



**CITY OF PACIFIC GROVE**  
300 Forest Avenue, Pacific Grove, California 93950

**AGENDA REPORT**

**TO:** Honorable Mayor and Members of City Council

**FROM:** Daniel Gho, Public Works Director; Wendy Lao, Assistant Planner

**MEETING DATE:** June 15, 2016

**SUBJECT:** Consideration of an appeal of the Planning Commission's decision to approve Use Permit No. 16-093 for installation of protective golf barrier netting including 7 poles, and planting of 6 trees, along the fifth hole of Pacific Grove Golf Links; 77 Asilomar Avenue (APN 006-094-099)

**CEQA STATUS:** Categorical Exemption, Section 15303, Class 3

**RECOMMENDATION**

Review the application, deny the appeal, and adopt proposed findings that uphold the Planning Commission decision to approve UP 16-093. To the extent the City Council does not approve the specific design, the Council may alternatively vest the City Manager or Public Works Director with discretionary authority to approve the specific design.

**BACKGROUND**

On October 16, 2015 the City of Pacific Grove entered into a Stipulation for Entry of Final Judgement (Stipulated Judgement) that required removal of 6 Blue Gum Eucalyptus Trees identified as numbers 916,917,918,919,924,925 (Attachment 1 – Stipulated Judgment). The trees were located along the fifth hole of Pacific Grove Golf Links at 77 Asilomar Avenue (APN 006-094-099). The property is not located in the Coastal Zone (Attachment 7 – Coastal Zone Map).

Based on several arborist reports prepared for the trees, it was determined the trees warranted removal. The Stipulated Judgement is an Order of the Superior Court, signed by Judge Wills. The Court Order required the City to remove the six trees; cost of the removal to be split equally between plaintiffs and the City. The City is also required to promptly install netting on the golf course where the trees were removed. The City will bear all costs of the netting. After netting is installed, the City is required to plant replacement trees of a suitable species, likely Cypress Trees. In its exercise of discretion on this matter, the City Council must ensure it nonetheless complies with all requirements of the Stipulated Judgment and Court Order (Attachment 1).

In November and December of 2015 the City removed the six trees and contacted firms to prepare for installation of the netting at the golf course along the fifth hole as a means to protect persons or property from errant golf balls.

The City applied for a Use Permit (Use Permit No. 16-093) to allow installation of protective golf barrier netting, including 7 poles, and planting of 6 trees. Notices were mailed to local residents ten (10) days prior to the Planning Commission March 3, 2016 meeting, as required by PGMC Section 23.86.020(b)(2). On March 3, 2016, the Planning Commission held a hearing and approved Use Permit 16-093.

On March 11, 2016, the Planning Commission's approval of the permit was appealed (Attachment 12 – Appellant Letter and Continuance Request). This appeal was processed in accord with PGMC Chapter 23.74. The Golf net requires a Use Permit, not an Architectural Permit, and did not require story poles or flagging. Nevertheless, staff installed story poles and flagging as of March 23, 2016, as a courtesy to appellants in preparation of the City Council meeting. The appeal was timely, but no other appeal was received. PGMC section 23.74.050 (c) provides “No person shall be allowed to join an appeal after the expiration of the time limit for appeals.”

PGMC section 23.74.030 (c) provides the Appeal “shall be limited to issues raised at the public hearing, or in writing before the hearing, or information that was not generally known at the time of the decision that is being appealed.”

PGMC section 23.74.050 (d) directs the City Council to conduct a de novo public hearing on the Appeal in compliance with Chapter 23.86 PGMC (Public Meeting and Hearing Procedures). At the hearing, the Council may consider any issue involving the matter that is the subject of the appeal, in addition to specific grounds identified in the appeal.

PGMC section 23.74.050 (d) (1) and (2) provide the Council may affirm, affirm in part, or reverse the action, decision, or determination that is the subject of the appeal, based upon findings of fact about the particular case. The findings shall identify reasons for the action on the appeal, and verify the compliance or non-compliance of the subject of the appeal with these regulations. Prior to approving a permit or other action, the applicable findings in Chapter 23.70 PGMC (Community Development Permit Review Authorities and Procedures) shall be made. The Council in this matter may also adopt additional conditions of approval that may address other issues or concerns than the subject of the appeal or call-up.

At the April 6, 2016 City Council Meeting, the Council opened the hearing on the appeal of Use Permit 16-093. In its deliberations, the City Council determined a net at a height of 14 feet could be constructed on the condition that the City's insurance carrier, PARSAC, first approve the design and agreed to the suggested height.

On April 25, 2016, City staff met with PARSAC representatives at the site to review the proposed net height. This review included an assessment of netting that exists elsewhere at the golf links, the location of surrounding homes and the layout of the golf course.

PARSAC declined to approve the net design and did not offer its opinion as to the suggested net height. PARSAC instead commented that a golf architect or netting designer could be retained to evaluate the situation. On May 18, 2016 the City Council determined that such an extended process should not be followed, and directed that the matter return to Council as a continuance of the public hearing on the appeal to allow evidence, and the Council's final decision, as to the physical dimensions of the net.

## **DISCUSSION**

The City of Pacific Grove Public Works Department evaluated the site and determined the netting that can best protect persons or property from errant golf balls would be constructed in a manner similar to netting that already exists on the fifth hole and at the driving range (Attachment 2 - Location). The Monarch Pines Community, adjacent to the fifth hole, is currently protected by a netting system of 35 feet height strung between poles that are also 35 feet in height. The existing netting starts at the western point of the Monarch Pines boundaries, turns east and runs along the property adjacent to the golf hole. City staff proposes to expand the existing netting an additional 320 feet (Attachment 3 - Existing Netting). The netting to be installed will be black in color, and be comprised of U.V. treated #930 polyester barrier netting of 1 inch mesh size and average single mesh break strength of 116.7 pounds. Poles will match the existing brown poles and will be evenly spread at intervals of 53 feet and 4 inches. The netting will start at ground level and extend upwards to a height of 35 feet (Attachments 5 and 6 - Plans and Specifications).

Staff has determined that the proposed netting material is virtually see-through; this style lends itself to transparent views and also provides the best protection to the surrounding community from errant golf balls (Attachment 4 - Driving Range Netting).

## **UPDATE - May 15, 2016**

The City's interest in installing golf netting is to protect persons or property from physical harm that may be caused by errant golf balls. No matter what protective measures are used, however, there can be no assurance that possible harm will not accrue in every scenario. The City can only take reasonable actions to ensure that it maintains the public golf course so that it is not dangerous. If harm does occur, the City may later raise several affirmative defenses that its property was designed and managed in a reasonable manner. This can include the following defenses:

- The condition and layout of the golf course was created by reasonable act. The City is not liable if its act or omission creating the condition was reasonable. See Govt C §835.4(a);
- The City is not liable if actions to remedy the condition were reasonable. See Govt C §835.4(b); CACI 1112 (jury may weigh efforts to alleviate a condition, and cost of doing so, against likelihood of injury). See *Cardenas v Turlock Irrig. Dist.* (1968) 267 CA2d 352, 362 (failure to fence canal reasonable considering cost and practicality).
- The City is not liable for injuries caused by a dangerous condition of its property when the plan or design creating that condition was reasonably approved before construction. Govt C §830.6. See *Cornette v Department of Transp.* (2001) 26 C4th 63, 69; *Anderson v*

*City of Thousand Oaks* (1976) 65 CA3d 82, 88. To establish design immunity, the City must establish each of the following elements: (1) a causal relationship between the plan and the accident; (2) discretionary approval of the plan before construction; and (3) substantial evidence supporting the reasonableness of the design. *Ramirez v City of Redondo Beach* (1987) 192 CA3d 515, 525 (immunity applies even if reasonable minds differ concerning whether design should have been approved).

The City's current installed golf netting has a standard dimension adjacent to the fifth hole; the current protective netting system is 35 feet in height, and is strung between poles that are also 35 feet in height. The City may assert the defense of design immunity if a similar plan or design is approved before construction. If an alternate plan or design is used, such as the suggested 14 foot high net, it must be based upon (1) discretionary approval of the plan before construction; and (2) substantial evidence supporting the reasonableness of the design.

If the City Council chooses to act on the appeal, but does not desire to approve a specific net design, Council may delegate that design responsibility to either the City Manager or Public Works Director. This alternative would vest the selected officer with discretionary authority to approve the specific designs, and thus enable the City to assert design immunity provided the selected design is based on substantial evidence that supports the reasonableness of the design.

## **FINDINGS**

Staff proposes the following findings be adopted as part of Council's action on the appeal, per PGMC 23.70.080(4).

- (A) The proposed use is allowed with a use permit within the O zoning district and complies with all applicable provisions of these regulations;
- (B) The proposed use is consistent with the General Plan;
- (C) The establishment, maintenance, or operation of the use will not, under the circumstances of the particular case, be detrimental to the health, safety, or general welfare of persons residing or working in the neighborhood of the proposed use;
- (D) The use, as described and conditionally approved, will not be detrimental or injurious to property and improvements in the neighborhood or to the general welfare of the City; and
- (E) The location, size, design, and operating characteristics of the proposed use are compatible with the existing and future land uses in the vicinity.

## **FISCAL IMPACT**

The installation of the netting has been budgeted in Fund 77, the golf fund as part of the February 2016 budget modification.

## **ALTERNATIVES**

There is a present need to ensure errant golf balls do not cause personal or property damage.

No tested alternative to the golf net exists. Failure to promptly install netting on a golf course where the trees were removed will violate terms of the Stipulated Judgment and Court Order in *Dolton, Nancy et al. v. City of Pacific Grove (M131641)*. Alternative net heights have been suggested, however, alternative protection measures have not been adequately designed, engineered or tested. The proposed size, color, and strength of the golf net and poles, as

approved by Use Permit No. 16-093, have been recommended by subject experts from Judge Netting Inc. This design has been shown to be effective and to protect neighboring properties and people from errant golf balls; however, the City Council may approve an alternative design, with adequate testing and engineering. Any selected design must be based on substantial evidence that supports the reasonableness of the design.

**ATTACHMENTS**

1. Stipulated Judgment
2. Location Picture
3. Existing Netting
4. Driving Range Netting
5. Plans
6. Specifications
7. Coastal Zone Map
8. CEQA Exemption
9. Mailing Notice
10. Affidavit
11. Resolution UP 16-093
12. Appellant Letter and Continuance Request

RESPECTFULLY SUBMITTED:



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Daniel Gho  
Public Works Director



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Wendy Lao  
Assistant Planner

REVIEWED BY:



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Ben Harvey  
City Manager

**FILED**

NOV 05 2015

TERESA A. ...  
CLERK OF THE SUPERIOR COURT  
PESMERALDA DEPUTY

1 David C. Laredo, CSBN 66532  
2 Alex J. Lorca, CSBN 266444  
3 **De LAY & LAREDO**  
4 Attorneys at Law  
5 606 Forest Avenue  
6 Pacific Grove, CA 93950-4221  
7 Telephone: (831) 646-1502  
8 alex@laredolaw.net

9 Attorney for Defendant,  
10 CITY OF PACIFIC GROVE

**Exempt from Filing Fee  
per Govt. Code § 6103**

11 **SUPERIOR COURT OF CALIFORNIA**  
12 **COUNTY OF MONTEREY**

13 NANCY DOLTON, MARION  
14 TRENTMAN MORELLI and ROBERT  
15 MORELLI,

16 Plaintiffs,

17 v.

18 CITY OF PACIFIC GROVE and DOES 1-  
19 50, inclusive,

20 Defendants.

Case No.: M 131643

**STIPULATION FOR ENTRY OF  
FINAL JUDGMENT; AND  
JUDGMENT THEREON [CCP § 664.6]**

21 Plaintiffs NANCY DOLTON, MARION TRENTMAN MORELLI AND ROBERT  
22 MORELLI (Plaintiffs), appearing by and through attorneys Joel Franklin, Andrew Swartz, and Neil  
23 Shapiro, and the CITY OF PACIFIC GROVE (City), appearing by and through their attorneys  
24 David C. Laredo and Alex J. Lorca, enter into the following Stipulation for Entry of Final Judgment  
25 (Stipulated Judgment) in full and final settlement of the above-captioned case without trial or  
26 adjudication of any issue of fact or law, and agree that a final judgment may be so entered:

**RECITALS**

1  
2 1. The parties enter into this Stipulation with reference to and in acknowledgment of  
3 the following facts:

4 1.1. On April 8, 2015, Plaintiffs Nancy Dolton, Marion Trentman-Morelli and Robert Morelli  
5 (Plaintiffs) filed the instant matter alleging six (6) Blue Gum Eucalyptus trees identified as  
6 numbers 916, 917, 918, 919, 924 and 925 in an April 14, 2014 report by the City's Arborist  
7 (located on City property near Hole 5 of the Pacific Grove Municipal Golf Course and  
8 adjacent to Plaintiffs' homes) were improperly maintained by the City.

9 1.2. On May 13, 2015 the City served Plaintiffs with its Amended Answer denying Plaintiffs'  
10 claims.

11 1.3. On July 21, 2015, Marion Trentman-Morelli filed Monterey Superior Court Case No.  
12 M132694 (*Trentman-Morelli v. City of Pacific Grove*), a Petition for Writ of Mandate seeking to  
13 compel the City to allow the inspection of, and to provide a copies of, requested City  
14 records under the California Public Records Act. (California Government Code §§ 6250 et  
15 seq.)

16 1.4. On August 10, 2015 the City filed an Answer denying Plaintiff's claims.

17 2. The parties wish to avoid the burden and expense of further litigation and accordingly have  
18 determined to compromise and settle their differences in accordance with the provisions of this  
19 Stipulation. Neither this Stipulated Judgment nor any of the statements or provisions contained  
20 herein shall be deemed to constitute an admission or an adjudication of any of the allegations of the  
21 Complaint.  
22

23 3. The parties to this Stipulated Judgment agree to resolve this action in its entirety by mutually  
24 consenting to the entry of a Final Judgment  
25

**STIPULATED JUDGMENT**

1  
2 1. The Six Trees (numbered 916, 917, 918, 919, 924, and 925) that are the subject of the  
3 instant matter shall be removed by the City, including stump grinding, within 60 days of entry of  
4 this Stipulated Judgment.

5 2. The costs of removal shall be split equally between Plaintiffs and the City. Plaintiff's  
6 payment shall be effected within 90 days following removal of the trees.

7 3. The City shall promptly install netting on the golf course where the trees were  
8 removed. The City shall bear the costs of netting.

9 4. The City shall replace the removed Eucalyptus trees with new trees of a suitable  
10 species, likely Cypress Trees, and regularly monitor and maintain the replacement trees.  
11 Plaintiffs shall be consulted regarding the specific species of tree to be planted, but City shall  
12 have the sole discretion to elect the species. Plaintiffs shall pay \$1,200 toward the costs of tree  
13 replacement. Costs exceeding this amount shall be borne entirely by the City.

14 5. Within five (5) court days of entry of the Stipulated Judgment herein, Plaintiff  
15 Marion Trentman-Morelli shall dismiss Monterey Superior Court Case No. M 132694 (*Trentman-*  
16 *Morelli v. City of Pacific Grove*), with prejudice. Each party shall bear its own attorney's fees and  
17 costs in that matter. Neither party shall be deemed a prevailing party in Case No. M 132694.

18 6. Neither party shall be deemed a prevailing party in the instant action.

19 7. All time periods set forth in this Stipulated Judgment may be extended by mutual  
20 written agreement between the parties.

21 8. Neither party shall appeal this Judgment.

22  
23 **RETENTION OF JURISDICTION AND ENFORCEMENT**

24 9. Pursuant to California Code of Civil Procedure §664.6 the Court shall retain  
25 jurisdiction for the purpose of enabling any of the parties to this Stipulated Judgment to apply to  
26

1 this Court at any time for such order or directions that may be necessary or appropriate for the  
2 construction, operation or modification of the Stipulated Judgment, or for the enforcement or  
3 compliance thereof.

4 10. This Stipulated Judgment may be used as evidence in a subsequent proceeding in  
5 which either party alleges breach of this Stipulated Judgment.

6 11. If any action at law or in equity, including an action for Declaratory Relief is brought  
7 to enforce or interpret the provisions of this Stipulated Judgment, the prevailing party shall be  
8 entitled to recover reasonable attorneys' fees in addition to any other relief to which the party may  
9 be entitled, including costs.

10 **IT IS SO STIPULATED:**

11  
12  
13 Dated: 10-15-15

Thomas Frutchet  
Thomas Frutchet, City Manager  
City of Pacific Grove

14  
15  
16 Dated: 10-16-15

Nancy Dolton  
Nancy Dolton, Plaintiff

17  
18  
19 Dated: 10/16/15

Marion Trentman-Morelli  
Marion Trentman-Morelli, Plaintiff

20  
21  
22 Dated: 10-16-15

Robert Morelli  
Robert Morelli, Plaintiff

23  
24 Approved as to Form:  
25 Dated: 10/16/15

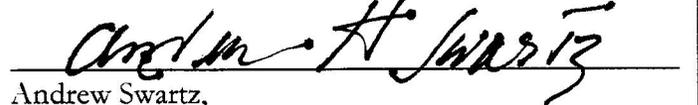
David C. Laredo  
David C. Laredo  
City Attorney, City of Pacific Grove

1  
2 Dated: 10/14/15



Joel Franklin  
Attorney for Plaintiffs Nancy Dolton, Marion  
Trentman Morelli and Robert Morelli

3  
4 Dated: Oct. 16, 2015



Andrew Swartz,  
Attorney for Plaintiffs Nancy Dolton, Marion  
Trentman Morelli and Robert Morelli

5  
6 Dated: Oct 16, 2015



Neil Shapiro,  
Attorney for Plaintiff Marion -Trentman Morelli

7  
8  
9  
10  
11 Upon the stipulation of the parties hereto and upon their agreement to entry of this  
12 Stipulated Judgment without trial or adjudication of any issue of fact or law herein, and good cause  
13 appearing therefore, IT IS SO ORDERED, ADJUDGED AND DECREED.

