referred to as the “island” (the area of land just north of the confluence of the main branch of Hot Springs Creek and its western tributary); and
- Installation of approximately 300 linear feet of a *Myoporum* hedge, a nonnative plant material along the top of the west bank of Hot Springs Creek.

The application for 09LUP-00000-00256 requested after-the-fact approval of all of the unpermitted development, including a new landscape plan, planting of native replacement trees in the southeast corner of the property (the rock stockpile area) and contribution of funds to an offsite restoration project. At the time the Zoning Violation was reported, the MLUDC required permits for the bridges under Section 35.442.020. Permits for the retaining walls were required under Chapter 14, section 14-6(a). Please refer to the October 8, 2010 MPC staff report page 13 for a complete discussion of permit requirements for the retaining walls (Attachment 6 to this BOS letter). On July 7, 2009, MLUDC Section 35-428.040, Environmentally Sensitive Habitat Overlay Zone, was amended by the BOS to include permit requirements for the removal of vegetation and grading over 50 cubic yards within the Environmentally Sensitive Habitat in which the unpermitted work took place.

On July 26, 2010, Planning and Development denied 09LUP-00000-00256 because the proposal was found inconsistent with a number of riparian Environmentally Sensitive Habitat policies and development standards included in the Montecito Community Plan and Montecito Land Use and Development Code. The applicants appealed the denial to the Montecito Planning Commission (MPC). After two hearings, the first on October 27, 2010 and the second on May 25, 2011 (there were three continuances of the MPC appeal hearing requested by the appellant and granted by the MPC between October 27, 2010 and May 25, 2011), the MPC denied the appeal and 09LUP-00000-00256 on May 25, 2011. The applicants/appellants appealed the MPC decision to your Board on June 3, 2011.

**Consideration of the Bagdasarian Appeal:**

The appellants raise ten numbered grounds for their appeal and three additional unnumbered grounds (identified as issues A-C herein). The appeal letter is included as Attachment 1 to this Board Letter. Appeal items 1 through 8 and 10 of the filed appeal to your Board are, verbatim, the grounds presented

for the appeal of the LUP denial to the MPC. Please refer to the October 8, 2010 staff report to the MPC, pages 7-13 for complete responses to these appeal issues (Attachment 6 to this BOS letter).

In addition, the appeal to your Board raises four new appeal issues specific to the MPC's action as follows:

9. *Appellants advised the MPC [during the May 25, 2011 MPC appeal hearing] that they would also perform the following additional mitigations if this would achieve a full and final resolution of the alleged zoning violation:*
- *Remove five (5) of the shallower tree wells*
  - *Remove the six (6) at grade stone borders*
  - *Remove three (3) segments of the retaining walls totaling approximately 123 liner [sic] feet, even though the Hydrology Study prepared by Bengal Engineering and concurred in by County Flood Control indicates that these walls do not adversely affect flooding downstream.*
  - *Relocate some of the oak and sycamore trees currently proposed within the rock stock pile area to the area "within the tributary creek or within the upland area between creeks, where the majority of the trees were removed," as suggested by County Planning & Development Staff.*

The project plans submitted to the MPC for their May 25, 2011 appeal hearing were unchanged from those presented on October 27, 2010, except for a proposal to replace the irrigated lawn with native grasses of undetermined species and native shrubs at the margins. The concessions listed in the appeal statement above would have removed only the least impactful elements of the unpermitted development, while retaining the deepest tree wells, the retaining walls and fill, and both bridges as constructed. As such, while the MPC considered these proposed additional changes, they acted to deny the appeal and the LUP on the basis of inconsistencies with Environmentally Sensitive Habitat policies of the Montecito Community Plan.

*A. The MPC's Denial and Findings Constitute an Abuse of Discretion, a Denial of Appellants' Right to Procedural Due Process of Law and a Denial of Equal Protection Under the Law.*

The MPC held two hearing on the subject appeal: the first on October 27, 2010 and the second on May 25, 2011. At both hearings, the appellants were granted time to present their arguments. As noted above, the May 25 project plans had not changed substantially from the October project plans with the exception of the proposal to replace the lawn with a native grass palette. At the May hearing, during their allotted time, the appellant team did not offer additional evidence to support their claim regarding the Environmentally Sensitive Habitat designation. Rather, the issues addressed by the team in the May hearing included: the appellants' lack of knowledge regarding permitting and ESH requirements for this development; work done and meetings with P&D staff since the October 2010 hearing; and the walls they had observed along neighborhood creeks downstream of their property. Upon due consideration of all the testimony received, the MPC acted 4-1 to deny the appeal and deny the Land Use Permit on the basis of inconsistencies with Environmentally Sensitive Habitat policies of the Montecito Community Plan.