14  
15 Dated: NOV 05 2015

**THOMAS W. WILLS**  
\_\_\_\_\_  
JUDGE OF THE SUPERIOR COURT

16  
17  
18  
19  
20 U:\GENERAL (NEW)\City of Pacific Grove\LITIGATION\ Dolton v. Pacific Grove M131643\Settlement\ Dolton v. City of Pacific Grove STIPULATION FOR ENTRY OF JUDGMENT  
AND ORDER THEREON.docx



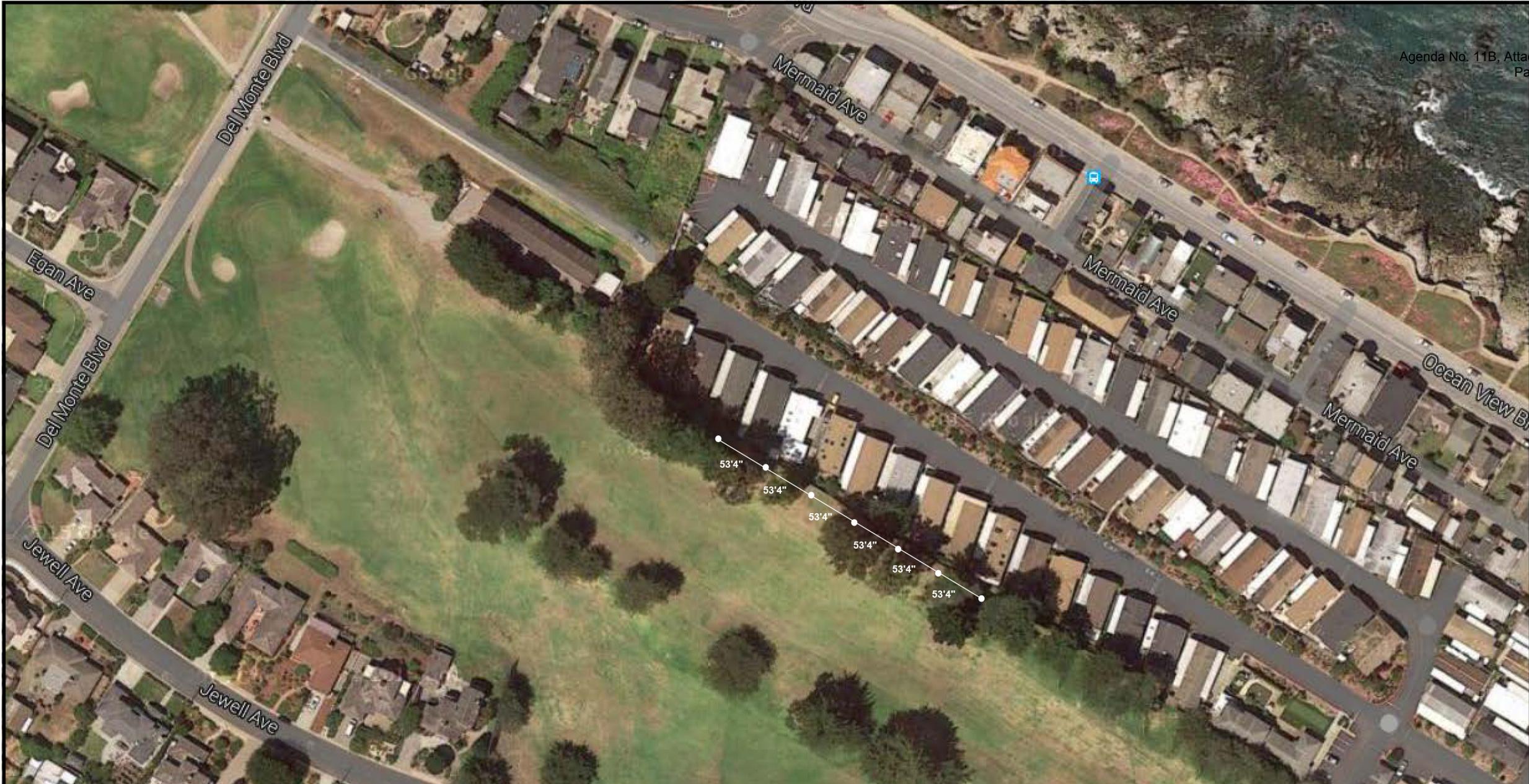
Location of Proposed Netting and Trees - Along 5<sup>th</sup> Hole of Pacific Grove Golf Links



Example: Existing Netting Along the 5<sup>th</sup> Hole of Pacific Grove Golf Links, Located Adjacent to Monarch Pines Community



Example: Driving Range Netting

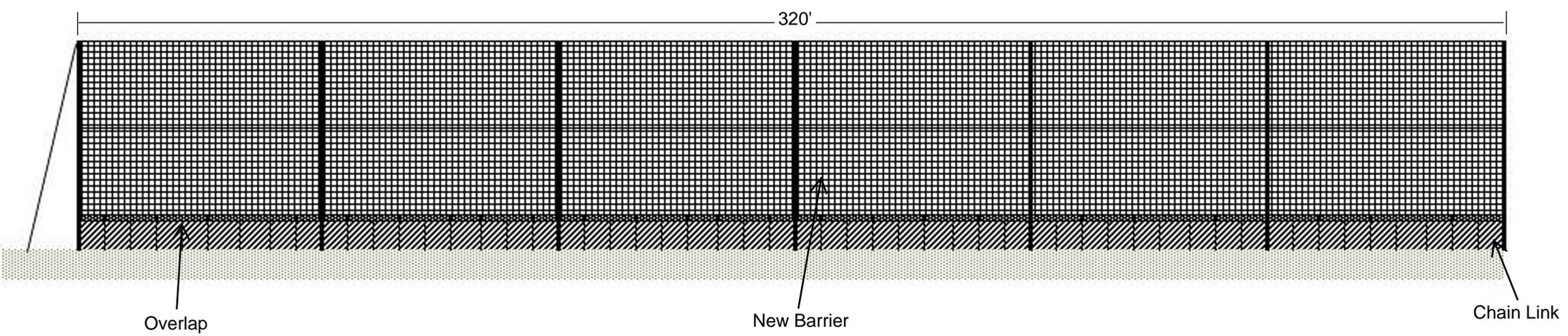


**Pacific Grove Golf Links**  
77 Asilomar Coastal Trail  
Pacific Grove, CA 93950  
New Netting Barrier- Site Plan

**Judge Netting Inc.**  
427 E. 17th St. #489  
Costa Mesa, CA. 92627  
P: 714-265-2200  
F: 714-265-2400  
www.judgenetting.com

Date:  
1/18/2016

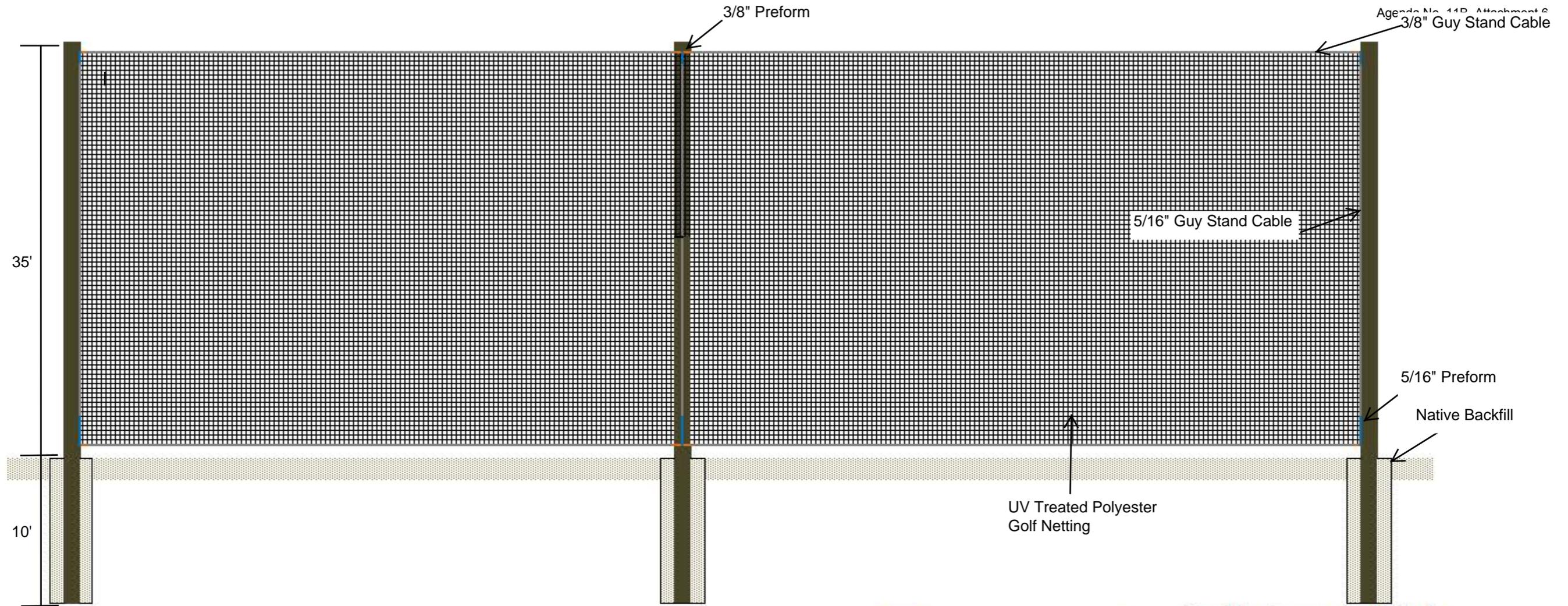
Drawing:  
Site Plan







320'



Pacific Grove Golf Links  
Pole Elevation

## **Redden Nets #930 Polyester Barrier Netting System**

- Component Specification / Tolerance

### **Netting Component:**

- ~ Redden Nets #930 polyester netting; 1" mesh size
- ~ Long stitch knotless join
- ~ U.V. treated yarn
- ~ Resin dye and bonding treatment
- ~ 116.7 lb. Average single mesh break strength. <sup>1</sup>
- ~ Weight factor: 40.0 square feet = 1-lb.

### **Attachment Twine / Hanging Twine:**

- ~ #48 Braided polyester twine
- ~ 375 lb. Tensile strength
- ~ Dye treated

### **Perimeter Border Ropes & Riblines:**

- ~ Braided synthetic cover
- ~ Parallel synthetic core
- ~ 3,500 lb. Tensile strength
- ~ 2,455 Wet abrasion cycles

### **Warranty:**

- ~ Ten year warranty. <sup>2</sup>

1.) Mesh strength based upon most recent independent lab testing reports. Report copies are available upon Request. Testing conducted per ISO 1806 methodology.

2.) Some exclusions and limitations do apply. Warranty document is available upon request.

## **Redden #930** **Golf Range Netting System Specifications**

**Netting:** Redden #930 polyester golf range netting with average 116.7 lb. mesh breaking strength, 2 ½" stretched mesh; 1" single bar measure, four needle raschel knotless construction, manufactured with U.V. treated yarn and additionally coated with a black resin dye and bonding treatment. Mesh break strength determined by independent laboratory per ISO 1806.

All sections of netting component to be constructed to a 3/8" braided black perimeter rope, minimum 3,500 lb. breaking strength. Additionally, net panels shall have internally constructed vertical and horizontal ropes of the same material. All rope locations on the net panels shall correspond to the as built net panel suspension and support cables constructed to pole structures. All net panels shall be custom fabricated to as built measurements of the pole/cable structure to provide a taut panel upon completion.

Attachment of net and rope components shall be made with #48 braided polyester twine, minimum 375 lb. tensile strength, treated black. The attachment twine shall continually encompass the netting component and be tied to the rope component via a clove and one half hitch knot +/- 6 inches on center, never to exceed 8 inches on center.

Finished net panels shall be suspended to cables by the rope component via a 9/32" cadmium plated steel carabiner attachment snap, minimum 1,140 lb. breaking strength. The interior of the snap shall encompass only the rope and cable components when suspension is completed. The interval between snap to cable attachment points shall not exceed 3 feet on center (snap size may vary to fit cable size(s) specified).

Netting system shall be accompanied by a ten year manufacturer's warranty. Netting system is available from Redden Marine Supply, Inc., Bellingham, WA, 800-426-9284, or engineers approved equal.



Certificate No. 0812-1036b  
December 16, 2008

Mr. Ron Chiabai  
Redden Marine Supply, Inc.  
1411 Roeder Ave.  
Bellingham, WA 98225-2916

**Subject: Determination of net mesh breaking load**

**Netting sample tested: #930 Barrier Netting, Bale No. 353/028, 12/09/08**

**Reference: ISO 1806, "Fishing nets - Determination of mesh breaking load of netting"**

Dear Mr. Chiabai:

Dynamark Engineering, Inc. was retained by Redden Marine Supply to perform tension testing on a netting sample provided by your company. This report contains a summary of our testing approach and results.

Testing was performed on December 16, 2008 using our JJ Lloyd Universal Testing Machine (DEI-110) which is in current calibration and traceable to the National Institute of Standards and Technology (NIST).

Per the referenced ISO 1806 specification, loading was applied with pins through one mesh at a time that was at least on one mesh inside of the edge. Tension loads were applied at a rate of 1 inch per minute until failure occurred.

The sample was tested a total of 10 times in remote locations on the netting. All tension was applied in the length direction of the manufactured netting.

Figure 1 shows the typical testing setup.

The test results are summarized in Table 1.



Figure 1. Tensile testing machine with net mesh in place for testing.



Figure 2. Break load testing in progress.

**Table 1. #930 Barrier Netting**

**Bale No. : 353/028 12/09/08**

Test No.	Tensile Strength [lb]
1	121
2	101
3	111
4	107
5	122
6	125
7	121
8	124
9	117
10	118
<b>Avg</b>	<b>116.7</b>
<b>Std Dev</b>	<b>7.5</b>
<b>Max Val</b>	<b>125</b>
<b>Min Val</b>	<b>101</b>

This report has been prepared for the exclusive use of Redden Marine Supply. Any reproduction or transmittal of this report must be done so with written permission from Redden Marine Supply. Thank you for using Dynamark Engineering, Inc. Please give me a call at 425.483.4447 if you have any questions regarding this testing, or if we can be of additional assistance.

Reviewed by: Leesa Johansen 

Sincerely,



Mark J. Suryan, PE



**Legend**

-  parcel 006094099000
-  Coastal Zone Boundary



SCALE: 1:1,200      PRINT DATE: 3/9/2016



0 50 100 Feet  
0 10 20 Meters



# CITY OF PACIFIC GROVE

## Community Development Department – Planning Division

300 Forest Avenue, Pacific Grove, CA 93950

T :: 831.648.3190 • F :: 831.648.3184 • [www.ci.pg.ca.us/cdd](http://www.ci.pg.ca.us/cdd)

### NOTICE OF EXEMPTION FROM CEQA

**Property Address/Location:** 77 Asilomar Ave, Pacific Grove, CA 93950

**Project Description:** Use Permit (UP) 16-093

Description: To allow the installation of protective netting (35' height x 320' width) including 7 poles, and planting of 6 trees, along the fifth hole of Pacific Grove Golf Links.

APN: 006-094-099

ZC: O GP: Open Space

Applicant Name: Daniel Gho, City of Pacific Grove, Director of Public Works Phone #: (831) 648-5722

Mailing Address: 300 Forest Avenue, Pacific Grove, CA 93950

Email Address: [dgho@cityofpacificgrove.org](mailto:dgho@cityofpacificgrove.org)

**Public Agency Approving Project:** City of Pacific Grove, Monterey County, California

**Exempt Status (Check One):**

- Ministerial (Sec. 21080(b)(1):15268))
- Declared Emergency (Sec. 21080(b)(3): 15269(a))
- Emergency Project (Sec. 21080(b)(4); 15269(b)(c))
- Categorical Exemption

Type and Section Number: Section 15303 Class 3 Categorical Exemption

**Exemption Findings:**

The project includes the installation of protective netting (35' height x 320' width) including 7 poles, and planting of 6 trees, and therefore qualifies for a Class 3 Exemption from CEQA requirements, pursuant to Section 15303 – New Construction or Conversion of Small Structures.

The proposed alterations do not present any unusual circumstances that would result in a potentially significant environmental impact.

**Contact:** Wendy Lao, Assistant Planner      **Contact Phone:** (831) 648-3185

**Signature:**

**Date:** February 24, 2016



City of Pacific Grove  
Community and Economic Development Department  
300 Forest Avenue  
Pacific Grove, CA 93950

SAN JOSE  
CA 95131  
23 FEB '16  
PM 2 L

neopost  
02 23 2016  
US POSTAGE \$00 48-  
PACIFIC GROVE CA 93950

**NOTICE OF PUBLIC HEARING**  
**before the**  
**PLANNING COMMISSION**  
6:00 p.m. Thursday, March 3, 2016

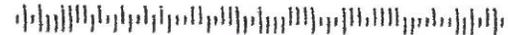
**For a property located at**  
**77 ASILOMAR AVE.**  
**PACIFIC GROVE, CA 93950**

Meeting Location:  
City Council Chambers – City Hall  
300 Forest Avenue, Pacific Grove, CA

006141005000

7 JEWELL AVE  
PACIFIC GROVE CA 93950

93950253955



**Address:** Pacific Grove Golf Links: 77 Asilomar Avenue. Pacific Grove, CA 93950

**Use Permit:** UP No. 16-093

**Project Description:** To install 7 poles of 35 feet height with protective barrier netting along the fifth hole (northern side) of Pacific Grove Golf Links, for a total width of 320 feet.

**Applicant/Owner:** Daniel Gho, Public Works Director/City of Pacific Grove

**Zone District/ Land Use:** O

**General Plan Designation:** Open Space

**Assessor's Parcel Number:** 006-094-099

**CEQA Status:** Categorical Exemption, Section 15303, Class 3

**Staff Reference:** Wendy Lao, wlao@cityofpacificgrove.org

*What is the purpose of this notice? This notice is to alert you to the time and place of the public meeting, which provides an opportunity for you to ask questions and/or formally record testimony related to a project. Legal challenges to the City's action on a project must be limited only to issues raised in testimony during the public meeting process.*

*What information is available? This notice is posted at the project site frontage(s). If required, story poles and netting have been placed on the property to outline the proposed ridgelines and extent of the project, but do not reflect all details. Project materials are available for review at the Community and Economic Development Department 8-12 & 1-5, Monday-Thursday and online at [www.cityofpacificgrove.org/about-city/boards-commissions/planning-commission](http://www.cityofpacificgrove.org/about-city/boards-commissions/planning-commission). Up-to-date plans and related materials will also be available for review at the meeting.*

*Are there special accommodations? The City of Pacific Grove does not discriminate against persons with disabilities and City Hall is an accessible facility. A limited number of devices are available to assist those who are hearing impaired. If you would like to use one of these devices, please contact the Community and Economic Development Department.*



<u>77 Asilomar Avenue</u>	<u>Pacific Grove</u>	<u>CA</u>	<u>93950</u>
Street	City	State	Zip

Planning Application:

APN:

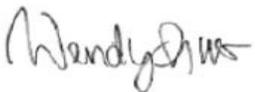
**DECLARATION**

I, Wendy Lao, declare as follows:

1. The Notice of Public Hearing shall be posted on the subject lot in a location that can be viewed from the nearest street. If the subject lot is a through lot, a notice shall be conspicuously posted adjacent to each street frontage in a location that can be viewed from the street.
2. The Notice of Public Hearing shall be mailed to owners of all properties 300 feet from the subject lot. The names and addresses used for such notice shall be those appearing on the equalized county assessment roll, as updated from time to time.

I declare under penalty of perjury under laws of the State of California that the foregoing is true and correct.

Print Name: Wendy Lao

Signature: 

Date: March 25, 2016



77 Asilomar Avenue                      Pacific Grove                      CA                      93950  
Street    City    State    Zip

Planning Application:              UP 16-093    APN: 006-094-099

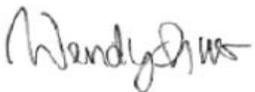
**DECLARATION**

I, Wendy Lao, declare as follows:

1. The Notice of Public Hearing shall be posted on the subject lot in a location that can be viewed from the nearest street. If the subject lot is a through lot, a notice shall be conspicuously posted adjacent to each street frontage in a location that can be viewed from the street.
2. The Notice of Public Hearing shall be mailed to owners of all properties 300 feet from the subject lot. The names and addresses used for such notice shall be those appearing on the equalized county assessment roll, as updated from time to time.

I declare under penalty of perjury under laws of the State of California that the foregoing is true and correct.

Print Name: Wendy Lao

Signature: 

Date:              June 1, 2016



## RESOLUTION NO. 16-XX

### **USE PERMIT (UP) NO. 16-093 TO INSTALL PROTECTIVE GOLF BARRIER NETTING (35 FEET HEIGHT X 320 FEET WIDTH) INCLUDING 7 POLES, AND TO PLANT 6 TREES, ALONG THE FIFTH HOLE OF PACIFIC GROVE GOLF LINKS.**

#### **FACTS**

1. The subject site is located at 77 Asilomar Ave., Pacific Grove, 93950 (APN 006-094-099)
2. The subject site has a designation of Open Space adopted by the City of Pacific Grove General Plan Land Use Map.
3. The project site is located in the O zoning district.
4. The subject site is developed with a golf course and a maintenance building.
5. The subject site is located in the Archaeological Zone.
6. The subject site is located in the Area of Special Biological Significance Watershed.
7. This project has been determined to be CEQA Exempt under CEQA Guidelines Class 3 Section 15303.
8. A use permit is required when structures are to be developed in the O zoning district.

#### **FINDINGS**

1. The proposed use is allowed in the O zoning district with a use permit per Pacific Grove Municipal Code 23.42.020, and;
2. The proposed development will meet the development regulations set forth in the O zoning district, and;
3. The proposed use is consistent with the general plan, and;
3. The establishment, maintenance or operation of the use will not, under the circumstances of this particular case, be detrimental to the health, safety, or general welfare of persons residing or working in the neighborhood of the proposed use, and;
4. The use, as described and conditionally approved, will not be detrimental or injurious to property and improvements in the neighborhood or to the general welfare of the city, and;
5. The location, size, and design of the proposed development are compatible with the existing and future land uses in the vicinity because the proposed structure is characteristic in the neighborhood, and;
6. The completed project will neither be detrimental to the orderly and harmonious development of the city nor impair the desirability of investment or occupation in the neighborhood because the project will be improving the subject property, and;
7. An archaeological report was completed on February 12, 2016 by Gary S. Breschini, Ph.D. and determined that the proposed project to not be delayed for archaeological reasons.

**CONDITIONS OF APPROVAL:**

1. **Permit Expiration:** This permit shall expire and be null and void if a building permit has not been applied for within one (1) year from and after the date of approval. Application for extension of this approval must be made prior to the expiration date.
2. **Archaeological Resources:** A qualified archaeological monitor should be present during initial project excavations. If archaeological resources or human remains are unexpectedly discovered during construction, work shall be halted within 50 meters ( $\pm 165$  feet) of the find until it has been evaluated for significance by a qualified professional archaeologist. If the find is determined to be significant, appropriate mitigation measures shall be formulated, with the concurrence of the lead agency, and implemented.
3. **Construction and Use Compliance:** All activities must occur in strict compliance with the proposal as set forth in the application for this Use Permit, subject to any special conditions of approval herein. Any deviation from approvals must be reviewed and approved by staff, and may require City Council approval as a use permit amendment.
4. **Public Works, Fire, and Building:** Review and approval by the Public Works, Fire and Building Departments are required prior to issuance of a building permit. Work taking place in the public right-of-way shall require an encroachment permit prior to issuance of the building permit.
5. **Tree Protection Standards During Construction:** Pursuant to Municipal Code Chapters 12.20 and 12.30, and the Urban Forestry Standards, all trees that are otherwise protected and will be impacted as a result of Development, both proposed for pruning or removal and where the development will impact the critical root zone of the tree are protected. Prior to issuance of the building permit, the Project Arborist shall review grading, drainage, utility, building and landscape plans to determine impacts to individual Trees, to determine required minimum Tree protection standards during construction.
6. **Stormwater Treatment:** The stormwater treatment measures shall be maintained by the property owner in perpetuity and City of Pacific Grove staff shall be allowed access to inspect all stormwater treatment measures on an annual basis.
7. **Terms and Conditions:** These terms and conditions shall run with the land, and it is the intention of the City Council and the Permittee to bind all future owners and possessors of the subject property to the terms and conditions, unless amended. Amendments to this permit may be achieved only if an application is made, and the City Council approves, any such amendments pursuant to the Zoning Code regulations.

8. **Conditions of Approval in Plans:** All conditions of approval for the Planning permit(s) shall be printed on a full size sheet and included with the construction plan set submitted to the Building Department.

**NOW, THEREFORE, BE IT RESOLVED BY THE PLANNING COMMISSION OF THE CITY OF PACIFIC GROVE:**

- I. The Commission determines that each of the Findings set forth above is true and correct, and by this reference incorporates those Findings as an integral part of this Permit.
- II. The Commission authorizes approval of Use Permit No. 16-02 to install protective golf barrier netting (35 feet height x 320 feet width) including 7 poles, and to plant 6 trees, along the fifth hole of Pacific Grove Golf Links.
- III. This permit shall become effective upon the expiration of the 10-day appeal period.
- IV. This permit shall not take effect until the owner acknowledges and agrees to all terms and conditions and agrees to conform to and comply with those terms and conditions.

**PASSED AND ADOPTED BY THE CITY COUNCIL OF THE CITY OF PACIFIC GROVE** this 6<sup>th</sup> day of April, 2016, by the following vote:

AYES:

NOES:

ABSENT:

APPROVED:

\_\_\_\_\_  
BILL KAMPE, MAYOR

The undersigned hereby acknowledge and agree to the approved terms and conditions, and agree to fully conform to, and comply with, said terms and conditions.

\_\_\_\_\_  
Ben Harvey, City of Pacific Grove Interim City Manager

\_\_\_\_\_  
Date

# HORAN | LLOYD

ANTHONY T. KARACHALE  
STEPHEN W. DYER  
MARK A. BLUM  
JAMES J. COOK  
ELIZABETH C. GIANOLA  
JEROME F. POLITZER  
PAMELA H. SILKWOOD  
JACQUELINE M. PIERCE  
BIANCA KARIM  
JENNIFER M. PAVLET  
GREGORY J. CARPER

*Of Counsel*

FRANCIS P. LLOYD  
ROBERT ARNOLD, INC.

LAURENCE P. HORAN  
(1929-2012)

HORAN LLOYD  
A PROFESSIONAL CORPORATION  
ATTORNEYS AT LAW  
26385 Carmel Rancho Blvd., #200  
Carmel, CA 93923

Pamela H. Silkwood

[psilkwood@horanlegal.com](mailto:psilkwood@horanlegal.com)

File No. 6910.02

Tel: 831.373.4131  
Fax: 831.373.8302  
horanlegal.com  
RECEIVED  
CITY MANAGER'S OFFICE  
2016 MAR 11 P 1:47  
CITY OF PACIFIC GROVE

March 11, 2016

## Via Hand Delivery

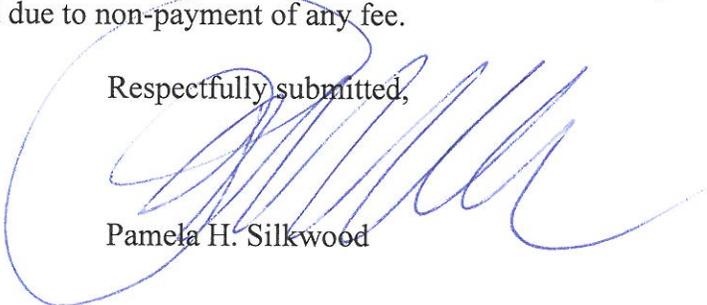
Mark Brodeur  
Department Director  
Community & Economic Development  
City Hall  
300 Forest Ave., 2<sup>nd</sup> Floor  
Pacific Grove, California 93950

**RE: Appeal of Planning Commission's approval of Use Permit Application No. UP 16 -093**

Dear Mr. Brodeur,

Enclosed with this letter, please find an appeal of the Planning Commission's approval of Use Permit Application No. UP 16 -093 for the installation of protective Netting (35 feet height x 320 feet width) and seven poles, and the planting of six trees along the fifth hole at the Pacific Grove Golf Links. Since the appeal fee is based on the application fee, and the City presumably did not pay a fee for this application, we assume the application fee to be zero. The appellants contacted the City to determine the application fee and received no response from the City. Accordingly, this appeal must not be denied due to non-payment of any fee.

Respectfully submitted,

  
Pamela H. Silkwood

PHS/jlt  
Enclosures



# CITY OF PACIFIC GROVE

Community Development Department - Planning Division

300 Forest Avenue, Pacific Grove, CA 93950  
T :: 831.648.3190 • F :: 831.648.3184 • www.ci.pg.ca.us/cdd

## Appeal Form

Appeal #: \_\_\_\_\_  
Date: \_\_\_\_\_  
Received By: \_\_\_\_\_  
Total Fee: \_\_\_\_\_

RECEIVED  
CITY MANAGER'S OFFICE

2016 MAR 11 P 1:48

**Project Information**

Project Address: \_\_\_\_\_ APN: \_\_\_\_\_  
 On HRI /  Not on HRI

Application & No.: \_\_\_\_\_  
 Applicant Name: \_\_\_\_\_ Phone #: \_\_\_\_\_  
 Mailing Address: \_\_\_\_\_  
 Email Address: \_\_\_\_\_  
 Owner Name: \_\_\_\_\_ Phone #: \_\_\_\_\_  
 Mailing Address: \_\_\_\_\_  
 Email Address: \_\_\_\_\_

**Action<sup>1</sup>**

ARB: Architectural Review Board  
 CDD: Planning Staff  
 HRC: Historic Resources Committee

PC: Planning Commission  
 NRC: Natural Resources Committee  
 SPRC: Site Plan Review Committee  
 ZA: Zoning Administrator

Date of Action: \_\_\_\_\_  
 Action Taken: \_\_\_\_\_

**Appeal Information**

Appellant Name: Richard T. Stillwell\* Phone #: 831-649-6269  
 Mailing Address: 801 Jewell Avenue, Pacific Grove, CA 93950  
 Email Address: RTStillwell@pacbell.net  
 Appeal Deadline: 5:00 p.m. on / /  
 Grounds for Appeal: Please see attached four (4) pages  
\*Additional names will be sent via e-mail  
*If necessary, use additional pages.*

**Fees**

Discretionary Fees <sup>2</sup>	_____	\$	_____
Appeal Fee = 25% of discretionary fees	_____	\$	_____
Cost of publication of legal notice <sup>3</sup>	_____	\$	_____
Photocopies _____ copies @ 10¢ each	_____	\$	_____
Postage <sup>4</sup> _____ stamps @ 45¢ each	_____	\$	_____
Other _____	_____	\$	_____
<b>Total Appeal Fee</b>	_____	\$	_____

Richard T. Stillwell  
Appellant Signature

03/11/2016  
Date

<sup>1</sup> See Table 23.70.012-1 in the Pacific Grove Zoning Code, which identifies roles of review authorities as they relate to appeals.  
<sup>2</sup> Whatever fee was collected by the city for the application for use permit, architectural approval, variance, etc., or combination of more than one fee if more than one decision is being appealed.  
<sup>3</sup> Currently averaging \$250-300.  
<sup>4</sup> Typically the number of address labels for parcels (or portions thereof) found within a 300 ft radius of the subject parcel (350 ft radius for homes in the Asilomar Dunes area) is approximately 120. Mailing is sent to owners and occupants (including most individual apartments) of properties.

**Appellants**

**Sanford Cohen  
775 Jewell Avenue**

**Margie Mentana  
1421 Courtyard Dr.  
San Jose, CA 95118**

**Gail Cohen  
776 Jewell Avenue**

**Sally Sirocky  
767 Jewell Avenue**

**Alexander Sirocky  
767 Jewell Avenue**

**Sue Kabat  
755 Jewell Avenue**

**Darryl Dornally  
759 Jewell Avenue**

**Jean Dornally  
759 Jewell Avenue**

**David Messina  
751 Jewell Avenue**

**Felicita Messina  
751 Jewell Avenue**

**Dorethy Nelson  
181 Cedar Street**

**Kan Nelson  
181 Cedar Street**

## Grounds for Appeal

Final Approval of Use Permit Application  
No. UP 16 -093 for the installation of protective  
Netting (35 feet height x 320 feet width) including  
7 poles, and planting of 6 trees, along the fifth hole  
of Pacific Grove Golf Links, pursuant to  
P.G.M.C. 23.42.020

In October, 2015, Monarch Pines Community of Pacific Grove and the City of Pacific Grove ("City") settled on a dispute regarding six poorly maintained Eucalyptus trees, and the Monterey County Superior Court entered judgment on the settlement ("Stipulated Judgment"). The Stipulated Judgment ordered the City to remove the six trees, to install netting on the golf course where the trees were removed, and to plant replacement trees.

At the outset, it is important to point out the City cannot contract away its right to exercise the police power in the future. (*Cotta v. City and County of San Francisco* (2007) 157 Cal.App.4<sup>th</sup> 1550, 1557.) A contract that purports to do so is invalid as against public policy and is a violation of Cal. Const., Art XI, §7. (*Cotta v. City and County of San Francisco, supra*, 157 Cal.App.4<sup>th</sup> at p. 1557.) Specific to this matter, the City's adjudicative bodies cannot be bound by the stipulated judgment because they are prohibited from surrendering, impairing or bargaining away its control of a police power or municipal function. Accordingly, the City Council must review this appeal on its merits without prejudice or bias. The California Coastal Commission, which is not a party to the complaint or the settlement, also has the obligation to review this appeal on its merits rather than in the context of the stipulated judgment if the application is further appealed.

Specific to the stipulated judgment, the City has jurisdiction over both tree removal [Pacific Grove Municipal Code ("PGMC") Chapter 12.20] and the issuance of a Use Permit (PGMC §23.60.070) for the installation of netting. Any discretionary approval must be supported by certain required findings based on substantial evidence in the record.