*B. The MPC's and County's decision and Findings also deprived Appellants of their procedural due process and equal protection rights because the MPC and the County have unlawfully and selectively enforced the aforesaid MCP policies and MLUDC regulations against Appellants in*

*contrast to other owners of properties proximate to Appellants' parcels who have done similar acts on said proximate properties without enforcement actions being brought against them.*

Pursuant to Board direction, the County's zoning enforcement process is driven by complaints. The "similar acts" the appellants reference above include retaining walls or hard bank stabilization along the banks of Hot Springs Creek south of the appellants' property. P&D has not investigated the proximate properties because P&D has not received any complaints of potentially unpermitted development activities on those properties. Absent a complaint to P&D's Zoning Enforcement staff and follow-up investigation, P&D does not know the status of these developments. If P&D were to receive any complaints, staff would investigate them.

On February 10, 2009, P&D did receive a complaint alleging unpermitted grading and construction activities on the appellant's property, at which time staff investigated the complaint. Upon investigation, P&D staff determined that the development 1) required permits, 2) did not have permits and 3) occurred within an Environmentally Sensitive Habitat and thus constituted a zoning violation. The appellants were advised in the violation determination letter, dated April 8, 2009, that findings of consistency to grant after-the-fact approval for the entirety of the development would be difficult to support given the inherent conflict with policies that protect native vegetation and Environmentally Sensitive Habitats but that a restoration plan of the area would be approvable at the staff level (Attachment E to October 8, 2010 MPC Staff Report, Attachment 6 to this Board letter). In identifying a zoning violation upon complaint and providing a permit path for resolution of the violation, P&D treated the appellant the same as they would any other landowner with property for which a zoning violation was reported.

*C. The MPC's Decision and Findings Constitute a Regulatory Taking of a Large Portion of the Appellants Property.*

The appellants claim that the MPC's decision denies the appellants "any reasonable access to and use of the "island" area of the 1194 East Mountain Drive parcel which constitutes approximately one quarter (1/4) of the total area of said parcel."

Montecito Community Plan Policy BIO-M-1.7 states in pertinent part that "no structures shall be allowed in a riparian corridor except: ... [any] other development ... where this policy would preclude reasonable development of a parcel." 1194 East Mountain Drive currently supports a single family dwelling (approximately 1,600 sq. ft.), garage and maintenance building, lawn and landscaping. Until such time as the bridges were constructed, the "island" area of 1194 East Mountain Drive was informally accessible to the property owner. In denying the project, the MPC interpreted MCP Policy BIO-M-1.7 to preclude the proposed development in the ESH given the reasonable development extant on the lot. Please see the MPC staff report dated October 8, 2010, pp 14-15 for a full discussion of this policy (Attachment 6 to this BOS letter).

**Fiscal and Facilities Impacts:**

Budgeted: Yes

**Fiscal Analysis:**

The costs for processing appeals are partially offset through payment of a fixed appeal fee of \$643 (\$500 of which covers P&D costs). P&D absorbs the costs beyond the appeal fee. The total estimated time to

process this appeal is approximately 70 staff hours, which equates to approximately \$13,000. These funds are budgeted in the Permitting and Compliance Program of the Development Review South Division, as shown on page D-314 of the adopted 2011/2012 fiscal year budget.

**Special Instructions:**

The Clerk of the Board shall publish a legal notice in a paper of general circulation at least 10 days prior to the hearing on September 6, 2011. The Clerk of the Board shall fulfill noticing requirements. Mailing labels for the mailed notice were attached to the Set Hearing Board Letter for agenda date August 9, 2011. A minute order of the hearing and copy of the notice and proof of publication shall be returned to Planning and Development, attention David Villalobos.

**Attachments:**

1. Appeal to the Board of Supervisors dated June 3, 2011
2. Findings for Denial
3. CEQA Notice of Exemption
4. MPC Action Letter, dated May 27, 2011
5. MPC Staff Memo dated May 13, 2011
6. MPC Staff Report dated October 8, 2010
7. MPC Staff Memos dated December 15, 2010, February 23, 2011 and March 23, 2011 regarding appellants' requests for continuances

**Authored by:**

Julie Harris, Planner III, Planning and Development, (805) 568-3518

**cc:**

Anne Almy, Supervising Planner – Planning and Development