### Tree Removal

The removal of the Eucalyptus trees took place in November and December, 2015. The citizens of Pacific Grove did not receive notice of this action taken by the City. The trees removed were "Public Trees" within the category of "Protected Trees" and thus, their removal triggered the requirements of permit application and processing as set forth in Chapter 12.60. (PGMC §12.20.040.) The appellants did not receive notice of such application, nor of the City decision, to remove the trees and thus, the City has failed to follow its code requirements. Prior to the tree removal, an assessment of the project's potential impact to

Monarch butterflies and other sensitive species should have been prepared, and the appellants have no knowledge that City prepared such assessment prior to the tree removal.

### Use Permit

On March 3, 2016, the City Planning Commission held a public hearing and approved a Use Permit Application (UP 16 -093) for the installation of protective netting (35 feet height by 320 feet width) and seven poles. Again, the City failed to provide sufficient notice of the Use Permit application in violation of City of Pacific Grove Municipal Code ("PGMC") § 23.86.020. Specifically, not all of the owners within a 300-foot radius of the exterior boundaries of the Golf Links received a 10-day notice of the Planning Commission hearing on the Use Permit application.

Moreover, the City failed to install any story pole and flagging prior to the Planning Commission hearing to inform fully inform the public of the project as required under section 23.86.040 of the Municipal Code.

Additionally, the City failed to perform any environmental analysis of the netting project's impact to protected resources. It is clear that the project would significantly affect the public's visual access of the ocean which is protected under the California Coastal Act. Section 30251 of the Coastal Act states, in relevant part, as follows:

Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and where feasible, to restore and enhance visual quality in visually degraded areas.

Section 30009 of the Coastal Act requires that "[The Coastal Act] shall be liberally construed to accomplish its purposes and objectives."

Even without the need to liberally construe section 30251 of the Coastal Act, it is clear that the project would impact public and private views to and along the ocean and scenic coastal areas and is visually incompatible with the character of surrounding areas, i.e., open space of the golf links. Thus, the netting project is in violation of the Coastal Act.

It is important to point out that the City's Local Coastal Program ("LCP") update identifies the project area as protected open space. Please see Figure 3 from the LCP update included as Exhibit "A". The scenic values of the identified open space must be protected; to the contrary, the 35-foot high netting as part of the project would significantly impair public and private visual access.

The view of the Bay from Jewell Avenue adjacent to the golf course is important to tourism in Pacific Grove. The inhabitants of Jewell Avenue frequently encounter tourists strolling along the golf course, many from foreign countries, who capture the scenic views with their cameras.

It is also important to note that the height of the netting was not specified in the stipulated judgment. It appears that the only justification given for the selection of 35 feet was the fact that the netting would be installed adjacent to the existing netting that is 35 feet in height. The existing netting is badly deteriorated and difficult to see through; however, its condition is not obvious because it is shielded from public view by a hill and several trees. Although the Planning Commission stated at the hearing that "the netting is virtually see through," and the "style is the least intrusive to view shed," the appellants do not believe this to be true particularly due to conditions of the existing netting.

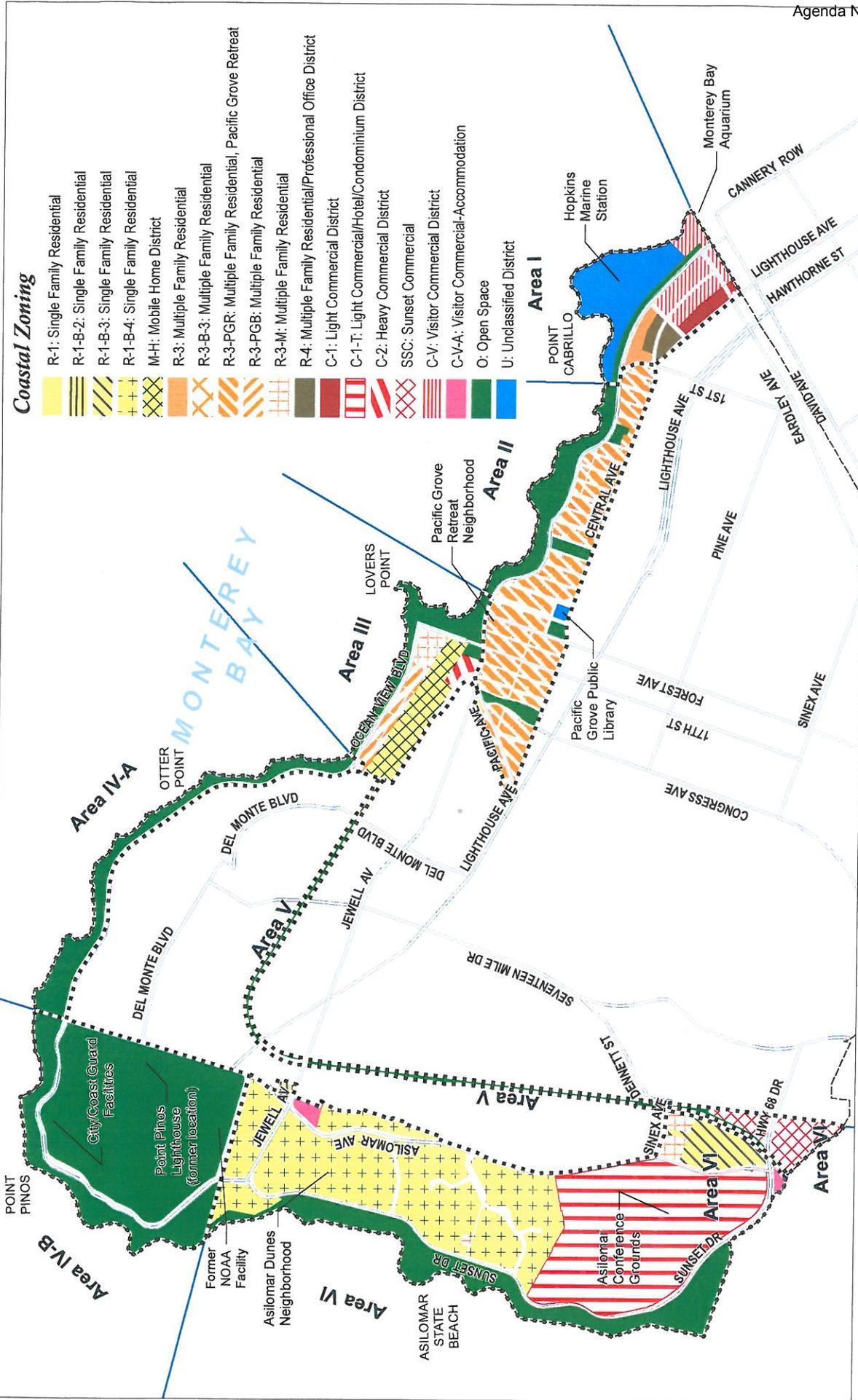
Based on the foregoing, the Appellants believe that the City failed to proceed with the procedural due process requirements; Planning Commission failed to make the required findings to approve Use Permit application UP 16 -093; and the Planning Commission lacked substantial evidence in the record to support the findings the Commission made as part of its approval.

#### Conclusion

Due to their potential to significantly impact these sensitive visual and other resources, the tree removal and netting should be evaluated under the California Environmental Quality Act. Upon the preparation of an initial study or Environmental Impact Report, the appellants request that the City Council approve this appeal and deny the project because it is clear that the project would pose significant impacts to public views and other valuable resources.

**Coastal Zoning**

- R-1: Single Family Residential
- R-1-B-2: Single Family Residential
- R-1-B-3: Single Family Residential
- R-1-B-4: Single Family Residential
- MH: Mobile Home District
- R-3: Multiple Family Residential
- R-3-B-3: Multiple Family Residential
- R-3-PGR: Multiple Family Residential, Pacific Grove Retreat
- R-3-PGB: Multiple Family Residential
- R-3-M: Multiple Family Residential
- R-4: Multiple Family Residential/Professional Office District
- C-1: Light Commercial District
- C-1-T: Light Commercial/Hotel/Condominium District
- C-2: Heavy Commercial District
- SSC: Sunset Commercial
- C-V: Visitor Commercial District
- C-V-A: Visitor Commercial-Accommodation
- O: Open Space
- U: Unclassified District



- Legend**
- Planning Area Boundaries
  - ▭ City of Pacific Grove
  - ▬ Major Roads
  - ⋯ Coastal Zone

0 1800 feet

# Exhibit A

## HORAN | LLOYD

ANTHONY T. KARACHALE  
STEPHEN W. DYER  
MARK A. BLUM  
JAMES J. COOK  
ELIZABETH C. GIANOLA  
JEROME F. POLITZER  
PAMELA H. SILKWOOD  
JACQUELINE M. PIERCE  
BIANCA KARIM  
JENNIFER M. PAVLET

*Of Counsel*

FRANCIS P. LLOYD  
ROBERT ARNOLD, INC.  
VIRGINIA E. HOWARD

LAURENCE P. HORAN  
(1929-2012)

HORAN LLOYD  
A PROFESSIONAL CORPORATION  
ATTORNEYS AT LAW  
26385 Carmel Rancho Blvd., #200  
Carmel, CA 93923

Tel: 831.373.4131  
Fax: 831.373.8302  
horanlegal.com

File No. 6910.02

March 25, 2016

### Via Electronic Mail

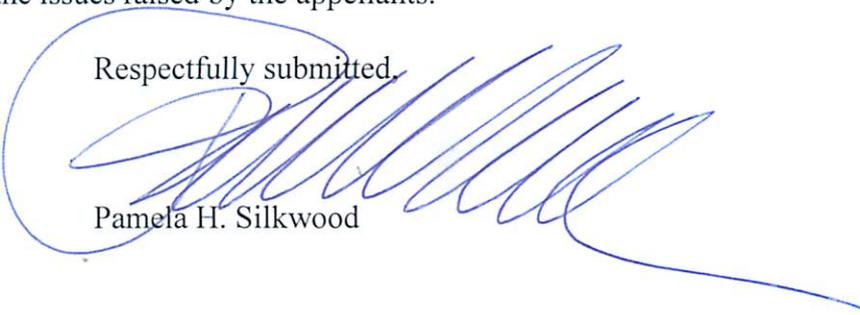
Wendy Lao  
Assistant Planner  
City of Pacific Grove  
300 Forest Avenue  
Pacific Grove, CA 93950

Re: Appeal of Use Permit 16-093 – Request for Extension

Dear Ms. Lao,

Thank you for meeting us at the Project site today. As we discussed, this letter is a request for a continuance of the hearing to May 2016 for the appeal of Use Permit 16-093. The appellants request the continuance to allow additional time to discuss the project with City staff with a goal towards reaching a resolution of the issues raised by the appellants.

Respectfully submitted,

  
Pamela H. Silkwood

Cc: Mark Brodeur

TELEPHONE	LAW OFFICES OF JOEL FRANKLIN	FACSIMILE
(831) 649-2545	2100 GARDEN ROAD, SUITE G MONTEREY, CALIFORNIA 93940	(831) 649-2547

June 8, 2016

**VIA ELECTRONIC MAIL**

William Kampe, Mayor  
Members of the Pacific Grove City Council  
CITY OF PACIFIC GROVE  
300 Forest Avenue  
Pacific Grove, CA 93950

Re: Response to Appeal of Use Permit No. 16-093 for Golf Course Netting at  
77 Asilomar Ave.

Dear Mayor Kampe and Members of the Pacific Grove City Council:

We write on behalf of Marion Trentman-Morelli, Robert Morelli and Nancy Dolton, residents of Lots 6 and 8, respectively, of the Monarch Pines community. We also join in the numerous letters that have been submitted to the Council by other Monarch Pines residents and local citizens opposing the appeal by certain Jewell Avenue residents ["Appellants"] of the March 3, 2016, Planning Commission's unanimous decision to authorize the installation of 35-foot golf course safety netting to provide protection to Lots 3-11, along the fifth fairway of the Pacific Grove Golf Links. (See Exhibit ["Exh."] A, Report of Daniel Gho to the Council, dated April 6, 2016, recommending denial of this appeal and adoption of the Planning Commission's findings on 35-foot safety netting ["Report of Daniel Gho"], and finding "[t]he netting is virtually see-through, [lending] itself to transparent views and [providing] the best protection to the surrounding community from errant golf balls"; see also Exh. B [photographs of view from Jewell Avenue both before and after the six Eucalyptus trees were removed].)

The open space that Appellants now assert must be protected as part of the "public view" was created as a result of the City's settlement agreement and Stipulation for Entry of Final Judgment ["Stipulated Judgment"] in *Dolton v. City of Pacific Grove* (Mont. Co. Super. Ct. Case No. M131643) ["Dolton"], and the related dismissal of the Public Records Act litigation, *Trentman-Morelli v. City of Pacific Grove* (Mont. Co. Super. Ct. Case No. 132694). As the Council is aware, November 5, 2015 Stipulated Judgment in *Dolton* mandated the City remove six (6) Eucalyptus trees that were alleged to be in a dangerous and decaying condition. Among other terms of the Stipulated Judgment, the City was to "promptly" install safety netting to protect against errant golf balls, after the trees had been removed. While the height requirements for the netting were not specified, the superior court, by the Honorable Thomas W. Wills, retained jurisdiction to interpret and enforce the Stipulated Judgment. The Morellis and Ms. Dolton have satisfied their responsibilities (having paid one-half of the expense of removal of the trees [\$14,011.57] in addition to paying \$1,200 toward the purchase of replacement trees), and the six Eucalyptus trees have been removed. Now, seven months after the Stipulated Judgment was filed and signed by Judge Wills, no safety netting has been installed.

Letter to Mayor and Members of the Pacific Grove City Council  
Re: Response to Appeal of Use Permit No. 16-093  
June 8, 2016  
Page 2

By this letter, we do not seek to address all of the points raised by Appellants in their correspondence to the Council, which includes various legal arguments. For example, Appellants make claims about CEQA, the California Coastal Act and the City's Local Coastal Program, and the administrative process by which the Planning Commission approved Use Permit No. 16-093. Those issues are amply addressed and properly dismissed in the Report of Daniel Gho. (See Exh. A.) We urge the Council to adopt that reasoning in this Appeal. We further ask that this letter and accompanying attachments be considered as part of the public record in this appeal, along with the presentation of any comments made on the record in support of the Planning Commission's decision and findings.

As we understand the posture of this matter, it is set for a full public hearing on June 15, 2016, which will review the appeal of the Planning Commission's findings and issuance of Use Permit No. 16-093 to install 320 feet of 35-foot high netting. Inasmuch as the City's carrier, PARSAC, has declined to give any liability opinion regarding the Council's recommendation at its meeting on April 6, 2016, to set the netting height at 14 feet, the Council's recommendation or decision, in our view, has no legal effect. Accordingly, the Council should hold a full public hearing to properly address the merits of the Planning Commission's decision.

### **The Six Eucalyptus Trees Removed Under Court Order Were Diseased and Dangerous.**

Inexplicably, Appellants argue the dangerous trees resulting in the Stipulated Judgment that requires installation of safety netting should not have been removed in the first place. Some Council members now also deny that the six trees that were the subject of the lawsuit, and were removed under Court Order, were in any way unhealthy – contradicting admissions made by other members of City staff directly involved with the tree removals. (See, e.g., Exh. C [Council member Ken Cuneo's email message to Robert Morelli, dated May 1, 2016].)

There can be no dispute that the trees were diseased, and that they created a very real risk of falling. The parties seeking the removal of the trees first brought their concerns and their understandable fears regarding ten suspect Eucalyptus trees to the City's attention in or around 2010. By 2012, the City had only removed four of the ten dangerous trees, refusing to remove the remaining trees without further testing accompanied by an expert's report. In 2013, the Dolton plaintiffs retained Barrie Coate, one of the country's premiere arborists, to examine the trees and render his opinion as to their safety. Mr. Coate recommended removal of five of the six remaining Eucalyptus trees, and was in the process of preparing a supplemental report on all of the remaining trees when the litigation settled. (A true and correct copy of Mr. Coate's report is attached hereto as Exh. D.)

In 2015, Nancy Dolton, Marion Trentman-Morelli and Robert Morelli ("Plaintiffs") filed suit in the Monterey County Superior Court, seeking removal of the remaining six trees because of the danger they presented. The City denied that the trees were dangerous. During the course of the case, the City retained two arborists to inspect the trees and to issue a report. The City paid Urban Forest Innovations \$13,160 and Tree Associates \$13,932.62 for that work. When the City was asked to disclose

Letter to Mayor and Members of the Pacific Grove City Council  
Re: Response to Appeal of Use Permit No. 16-093  
June 8, 2016  
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copies of the reports under the Public Records Act, it responded that neither it nor its outside counsel had any such copies. (See Exh. E [the City's response to Public Records Act Request No. 1603-004].) It is common for experts hired to assist in litigation to give their employers oral reports, with formal written reports to follow only if they are favorable to the party hiring the expert. Because the City has asserted that no formal written reports exist regarding the health of the removed Eucalyptus trees, the logical inference is that the findings of the experts did not support the City's position that the trees were safe.

Tellingly, Public Works Director Daniel Gho's October 26, 2015, memorandum to the Beautification and Natural Resources Commission, supports the accuracy of that inference:

In its effort to defend the action, and to best identify potential hazards posed by the trees, the City retained highly qualified expert arborists to evaluate the trees by using ultrasound technology and assess the quality of the trees and to detect flaws and irregularities. . . Results showed defects in the trees both within the trunk and also in the canopy of the trees. Each tree tested had varying results, but all of the trees showed signs of defects. Plaintiffs also retained arborists to assess the quality of the trees and their root structures. *All experts concluded that the six trees posed present risks due to decay.*" (Exh. F, emphasis added).

The City and the Plaintiffs ultimately agreed, among other things, that the trees would be removed, with the parties splitting the cost, and that the City would "promptly" install appropriate netting at its expense. After the Stipulated Judgment was filed, Council member Rudy Fischer sent a letter addressed to all Monarch Pines homeowners supporting the Stipulated Judgment as a "win-win" for both the city and the Monarch Pines residents in light of the hazard the trees presented:

...to get to the truth the City called on some highly qualified arborists to evaluate the trees. They used ultrasound to evaluate the trees and find any flaws and issues with their structure. Although the trees were still viable, the results also showed some potential problems in both their trunk and canopy. People in our city love trees, and it is always difficult to take down mature ones. In fact, we are being criticized by some for even this action. The City and the people affected agreed, however, that if there was the slightest risk to people the best thing to do would be to remove them and replant that area with cypress trees...We are also installing netting to protect homes near the golf course from golf balls.

(Exh. G [letter from Council member Rudy Fischer to Monarch Pines residents].)

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Despite the above concessions regarding the poor health of the Eucalyptus trees – the removal of which Appellants dispute – several questions still remain. Why did the City spend \$85,163.46 in tax dollars on attorneys and \$27,092.63 in tax dollars on experts to try to prevent the removal of giant Eucalyptus trees that every expert agreed presented the real risk of falling in a storm and crushing one or more human beings? Why did the City require some elderly residents threatened by that real risk to spend tens of thousands of dollars on attorneys and arborists over a period of five years to remove a threat visited upon them by the City? Finally, and most pertinent to the appeal at hand, why are the same residents who spent their own money and time to secure removal of a dangerous condition maintained by the City now being required to again ask the City to use its reasonable judgment to install netting at the same height at which safety netting already exists in nearby locations?

### **The Judgment Entered by Judge Wills is Enforceable.**

On page four (4) of Pamela Silkwood’s letter of March 11, 2016, accompanying the appeal, it is asserted that the Stipulated Judgment is nothing more than a contract, that “the City cannot contract away its right to exercise the police power in the future,” and that a “contract that appears to do so is invalid as against public policy . . .” And it is asserted, “[s]pecific to this matter, the City’s adjudicative bodies cannot be bound by the stipulated judgment because they are prohibited from surrendering, impairing or bargaining away its control of a police power or municipal function.” The only authority cited for this contention is *Cotta v. City and County of San Francisco* (2007) 157 Cal.App.4th 1550, 1557 [“Cotta”]. *Cotta* is inapplicable here.

In *Cotta*, plaintiff taxi owners sued the defendant city after it modified certain regulations that provided various incentives to taxi owners operating compressed natural gas (“CNG”) vehicles by reducing the incentives that appeared in earlier versions of the relevant regulations. The plaintiffs contended that a contract existed – specifically that they had entered into a unilateral contract by accepting the city’s earlier incentives and purchasing CNG taxicabs – and that the new rules breached that contract. The Court of Appeal affirmed the decision of the trial court: “no contract was formed.” (*Cotta, supra*, 157 Cal.App.4th at p. 1561.) The Court also observed that if there had been a contract it would have taken away the City’s police power for a period of four years, and would have been invalid on that basis.

Here, by contrast, the Stipulated Judgment settled a present dispute by requiring the City to remove the trees and to install netting, and does not prevent the City from exercising its police power. The City is bound by the Stipulated Judgment it entered into with the Plaintiffs. (See *Levy v. Super. Ct.* (1995) 10 Cal.4th 578, 586 [settlement agreement is binding on the parties who sign it]; see also *Provost v. Regents of the University of California* (2011) 201 Cal.App.4th 1289, 1295-1298 [settlement agreement between individual and state university is binding on both parties]; *Hook v. State of Ariz., Dept. of Corrections* (1992) 972 F.2d 1012, 1014-1015 [state bound by consent decree with prison inmates].)

If Ms. Silkwood’s argument about the claimed invalidity of the Stipulated Judgment had merit, the remedy would be to ask the Court to vacate it; the City could not simply ignore it. And if the Court did vacate the Stipulated Judgment, it would

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restore the case to the civil active list, discovery would be completed, and the case would be set for trial. The Public Records Act case also would be reinitiated.

### **Safety Netting at 14 Feet in Height is Not Adequate.**

In addition to disputing the enforceability of the Stipulated Judgment, Appellants request that the City reach a “compromise” between no netting and 35-foot netting by installing 14-foot netting. This “compromise” obscures the fact that not installing netting at all is not an option under the express terms of the Stipulated Judgment. In determining a reasonable height for the netting using its best judgment, the Council therefore cannot consider any request that involves not installing netting at all.

The four letters attached hereto as Exhibit H constitute a representative sample of those already provided to the Council. They and the others address certain facts that are indisputable.

First, the residents of Monarch Pines have been bombarded for many years with errant golf balls, some of which caused property damage and all of which put those residents in reasonable fear of injury or death if struck by one of those balls. Second, the removal of the diseased trees has exacerbated the problem, but only marginally. In reality, only the minority of golf balls that previously struck the trunks of the trees were affected by the trees’ presence – and this small protection came at the cost of living under the threat of 100-foot tall Eucalyptus trees with decaying roots and trunks that could crush the nearby residents at any moment. The residents of Monarch Pines never had adequate protection from golf balls; now they have none.

When the Court included in its November 5, 2015, Stipulated Judgment that netting must be installed “promptly,” it did not set the required height. We are pretty sure that the Court intended that the height be determined by people with knowledge and experience, such as those who selected 35-foot netting both east and west of the current gap that the City must now fill. The City’s Public Works Department decided that 35 feet was the appropriate height. The Planning Commission did so as well. Unanimously. Public Works Director Daniel Gho is on record as supporting the Planning Commission’s conclusions. (See Exh. A [Report of Daniel Gho].) And the design submitted by the proposed netting installer was for a 35-foot high net. It appears that nobody with knowledge or experience has recommended any height lower than 35 feet.

The genesis of the idea that 14 feet is sufficient comes from a handful of residents on or near Jewell Avenue who are willing to let other human beings risk serious injury or death rather than permit a minor and virtually non-existent infringement on a view that they did not have until the trees were removed – a view that will be impacted much more significantly in a relatively modest period of time as the replacement trees grow to the height of 35-feet. (See Exh. B[photographs comparing view from Jewell Avenue before and after the Eucalyptus trees were removed].) Appellants can claim no experience in designing golf club netting. Nor are they aware of what safety requires to reduce the risk of serious injury. The geography and layout of the golf course, several rows of healthy Eucalyptus and Cypress trees, and a street all separate and shield

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Appellants' houses from the continuing threat of errant golf balls faced by Monarch Pines residents on a daily basis. If the City bases its decision on the record before it, any decision other than installing 35-foot safety netting would appear arbitrary and capricious, and in our view, subject to legal attack.

If this were not such a serious issue, Appellants' asserted justifications for their proposed 14-foot height would be disingenuous, at best. For example, on page six (6) of the appeal it is suggested that "[t]he view of the Bay from Jewell Avenue adjacent to the golf course is important to tourism in Pacific Grove." It is difficult to rationally estimate how many tourists use Jewell Avenue – with no sidewalks and with a golf course impeding the view of the ocean – for any purpose, particularly with the bike path featured in the City's tourism materials located only two blocks away. To say "precious few" almost certainly overstates the actual number. Appellants seem to admit as much when they say that the tourists they claim they have encountered were "strolling along the golf course . . . to capture scenic views with their cameras." To those "strolling along the golf course" to take pictures of the scenic views, the height of the netting is irrelevant, unless those tourists stand taller than 14 feet but shorter than 35 feet in height.

### **The Consequences of Approving 14-Foot High Netting.**

Paragraph nine (9) of the Stipulated Judgment signed by Judge Wills provides that "the Court shall retain jurisdiction for the purpose of enabling any of the parties to this Stipulated Judgment to apply to the Court at any time for such order or directions that may be necessary or appropriate for the construction, operation or modification of the Stipulated Judgment, or for the enforcement or compliance thereof."

We are prepared to return to Judge Wills for interpretation and direction, either by way of a motion to enforce the settlement or by an action for declaratory relief. We expect that we will prevail, and that the City will have to pay our fees for so doing.

Indeed, Paragraph 11 of the Stipulated Judgment provides that "[i]f any action at law or in equity, including an action for Declaratory Relief is brought to enforce or interpret the provisions of this Stipulated Judgment, the prevailing party shall be entitled to recover reasonable attorneys' fees in addition to any other relief to which the party may be entitled, including costs."

Plaintiffs also retain the option of seeking an Order to Show Cause re Contempt against the City and its responsible officials, if the facts warrant it. Paragraph three (3) of the Stipulated Judgment requires the City to "*promptly* install netting on the golf course where the trees were removed." (Emphasis added). That was seven months ago. No netting has been installed – nor is any on the foreseeable horizon – leaving the Plaintiffs with the same substantial risk the Court was attempting to avoid and the City ostensibly agreed to as part of the settlement.

If necessary, we are prepared to bring an action against the City and CourseCo to enjoin the operation of the golf course until adequate netting is installed. In *Sierra Screw Products v. Azusa Greens, Inc.* (1979) 88 Cal.App.3d 358 ["*Azusa Greens*"], adjoining property owners sued a golf course owner because an excessive number of golf balls

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were landing on the plaintiffs' property, causing broken windows in cars and in buildings as well as striking some of the plaintiffs' employees. The trial court found that the design of two holes of the course was problematic, and that the fencing installed to prevent golf balls from striking plaintiffs' property was inadequate. The trial court ruled that "[p]laintiffs are entitled to the issuance of a mandatory injunction . . . directing the defendants on or before November 1, 1976, to redesign and reconstruct the third and fourth holes of the existing golf course in such a manner as to minimize the intrusion of golf balls onto the plaintiffs' adjoining property . . ." (*Azusa Greens, supra*, 88 Cal.App.3d at p. 364.) The Court of Appeal affirmed the judgment of the trial court. The facts here are substantially identical and, in our view, the *Azusa Greens* case is instructive.

### **The City May Not be Indemnified by CourseCo and Could Face Claims by Persons Injured by Errant Golf Balls if it Adopts a Safety Netting Height of 14 Feet.**

In the event that what nobody wants to happen – injury or death to someone struck by an errant golf ball – does happen, the City will almost certainly be liable to the person injured or to the family of the person killed for substantial damages. Some City officials seem indifferent to such potential financial liability because the City's deductible on its insurance coverage is \$100,000, and thus the City's financial risk is limited. It must be remembered, however, that the City's \$100,000 payment in that regard is not the City's money; it belongs to the taxpayers, few if any of whom would like to see it spent that way.

Additionally, Appellants presented lengthy arguments in a letter to the Council dated May 12, 2016, concluding that the City will not face any potential liability for harm to citizens from errant golf balls if the Council adopts a lower, 14-foot net as opposed to the 35-foot safety netting that currently exists on either side of Lots 3 through 11. According to Appellants' interpretation of the City's lease with CourseCo ["Lease"], CourseCo will either indemnify the City if the City is found liable, or no issue of liability will even arise because the individual golfer is responsible for any harm caused. Their legal analysis is seriously flawed, and demonstrably incorrect.

We have previously written to the City's attorney, Mr. Laredo, expressing our view that Appellants' claims about the relationship between the City and CourseCo are misinformed, and do not in fact relieve the City of potential liability. (See Exh. I [letter from Joel Franklin to City Attorney David Laredo].) The Council can surely seek the City Attorney's advice on this likelihood.

Appellants' interpretation of the Lease between the City and CourseCo attempts to pass indemnity to CourseCo while ignoring the persisting safety issues and enforceability of the Stipulated Judgment, which could create significant liability for the City. Lowering the current safety standard of 35-foot netting that exists on either side of Lots 3 through 11, to 14-foot netting where the six dangerous and decaying Eucalyptus trees were removed, increases the risk of harm to an arbitrarily selected portion of the Monarch Pines residences. Perhaps this is why PARSAC has refused to enter the fray and provide its blessing or any opinion whatsoever? How can the City logically argue that it should be absolved of liability after lowering safety for some residents while maintaining safety standards for others?

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Further, as to responsibility for Improvements, the terms of the Lease require CourseCo to receive City approval for installation of any Improvements over \$25,000, and CourseCo is only responsible for Improvements installed after the commencement date of the Lease (October 1, 2014). Installation of netting along the fifth fairway of the golf course is part of a continuing effort to mitigate the dangerous condition of decaying Eucalyptus trees that existed long before 2014, and therefore continues to be the City's responsibility, rather than CourseCo's.

In our view, Ms. Silkwood incorrectly reads the provisions of the Lease discussing waiver and indemnity, which explicitly state that the City retains liability for negligence or willful misconduct, as alleged in the Complaint filed by Plaintiffs that ultimately resulted in the Stipulated Judgment. We assert strongly that it is a miscalculation for the Council to think that only the golfer who hits the errant ball into Monarch Pines will be on the hook for potential liability. Additionally, any duty by CourseCo to indemnify the City would generally arise only after the City is found liable, and then seeks to have CourseCo reimburse or pay for the harm and consequential damages. The process of securing indemnification, which Appellants do not address, often entails litigation between the parties at further taxpayer expense.

### **Arbitrary and Selection Enforcement of the Law.**

In addition to language in both the Stipulated Judgment and the Lease indicating that the City would be liable for failing to comply with a proper standard of safety towards certain Monarch Pines residents, the City Council's potential decision to reduce the height of safety netting to 14 feet raises grave concerns for our clients that such a decision may be taken for arbitrary reasons and in retaliation for their bringing a lawsuit against the City for removal of the dangerous Eucalyptus trees. Surely, the Council understands that citizens have a constitutional right to seek redress against government through use of the courts. (*City of Long Beach v. Bozek* (1982) 31 Cal.3d 527, 533-534, opn. vac. 459 U.S. 1095, reinstated, (1983) 33 Cal.3d 727-728 [right of petition for redress includes right of filing suit against governmental entity and thus "invokes constitutional protection"].) Here, that right was exercised and led to a settlement of the litigation and entry of a Stipulated Judgment. As we have discussed, that Stipulated Judgment is binding and enforceable against the City.

What is troubling to the residents of Monarch Pines is the possibility that the Council might sanction a situation where 35-foot safety netting is placed to protect houses on either side of Monarch Pines residences on Lots 3 through 11, but only 14-foot netting is erected in front of these particular homes, including the homes of the Plaintiffs in the lawsuit that resulted in a Stipulated Judgment requiring netting. (See Exh. J [photographs of existing netting, fencing, and other protections surrounding the fifth fairway].) In our view, there is no justification for such a result; rather it would be irrational, palpably arbitrary and capricious, and not related to any legitimate health and safety purpose.

A state's police power is "the power to subject individuals to reasonable regulation for the purpose of achieving governmental objectives such as the public safety, health, morals and public welfare. [Citations.] 'Reasonable regulation' implies that the regulatory objective is the welfare of the general public as contrasted with that

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of a special class or segment. [Citation.] The law must not be arbitrary; it must rest upon 'adequate reason.' [Citation.] If the general objective of the law is within the state's regulatory power, its individual provisions must have a 'real and substantial relation' to that objective. [Citations.]" (*Doyle v. Board of Barber Examiners* (1963) 219 Cal.App.2d 504, 509-510.) "[A]rbitrary government acts are unreasonable in the legislative or regulatory context." (*Engquist v. Oregon Dept. of Agriculture* (2007) 478 F.3d 985, 995.)

The City has established a standard that 35-foot safety netting is necessary for the health and safety of Monarch Pines residents in Lots 1 through 3, which are also adjacent to the fifth fairway on the public golf course. (See Exh. J, page 2 [photographs of existing 35-foot safety netting along Lots 1 through 3].) This regulatory standard is reasonable and has a "real and substantial relation" to providing safety from errant golf balls. (*Doyle v. Board of Barber Examiners, supra*, 219 Cal.App.2d at pp. 509-510.) The City has also implemented a series of measures to protect residences and buildings along other portions of the fifth fairway, including 35-foot netting protecting the Sally Griffin Center, baffled netting near Lots 12 through 17 of Monarch Pines, and healthy rows of trees and fencing in front of the Jewell Avenue residences. (See Exh. J, page 1.) Selecting a 14-foot netting height for residents in Lots 3 through 11 therefore cannot, under any rational view, be seen as a reasonable or objective decision consistent with the standards the City has implemented on nearly every other part of the fifth fairway. What goals does the City achieve by lowering the standard of protection given to a select group of Monarch Pines residents, not to mention the citizens, families and other persons visiting the Monarch Pines neighborhood near these homes?

Moreover, and while based on the public record to date we do not suggest any improper motive on the part of the City Council, the selection of a less safe netting for the homes of Plaintiffs – who brought the underlying lawsuit – raises the spectre of discrimination. As the United States Supreme Court warned 130 years ago:

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.

(*Yick Wo v. Hopkins* (1886) 118 U.S. 356, 373-374.)

There are regulatory and constitutional standards that the City is obligated to follow. Making an arbitrary reduction in the height of the safety netting under these circumstances to accommodate the demands of a few disgruntled neighbors whose personal safety is not at risk would, in our view, be a breach of the City's duties.

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We appreciate the Council's most thoughtful review of the position we have advanced in this Letter and accompanying Exhibits. On balance and in light of all the information provided to the Council on this Appeal, we strongly urge the Council to adopt the unanimous findings of the Planning Commission, deny the Appeal, and grant the request to install 35-foot safety netting authorized by Use Permit No. 16-093.

Respectfully submitted,

Neil L. Shapiro  
LAW OFFICES OF NEIL L. SHAPIRO



Joel Franklin  
LAW OFFICES OF JOEL FRANKLIN



Counsel for Nancy Dolton, Marion  
Trentman-Morelli, and Robert  
Morelli

cc: David C. Laredo, City Attorney  
Ben Harvey, Interim City Manager  
Daniel Gho, Public Works Director  
Wendy Lao, Assistant Planner  
Sandra Kandell, City Clerk

## **EXHIBIT A**

**Agenda Report from Public Works Director Daniel Gho and Assistant Planner  
Wendy Lao to the Honorable Mayor and Members of City Council for the City  
Council Meeting of April 6, 2016**

(4 pages)

**CITY OF PACIFIC GROVE**  
300 Forest Avenue, Pacific Grove, California 93950

**AGENDA REPORT**

**TO:** Honorable Mayor and Members of City Council

**FROM:** Daniel Gho, Public Works Director; Wendy Lao, Assistant Planner

**MEETING DATE:** April 6, 2016

**SUBJECT:** Consideration of an appeal of the Planning Commission's decision to approve Use Permit No. 16-093 for installation of protective golf barrier netting including 7 poles, and planting of 6 trees, along the fifth hole of Pacific Grove Golf Links; 77 Asilomar Avenue (APN 006-094-099)

**CEQA STATUS:** Categorical Exemption, Section 15303, Class 3

**RECOMMENDATION**

Review the application, deny the appeal, and adopt the proposed findings that uphold the Planning Commission's decision to approve UP 16-093.

**BACKGROUND**

On October 16, 2015 the City of Pacific Grove entered into a Stipulation for Entry of Final Judgement (Stipulated Judgement) that required removal of 6 Blue Gum Eucalyptus Trees identified as numbers 916,917,918,919,924,925 (Attachment A – Stipulated Judgment). These trees were located along the fifth hole of Pacific Grove Golf Links at 77 Asilomar Avenue (APN 006-094-099).

Based on several arborist reports prepared for the trees, it was determined that decay within the trees warranted removal. The Stipulated Judgement is an Order of the Superior Court, signed by Judge Wills. The Court Order required the City to remove the six trees; cost of the removal is to be split equally between plaintiffs and the City. The City is also required to promptly install netting on the golf course where the trees were removed. The City will bear all costs of the netting. After netting is installed, the City is required to plant replacement trees of a suitable species, likely Cypress Trees.

In November and December of 2015 the City removed the six trees and contacted firms to prepare for installation of the netting at the golf course along the fifth hole.

As a means to protect persons or property from errant golf balls, the City applied for a Use Permit (Use Permit No. 16-093) to allow installation of protective golf barrier netting, including 7 poles, and planting of 6 trees. This effort also complies with the Court Order and Stipulated

Judgement. On March 3, 2016, the Planning Commission held a hearing and approved Use Permit 16-093.

On March 11, 2016, Ms. Pamela Silkwood, an attorney with Horan Lloyd Legal, submitted an appeal of the Planning Commission's approval of the permit (Attachment L – Appellant Letter and Continuance Request). This appeal required to be processed in accord with PGMC Chapter 23.74. Paragraph B (1) of PGMC section 23.74.030 requires any appeal to be filed within 10 days of the action being appealed.

The Silkwood appeal is timely. No other appeal was received and PGMC section 23.74.050 (c) provides “No person shall be allowed to join an appeal after the expiration of the time limit for appeals.”

Ms. Silkwood did request the hearing of the appeal to be continued to an unspecified date in May, 2016. (Attachment L.) The reason stated for the continuance was “to allow additional time to discuss the project with City staff with a goal towards reaching a resolution of the issues raised by the appellants.” PGMC section 23.74.050 (Scheduling of Hearing) provides however, “After an appeal or call-up for review has been received... the matter shall be placed on the next available agenda of the appeal authority or body calling up the item.” City staff is concerned that undue delay may result in injury by reason of errant golf balls.

## **DISCUSSION**

The City of Pacific Grove Public Works Department evaluated the site and determined the best netting would be similar to netting that already exists on the fifth hole and at the driving range (Attachment B - Location). The Monarch Pines Community, adjacent to the fifth hole, is currently protected by a netting system of 35 feet height strung between poles that are also 35 feet in height. The existing netting starts at the western point of the Monarch Pines boundaries, turns east and runs along the property adjacent to the golf hole. The City proposes to expand the existing netting an additional 320 feet (Attachment C - Existing Netting). The netting to be installed will be black in color, and comprise of U.V. treated #930 polyester barrier netting of 1 inch mesh size and average single mesh break strength of 116.7 pounds. Poles will match the existing brown poles and will be evenly spread at intervals of 53 feet and 4 inches. The netting will start at ground level and extend upwards to a height of 35 feet (Attachments E and F - Plans and Specifications).

The netting is virtually see-through; this style lends itself to transparent views and also provides the best protection to the surrounding community from errant golf balls (Attachment D - Driving Range Netting).

## **APPEAL PROCESS**

Following the March 3, 2016, Planning Commission approval of Use Permit 16-093, Ms. Pamela Silkwood on March 11, 2016 submitted an appeal of the Planning Commission's approval of the permit (Attachment L – Appellant Letter and Continuance Request).

PGMC section 23.74.030 (c) provides this Appeal “shall be limited to issues raised at the public hearing, or in writing before the hearing, or information that was not generally known at the time of the decision that is being appealed.”

PGMC section 23.74.050 (d) directs the City Council to conduct a de novo public hearing on the Appeal in compliance with Chapter 23.86 PGMC (Public Meeting and Hearing Procedures). At the hearing, the Council may consider any issue involving the matter that is the subject of the appeal, in addition to specific grounds identified in the appeal.

PGMC section 23.74.050 (d) (1) and (2) provide the Council may affirm, affirm in part, or reverse the action, decision, or determination that is the subject of the appeal, based upon findings of fact about the particular case. The findings shall identify reasons for the action on the appeal, and verify the compliance or non-compliance of the subject of the appeal with these regulations. Prior to approving a permit or other action, the applicable findings in Chapter 23.70 PGMC (Community Development Permit Review Authorities and Procedures) shall be made. The Council in this matter may also adopt additional conditions of approval that may address other issues or concerns than the subject of the appeal or call-up.

### **RESPONSE TO APPEAL**

The Pacific Grove Public Works and Community and Economic Development Departments have reviewed appellant’s appeal and respectfully disagree. The property is not located in the Coastal Zone (Attachment G – Coastal Zone Map). Issues concerning removal of the trees were discussed by City Council when the Council approved the Stipulated Judgment in October 2015. Notices were mailed to local residents ten (10) days prior to the Planning Commission March 3, 2016 meeting, as required by PGMC Section 23.86.020(b)(2), as evidenced by date stamps from the U.S. Postal Service (Attachment I – Mailing Notice). Golf net requires a Use Permit, not an Architectural Permit, and therefore does not require story poles or flagging. Nevertheless, staff installed story poles and flagging as of March 23, 2016, as a courtesy to appellants in preparation of the City Council meeting.

In its exercise of discretion on the appeal, the City Council must nonetheless comply with all requirements of the Stipulated Judgment and Court Order (Attachment A).

### **FINDINGS**

Staff proposes that the following findings be adopted as part of Council’s action on the appeal.

- (A) The proposed use is allowed with a use permit within the O zoning district and complies with all applicable provisions of these regulations;
- (B) The proposed use is consistent with the General Plan;
- (C) The establishment, maintenance, or operation of the use will not, under the circumstances of the particular case, be detrimental to the health, safety, or general welfare of persons residing or working in the neighborhood of the proposed use;
- (D) The use, as described and conditionally approved, will not be detrimental or injurious to property and improvements in the neighborhood or to the general welfare of the city; and
- (E) The location, size, design, and operating characteristics of the proposed use are compatible with the existing and future land uses in the vicinity.

**FISCAL IMPACT:**

The installation of the netting has been budgeted in Fund 77, the golf fund as part of the February, 2016 budget modification.

**ALTERNATIVES:**

There is a present need to ensure errant golf balls do not cause personal or property damage.

No tested alternative to the golf net exists. Failure to promptly install netting on a golf course where the trees were removed will violate terms of the Stipulated Judgment and Court Order in *Dolton, Nancy et al. v. City of Pacific Grove (M131641)*. Alternative net heights have been suggested, however, alternative protection measures have not been adequately designed, engineered or tested. The proposed size, color, and strength of the golf net and poles, as approved by Use Permit No. 16-093, have been recommended by subject experts from Judge Netting Inc. This design has been shown to be effective and to protect neighboring properties and people from errant golf balls; however, the City Council may approve an alternative design, with adequate testing and engineering.

**ATTACHMENTS**

1. Stipulated Judgment
2. Location Picture
3. Existing Netting
4. Driving Range Netting
5. Plans
6. Specifications
7. Coastal Zone Map
8. CEQA Exemption
9. Mailing Notice
10. Affidavit
11. Resolution UP 16-093
12. Appellant Letter and Continuance Request

RESPECTFULLY SUBMITTED:

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Daniel Gho  
Public Works Director

REVIEWED BY:

*Ben Harvey*

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Ben Harvey  
Interim City Manager

Wendy Lao  
Assistant Planner

## **EXHIBIT B**

**Photographs of view from Jewell Avenue before and after the six Eucalyptus trees  
were removed**

photographs taken November 13, 2014, and May 24, 2016

(1 page)



**Photograph taken on November 13, 2014 showing the view from Jewell Ave. before the 6 Eucalyptus trees were removed pursuant to the Stipulated Judgment**



**Photograph taken on May 24, 2016 showing the view from Jewell Ave. after the 6 Eucalyptus trees were removed pursuant to the Stipulated Judgment**

## **EXHIBIT C**

**Email message from Council member Ken Cuneo to Robert Morelli**

dated May 1, 2016

(2 pages)

**From:** Ken Cuneo <[kencun17@icloud.com](mailto:kencun17@icloud.com)>  
**Subject: Re: Golf Course Netting**

**Date:** May 1, 2016 at 11:58:42 AM PDT  
**To:** Robert Morelli <[mtrentman@me.com](mailto:mtrentman@me.com)>

Hi Robert,

Thank you for your comments concerning the trees and netting on the 5th fairway of the PG Golf Course

As you are aware it was your lawsuit that caused the removal of the eucalyptus trees which were found to be healthy. These trees were part of the barrier that protected Monarch Pines. The judge's decision required the removal of those trees; the planting of new trees (type not specified) and the installation of netting (type and height not specified). The judge left the decision of both the new trees and netting up to the City.

Be cognizant that many golf courses have no netting whatsoever. Also liability for an errant shot belongs to the golfer who hit it and not the City. In some cases this is covered by Homeowners' Insurance again not the City. Just as moving next to an airport will lead to noise when you build or live very close to a golf course you can expect golf balls flying onto your property.

As there is currently a dispute between neighbors on Jewell and Monarch Pines the City will attempt to balance between the sea views of Jewell and some safety for those who live in Monarch Pines. While there can be some protection by new trees and some netting it is not reasonable or practical to expect that no golf ball will ever go into Monarch Pines.

Again the City will do its best to provide a fair solution.

Thank you again for your comments.

Most Sincerely,  
Ken Cuneo  
City Council Member, PG

Sent from my iPhone

On Apr 15, 2016, at 11:13 PM, Robert Morelli <[mtrentman@me.com](mailto:mtrentman@me.com)> wrote:

Dear Mayor and City Council Members:

We watched the City Council Meeting on Public Access Television on

Sunday. We heard Mayor Kampe say he wanted input from Monarch Pines. We did not realize that the netting was going to be an issue and had been told by the City that the existing netting would be extended to protect us. We heard testimony that golf balls “never” go into Monarch Pines, and two City Council Members who claimed to be mediocre players said they have never hit a ball into Monarch Pines. Those Council Members sell themselves short, or there are a lot of very poor golfers.

Attached is a letter from me and my husband and a letter from Nancy Dolton & Jeannine Farrell, neither of whom have computers. Please scroll to the second page of each letter which has pictures of the damage golf balls have done to our houses. However, we want to emphasize that our main concern is our personal safety, not broken windows. Golf balls whiz onto our property with the speed and force of bullets. They are deadly if they connect with our bodies. We are much closer to the fairway than I think most people realize.

We hope the City will make our safety a priority.

Marion Trentman-Morelli

Robert Morelli

<Dolton ltr to city council.pdf><Morelli ltr signed city council.pdf><Farrell ltr to Coucil signed.pdf>

## **EXHIBIT D**

**Arborist Report prepared by Barrie D. Coate and Associates**

dated September 23, 2013

(16 pages)



**BARRIE D. COATE  
and ASSOCIATES**

Horticultural Consultants  
23535 Summit Road  
Los Gatos, CA 95033  
408/353-1052

**An Evaluation of Six Eucalyptus Trees  
Located at the Pacific Grove Golf Links Course  
Pacific Grove, California**

**Prepared at the Request of:  
Marion Morelli  
700 Briggs Avenue  
Pacific Grove, CA 93950**

**Prepared by:  
Michael L. Bench, Consulting Arborist  
September 23, 2013**

**Job #09-13-098**



**BARRIE D. COATE  
and ASSOCIATES**

Horticultural Consultants  
23535 Summit Road  
Los Gatos, CA 95033  
408/353-1052

**An Evaluation of Six Eucalyptus Trees  
Located at the Pacific Grove Golf Links Course  
Pacific Grove, California**

**Assignment**

We were asked by Marion Trenton-Morelli and Nancy Dolton to inspect six eucalyptus trees located on the Pacific Grove Golf Links Course near the Hole # 5. Marion Trenton-Morelli and Nancy Dolton are homeowners of residences adjacent to the golf course near the row of eucalyptus trees. The residences near these trees are Units # 4-9 of Monarch Pines, 700 Briggs Avenue, Pacific Grove, California 93950.

Previous evaluations had been done concerning these trees by Mr. Joseph E. Bileci, Jr., an arborist certified (Certification # 985) by the International Society of Arboriculture (ISA). Mr. Bileci's initial report, dated 2-13-12, was based on visual inspection. In July 2012, the trees were pruned and Trees # 920, 921, 922, and 923 were removed. Mr. Bileci produced a follow-up report, dated 11-30-12, which was based on visual inspection. However, the 11-30-12 report showed cavities and internal decay in Tree # 920 and Tree # 922, which was discovered at the time of removal. Bileci's report suggested that Trees # 921 and # 923 also had internal decay, but this was not confirmed by photo documentation.

Marion Trenton-Morelli reported to us that they (Marion Trenton-Morelli and Nancy Dolton) had been given permission by a city official in a public meeting that they could further evaluate the 6 remaining Eucalyptus trees, provided that the evaluation was of a scientific nature.

This report evaluates the 6 remaining Eucalyptus trees for the presence or absence of internal decay and makes recommendations based on those findings. However, the information in this report must be considered in addition to the fact that these 6 trees have been "Topped" several times, and as a result, have inherently weak limb attachments. The destructive practice of "topping" is not disputed by tree professionals, which has been well established in scientific arboriculture literature.

**Observations**

The 6 subject trees are all Tasmanian Blue Gum Trees (*Eucalyptus globulus*), which are located in a row along the north side fence of the Pacific Grove Golf Links Course near the Hole # 5. There exist a continuous row of Monterey cypress trees (*Hesperocyparis macrocarpa* [formerly *Cupressus macrocarpa*]) on the east and west ends of this row of 6 remaining Blue Gum specimens. A sketch of the site relationships is provided in the attachments.

For reference, the 6 trees are:

<u>Tree Number</u>	<u>Trunk Diameter</u>	<u>Canopy Height</u>	<u>Canopy Spread</u>	<u>Overall Health</u>	<u>Structural Integrity</u>	<u>Notable Characteristics</u>
Tree #916	79 inches	105 Feet	90 Feet	Good	Poor	Weak Limb Attachments
Tree #917	75 inches	110 Feet	90 Feet	Good	Poor	Weak Limb Attachments
Tree #918	44 inches	90 Feet	40 Feet	Good	Poor	Weak Limb Attachments
Tree #919	25 inches	90 Feet	30 Feet	Good	Poor	Weak Limb Attachments
Tree #924	43 inches	100 Feet	60 Feet	Good	Poor	Weak Limb Attachments
Tree #925	75 inches	90 Feet	80 Feet	Good	Poor	Weak Limb Attachments

This is the basic data provided by Mr. Bileci in his 2-13-12 report. Except for the fact these trees were pruned in July 2012, this basic data should not have changed significantly since that time.

### **Method**

The method used for this evaluation is known as the portable drill method. This consists of using a portable drill to penetrate the wood at strategic locations to investigate the integrity of the interior wood. The portable drill has been used for a number of years by tree care professionals and is considered by many to be a reliable detection method (Costello and Quarries, 1999). In addition, this 1999 study by Costello and Quarries evaluated the reliability of the portable drill and the Resistograph comparing decay assessments on *Eucalyptus globulus* and elms. Costello and Quarries reported that the portable drill was equal to the Resistograph in decay detection accuracy, when performed by an experienced arborist. The portable drill was less reliable by as much as 1/3 when performed by a less experienced arborist. The operator of the portable drill notes changes in the wood resistance. At each change, the operator retracts the bit and inspects the shavings caught in the worm shaft of the bit. Changes in texture, color, and moisture are typically noted. The bits used for this evaluation were brad-point drill bits: (1) 3/16-inch diameter for the buttress roots, which were all done at grade, and (2) 3/8-inch diameter for the trunks. The 3/16 bit has a maximum penetration length of 10 inches, and the 3/8 bit has a maximum penetration length of 16 inches, which is essential for inspection of larger trees.

Certainly there are highly technical instruments on the market today to estimate internal decay in trees. A comparison of the most common of these was reviewed in a technical review by Nicoletti and Miglietta (1998). Physicist Frank Rinn, who invented and markets one of the Sonic Tomography tools (Lecture, Asilomar, May 2012) stated that the reliability of the instrument depends on the operators' success with calibration and on the operators' skill with interpretation of the results, and there are plenty of chances for error. In addition, the costs for testing with high tech equipment at this time are outside the price range of the average homeowner.

All of the methods used to evaluate internal decay are invasive.

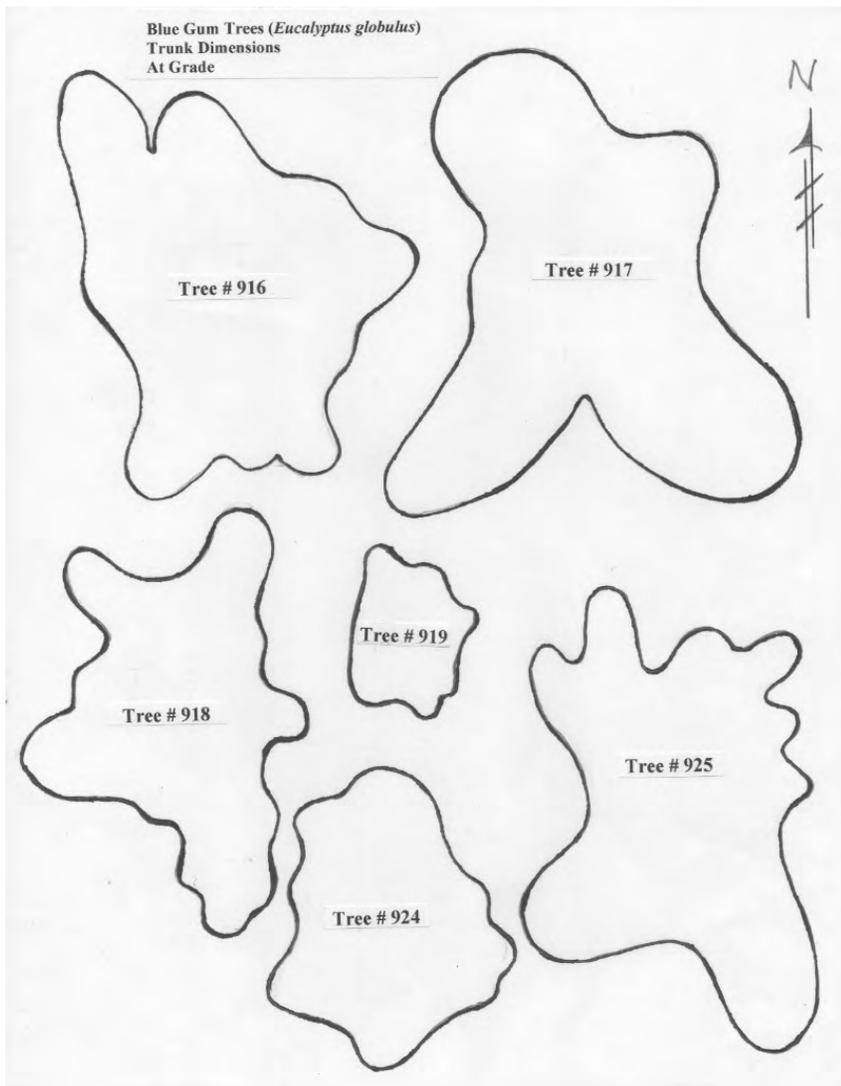
This evaluation involved an inspection at 2 elevations: (1) the buttress roots at soil grade, and (2) the trunk at an elevations between 2 feet and 5 feet. If the elevation was elected to be approximately 2 feet, the inspection locations on that tree were done at, or approximate to that elevation in order to get data about a cross section reading.

A drawing of the trunk shape of each tree was done at grade. Several measurements using a standard measuring tape were done of the trunk at grade (i.e., north, south, east, west, diagonal (if possible), and between buttresses). This information was used to create an approximate scale drawing of each trunk. I used the scale: 1/2-inch = 1 foot. I use the word "approximate" because I did not measure the depressions between buttress roots or some of the curves. Thus, the final drawing gives an image of the trunk to approximate scale. Each drill location was marked on the drawing, and notes about the findings at each drill location were recorded.

Three types of interior wood were recorded: (1) typical sound wood in blue gum, which is very hard, difficult to drill, moist to wet, and creamy in color; (2) Sapwood decay found in the outer layers of wood generally, which is softer wood, easier to drill, often dry and somewhat crumbly, and typically darker in color (tan to brown); (3) a Cavity, which gives way to minimal drilling pressure, and usually collects a section or a ring of dark colored tissue on the drill bit at the point of the cavity entry. With the detailed notes from this, an image of the interior decay, if any, takes shape on the scale drawing, after logical connections are joined.

### Observations

After the trunks of the 6 trees were drawn to approximate scale, I assembled them on a single page as follows:



These are more meaningful than mere shapes. There are several important factors reflected by these shapes.

All of the trunks are elongated north to south, including the smallest Tree # 919.

In addition, the largest or more prominent buttress roots tend to be on the north and south sides.

Trees (and plants in general) react to their environment. The primary forces to which they react are Sunlight, Gravity, and Wind.

In this case, the elongation of all of the trunks on the north and south suggests strong winds on a regular and consistent basis from a primary direction. The residents of Monarch Pines report the strongest winds tend to come from the south to north during storms.

The tree responds to the bending back and forth during windy days and storms by growing additional wood on the north and south sides in an attempt to withstand the wind pressures. This likely partially explains the elongation of the trunks.

Strong winds create internal cracks (often referred to as radial cracks) as limbs whip back and forth. Cracks may occur in any part of the tree, including roots. The tree's response is to grow additional wood to strengthen the exterior wood where internal cracks have occurred inside. As far as we know, internal cracks do not heal.

The last significant factor is that these 6 trees have been topped several times. Major stems that have been stub-cut (topped) take a very long time to seal over, if at all. Internal decay develops down the core of those stub cuts, because the wounds cannot adequately seal off to stop the attack of decay pathogens. This typically results in a decay column down the trunk. The trees sense the internal weaknesses associated with a decay column, sometimes combined with internal cracks. The trees respond by growing additional exterior wood at those locations where weaknesses are sensed. The size and massiveness of the elongated buttress structures strongly suggest significant structural weakness.

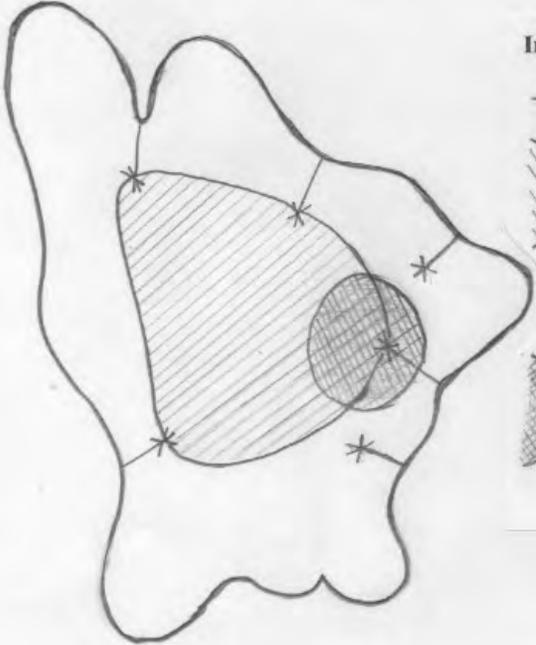
The results of the drilling inspection for the 6 trees is as follows:

**Blue Gum Tree # 916**  
**Inspection Using The Portable Drill Method**  
**Approximate Scale: 1/2 inch = 1 foot**



Inspection of Buttress Roots At Grade;  
The following symbols indicate  
the locations of inspection.

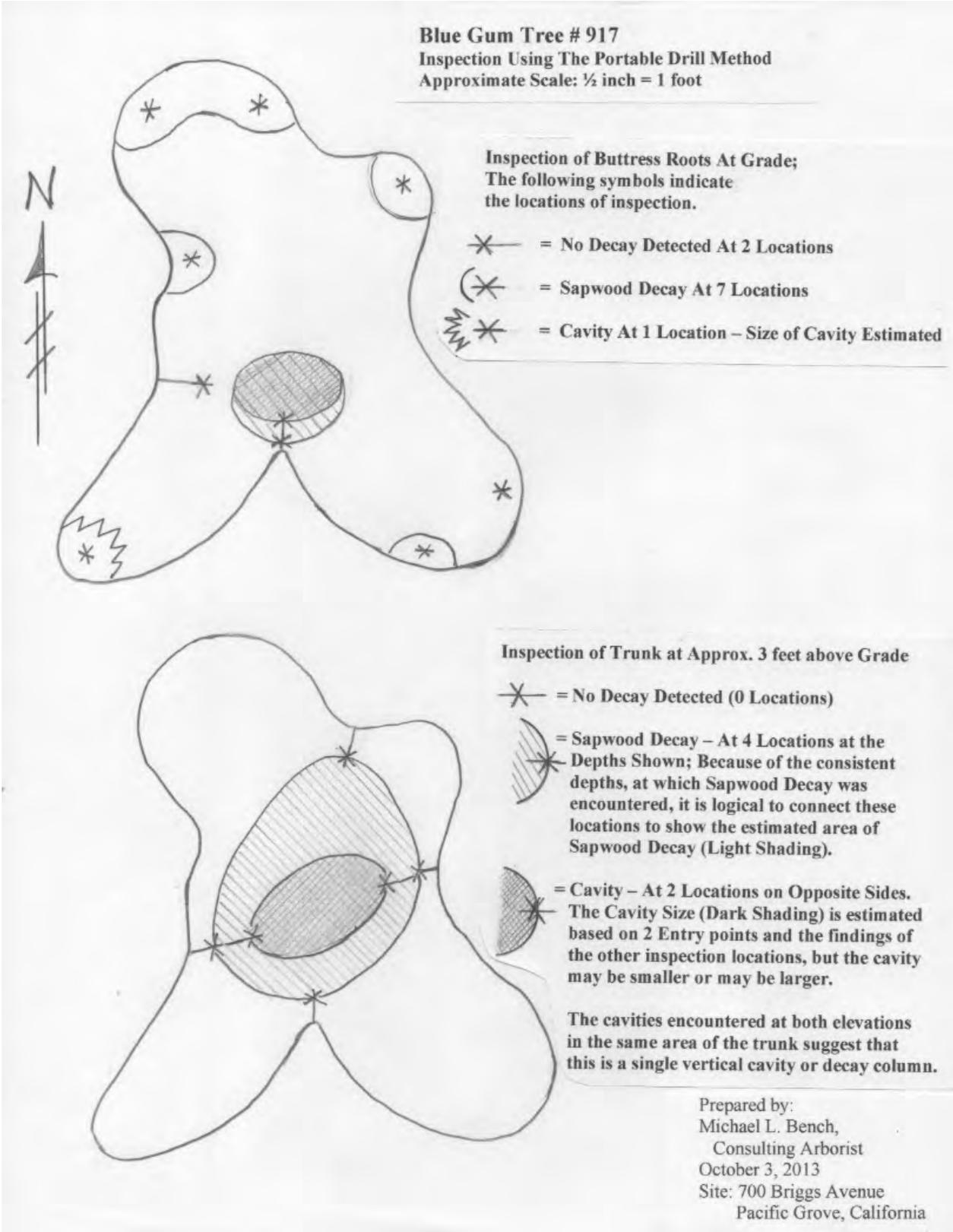
- \* = No Decay Detected
- (\*) = Sapwood Decay
- ~\* = Cavity



Inspection of Trunk at Approx. 3 feet above Grade

- \* = No Decay Detected - At 2 Locations
- (\*) = Sapwood Decay - At 4 Locations at the Depths Shown; Because of the consistent depths, at which Sapwood Decay was encountered, it is logical to connect these locations to show the estimated area of Sapwood Decay as shown by the Light Shading
- ~\* = Cavity - At 1 Location - The Size of the Cavity (Dark Shading) is estimated based on 1 Entry point and the findings of the other inspection locations, but the cavity may be smaller or may be larger, possibly approaching the size of the Sapwood Decay.

Prepared by:  
Michael L. Bench,  
Consulting Arborist  
October 3, 2013  
Site: 700 Briggs Avenue  
Pacific Grove, California

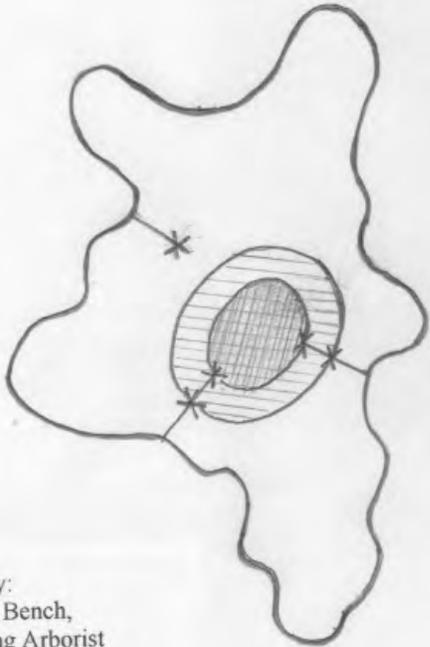


**Blue Gum Tree # 918**  
Inspection Using The Portable Drill Method  
Approximate Scale: 1/2 inch = 1 foot



Inspection of Buttress Roots At Grade;  
The following symbols indicate  
the locations of inspection.

- \* = No Decay Detected At 3 Locations
- (\*) = Sapwood Decay At 1 Location
- ⚡\* = Cavity At 1 Location



Inspection of Trunk at Approx. 20-24 inches above Grade

- \* = No Decay Detected 1 Location
-  = Sapwood Decay – At 2 Locations at the Depths Shown; Because of the consistent depths, at which Sapwood Decay was encountered, it is logical to connect these locations to show the estimated area of Sapwood Decay (Light Shading).
-  = Cavity – At 2 Locations on Opposite Sides. The Cavity Size (Dark Shading) is estimated based on 2 Entry points and the findings of the other inspection locations, but the cavity may be smaller or may be larger.

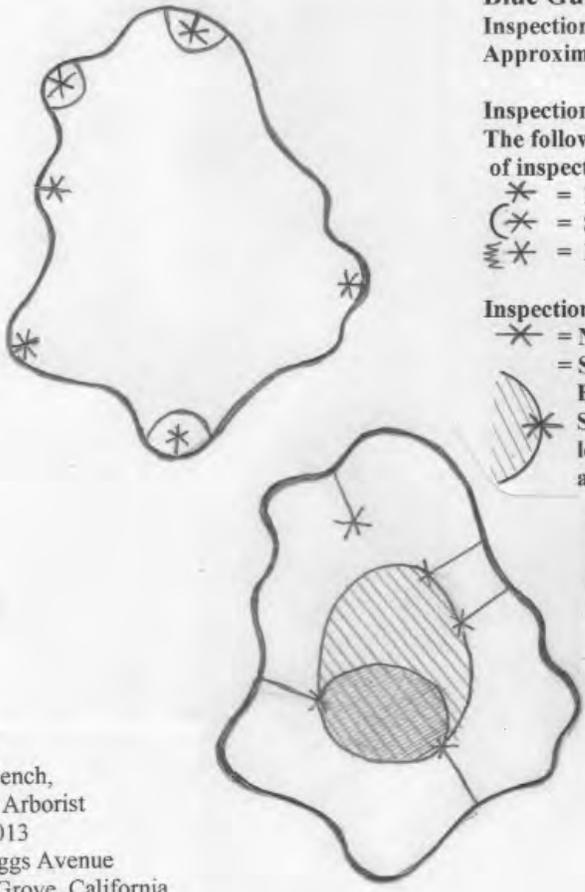
Prepared by:  
Michael L. Bench,  
Consulting Arborist  
October 3, 2013  
Site: 700 Briggs Avenue  
Pacific Grove, California



**Blue Gum Tree # 919**  
 Inspection Using The Portable Drill Method  
 Approximate Scale: ½ inch = 1 foot

**Inspection of Buttress Roots At Grade.**  
 \* = No Decay Detected at 3 Locations  
 (\* = Sapwood Decay at 1 Location  
 ≡\* = Cavity at 1 Location on S. Side

**Inspection of Trunk at Approx. 40 inches above Grade:**  
 = No Decay Detected at 0 Locations  
 = Sapwood Decay at 3 Locations (Light Shading) - Size of Sapwood Decay estimated.  
 = No Trunk Cavities Detected

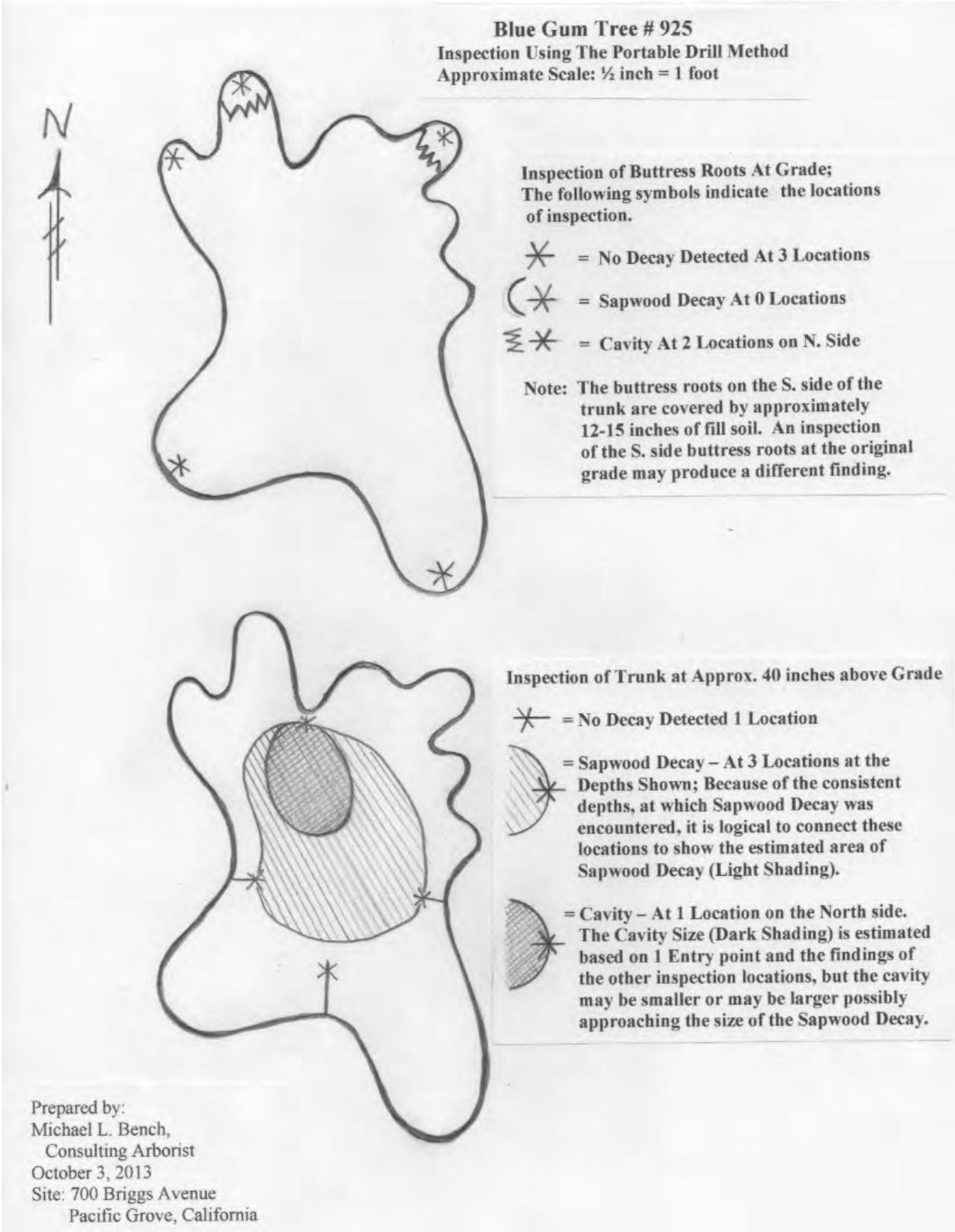


**Blue Gum Tree # 924**  
 Inspection Using The Portable Drill Method  
 Approximate Scale: ½ inch = 1 foot

**Inspection of Buttress Roots At Grade;**  
 The following symbols indicate the locations of inspection.  
 \* = No Decay Detected at 3 Locations  
 (\* = Sapwood Decay at 3 Locations (Light Shading)  
 ≡\* = No Buttress Root Cavities Detected

**Inspection of Trunk at Approx. 4-5 feet above Grade**  
 \* = No Decay Detected 1 Location  
 = Sapwood Decay at 4 Locations.  
 Because of the consistent depths, at which Sapwood Decay was encountered, it is logical to connect these locations indicating an estimated area of decay (Light Shading).  
 = Cavity at 2 Locations.  
 The Cavity Size (Dark Shading) is estimated based on the 2 Entry points and the findings of the other inspection locations, but the cavity may be smaller or may be larger possibly approaching the size of the Sapwood Decay.

Prepared by:  
 Michael L. Bench,  
 Consulting Arborist  
 October 3, 2013  
 Site: 700 Briggs Avenue  
 Pacific Grove, California



## Discussion

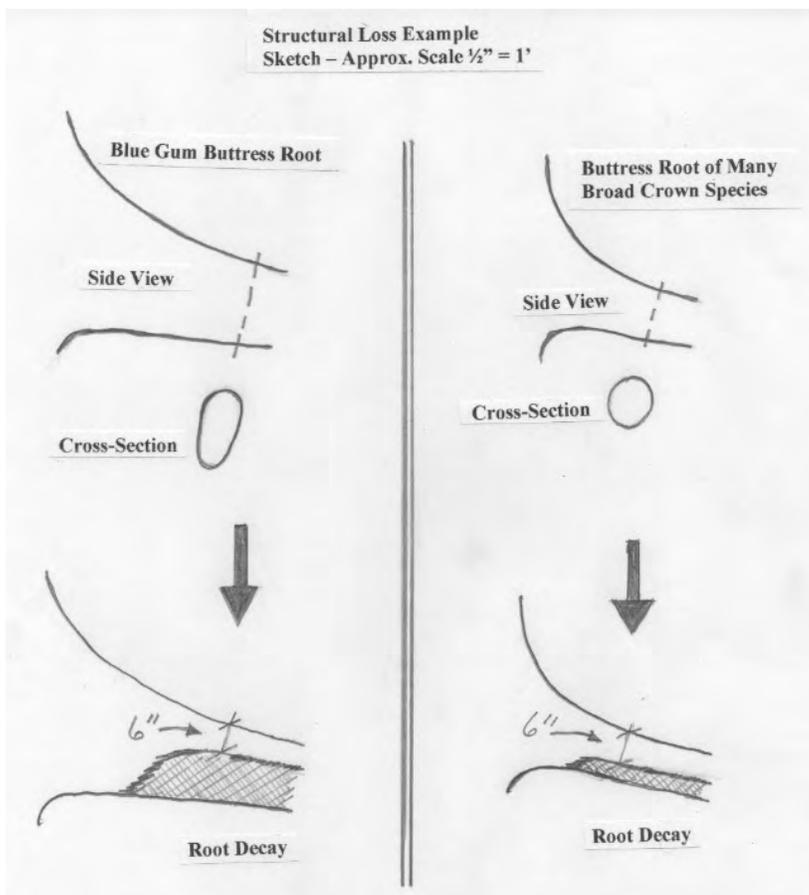
It is significant to note that the buttress roots of *Eucalyptus globulus* are typically not round in shape but are, in the majority of cases, instead vertically oval or elliptical in the area near the trunk. The same roots tend to become more circular or round, depending on the soil conditions, the further the root grows from the trunk.



For example, I excavated the stump of this *Eucalyptus globulus* by hand in March 2013 in Salinas. The primary buttress roots essentially take on vertical oval shapes at the trunk in response to the bending movements and wind pressures at that location.

In this case, the predominately strong winds are virtually always from the west. This photo was taken from the north; this view of the stump is East (L) and West (R). The predominant winds are from R to L in this view. This is significant because the buttress

roots are vertically oval on all sides of the trunk with the largest on both East and West sides. The significance of this is described in the following sketch:



Decay of roots virtually always occurs on the underside, because the moisture and temperature fluctuations are reduced and, thus, more favorable for decay pathogen survival.

Concerning the 6 *Eucalyptus globulus* trees at 700 Briggs Avenue, the decay discovered by drill inspection, Trees #926, 917, 918 and 925 were observed to have buttress root cavities. The results by individual buttress root (inspection locations on previous drawings) are as follows:

	Depth of Cavity	Root Surface Diameter	Estimated Existing Structure	Estimated Existing Structure	Estimated Structural Loss
Tree #916	7 in	16 in	18 – 20 in	35% - 39%	61%-65%
Tree #917	8 in	20 in	23 – 25 in	32% - 35%	65% - 68%
Tree #918	6 in	16 in	18 – 20 in	30% – 33%	67% - 70%
Tree #925	6 in (faces north-east)	15 in	17 – 19 in	32% - 35%	65% - 68%
Tree #925	6 in (faces north-west)	11 in	13 – 15 in	40% - 46%	54% - 60%

Because the buttress roots of the 6 *Eucalyptus globulus* trees at this site were not excavated, their vertical diameters were estimated. In my experience, the vertical diameters estimated here are very conservative. This means that the actual structural losses resulting from buttress root decay may be greater than estimated here.

In addition to the buttress cavities, sapwood decay was encountered in several buttress roots. Sapwood decay is described as softer wood, easier to drill, often dry and somewhat crumbly, and typically darker in color (tan to brown). The previous drawings indicate the buttress locations, which is summarized as follows:

- Tree #916 – 2 Locations
- Tree #917 – 5 Locations
- Tree #918 – 1 Location
- Tree #919 – 1 Location
- Tree #924 – 3 Locations
- Tree #925 – 0 Locations

The south side of the root collar of Tree #925 is covered with approximately 12-15 inches of soil, which forms a noticeable mound. The inspections on the buttress roots on the south side of this tree may have been too high on the trunk or at least were not at a consistent elevation with the other buttress root inspection locations.

Although many tree professionals recognize buttress root decay, I was not able to find any research in the Arboriculture Scientific Journals specific to this subject. There are no studies, which include structural loss information concerning sapwood decay. It is regarded as the initial stages of decay infection. Whether or not there is any structural loss associated with it has not been measured effectively by scientific study. On the other hand, it is essentially always present around a cavity. In some cases, the sapwood decay is essentially a cavity in the sense that it is a woody material ( the lignin and much of the cellulose has been digested by disease), leaving the cells empty, devoid of all structural stability.

Cavities are much easier to identify and measure. This evaluation has found cavities in Trees #916, 917, 918, 924, and 925. The estimated sizes and locations of these cavities are shown in the drawings. Tree #917 was found to have a cavity at both elevations inspected in approximately the same area of the trunk. This suggests a vertical decay column down the trunk. In my experience, topped *Eucalyptus globulus* almost always develop decay columns in topped or stub cut stems, which were approximately 8 inches in diameter or larger. The wound simply cannot close fast enough to prevent the entry of decay. The cavities detected in the other Trees #916, 918, 924, and 925 may be extensions of decay columns in their trunks, despite the fact that this inspection does not demonstrate this fact.

The sizes of the cavities are estimated conservatively based on the few entry points performed. The sizes of the cavities encountered may be smaller, but it is more likely that these cavities are larger, possibly approaching the sizes of the sapwood decay detected.

Currently it is not possible to calculate with accuracy the structural loss that these cavities pose. In recent years engineering formulas have been used to calculate risk thresholds, but these formulas used a limited number of variables (diameter, cavity size, wall thickness, opening size) but were not able to account for multiple changing variables (wind gusts, torsion events, dampening events, etc.), and for this reason, thresholds associated with formulas are no longer used. All of the methods used by professionals and scientists at this time, including low-tech equipment or high tech equipment, require experience, practice, and judgment.

Recently studies by Physicist Frank Rinn state that a cavity in the center of the tree surrounded by healthy wood reduces structural integrity by only a slight amount, but that irregular shaped trunks, or cavities near the edge of the trunks, result in the sharp decline of structural integrity. (Rinn, Arborist News, Feb 2011; and Lecture, Asilomar, May 2012).

### **Conclusions**

Significant root buttress weakness was encountered in Trees #916, 917, 918, and 925. Sapwood decay was encountered in all 6 trees, but the size of the decay relative to the trunk size and shape was greatest in Trees #916, 917, and 925. The smallest quantity detected was in Tree #919.

Cavities were detected in Trees #916, 917, 918, 924, and 925. The extent of these cavities was not fully accessed by the method used. The fact that sapwood decay virtually always surrounds a cavity, it can be inferred that the cavities may approach the size of the sapwood decay, which was detected, but that was not confirmed.

The fact that cavities were detected at 2 elevations on Tree #917, it appears clear that a column of decay exists in this tree. Our experience with *Eucalyptus globulus* suggests that the cavities detected in Trees #916, 918, 924, and 925 may well be segments of a decay columns in each of these trees, but this was not confirmed.

The report dated 11-30-12 by Mr. Bileci included photo documentation of extensive internal decay in Tree #920 and Tree #922. This evaluation finds similar patterns of internal decay in 5 of the 6 remaining trees.

## Recommendations

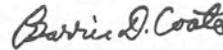
The buttress root decay detected in 4 of the 6 trees, in my opinion, is sufficient justification to recommend the removal of these trees in light of presence of numerous precious targets (people) that exist at this location within striking distance on an almost constant basis.

Based on the information obtained from this evaluation, I recommend the removal of Trees #916, 917, 918, 924, and 925.

Respectfully submitted,



Michael L. Bench, Consulting Arborist



Barrie D. Coate, Principal

Attachments: Map Sketch of Site Relationships  
Assumptions and Limiting Conditions

## References Cited

Costello, L.R. and S.L. Quarles, 1999. Detection Of Wood Decay in Blue Gum and Elm: An Evaluation of the Resistograph and the Portable Drill. Journal of Arboriculture, Vol.25, No.6, pp 201-209.

Nicoletti, G. and P. Miglietta, 1998: Using High Technology Instruments to Detect Decay in Trees. Journal of Arboriculture, Vol. 24, No.6, pp. 297-302.

Rinn, F. 2001: Aspects of Mechanical Stability of Tree Cross Sections. Arborist News, Feb. 2011, pp. 52-54.

Rinn, F. 2012: Possibilities and Limitations of Technical Tree Inspection. Solution Based Arboriculture Lecture, May 1, 2012.

**Location of Existing  
Blue Gum Trees (*Eucalyptus globulus*)  
In Relation to Existing Residences  
Sketch - No Scale**

**Tree # 925** ●

**Tree # 924** ●

**Tree # 919** ●

**Tree # 918** ●

**Tree # 917** ●

**Tree # 916** ●

Residence # 4

Residence # 5

Residence # 6

Residence # 7

Residence # 8

Residence # 9

**Briggs Avenue**

Prepared by:  
Michael L. Bench,  
Consulting Arborist  
October 23, 2013  
790 Briggs Avenue  
Pacific Grove, California





## **ASSUMPTIONS AND LIMITING CONDITIONS**

1. Any legal description provided to the appraiser/consultant is assumed to be correct. No responsibility is assumed for matters legal in character nor is any opinion rendered as to the quality of any title.
2. The appraiser/consultant can neither guarantee nor be responsible for accuracy of information provided by others.
3. The appraiser/consultant shall not be required to give testimony or to attend court by reason of this appraisal unless subsequent written arrangements are made, including payment of an additional fee for services.
4. Loss or removal of any part of this report invalidates the entire appraisal/evaluation.
5. Possession of this report or a copy thereof does not imply right of publication or use for any purpose by any other than the person(s) to whom it is addressed without written consent of this appraiser/consultant.
6. This report and the values expressed herein represent the opinion of the appraiser/consultant, and the appraiser's/consultant's fee is in no way contingent upon the reporting of a specified value nor upon any finding to be reported.
7. Sketches, diagrams, graphs, photos, etc., in this report, being intended as visual aids, are not necessarily to scale and should not be construed as engineering reports or surveys.
8. This report has been made in conformity with acceptable appraisal/evaluation/diagnostic reporting techniques and procedures, as recommended by the International Society of Arboriculture.
9. When applying any pesticide, fungicide, or herbicide, always follow label instructions.
10. No tree described in this report was climbed, unless otherwise stated. We cannot take responsibility for any defects which could only have been discovered by climbing. A full root collar inspection, consisting of excavating the soil around the tree to uncover the root collar and major buttress roots, was not performed, unless otherwise stated. We cannot take responsibility for any root defects which could only have been discovered by such an inspection.

## **CONSULTING ARBORIST DISCLOSURE STATEMENT**

Arborists are tree specialists who use their education, knowledge, training, and experience to examine trees, recommend measures to enhance the beauty and health of trees, and attempt to reduce risk of living near trees. Clients may choose to accept or disregard the recommendations of the arborist, or to seek additional advice.

Arborists cannot detect every condition that could possibly lead to the structural failure of a tree. Trees are living organisms that fail in ways we do not fully understand. Conditions are often hidden within trees and below ground. Arborists cannot guarantee that a tree will be healthy or safe under all circumstances, or for a specified period of time. Likewise, remedial treatments, like medicine, cannot be guaranteed.

Trees can be managed, but they cannot be controlled. To live near trees is to accept some degree of risk. The only way to eliminate all risk associated with trees is to eliminate all trees.

---

Barrie D. Coate  
ISA Certified Arborist  
Horticultural Consultant

## **EXHIBIT E**

**Letter from City Clerk Sandra Kandell to Neil Shapiro responding to Public Records  
Act Request No. 1603-004**

dated May 10, 2016

(1 page)



**300 Forest Avenue  
Pacific Grove, California, 93950**

May 10, 2016

**VIA EMAIL [NLSHAPIRO@SBCGLOBAL.NET](mailto:NLSHAPIRO@SBCGLOBAL.NET)**

Neil L. Shapiro, Esq.  
Law Offices of Neil L. Shapiro  
2100 Garden Road, Suite C  
Monterey, CA 93940

**Re: Public Records Act Request No. 1603-004**

Dear Mr. Shapiro:

This letter responds to your further email of April 27, 2016, requesting *“copies of the reports issued by Tree Associates and Urban Forest Innovations, for which the City paid more than \$27,000.”*

This again confirms that the City had no record of receiving reports. This also confirms that this office has conferred with special counsel and no reports exist.

Our Office has made extensive efforts to locate records that might fall within the scope of your records request; however our search failed to identify any related documents. If you have knowledge of a specific document that has not been provided in response to your request, please notify us and we will be happy to provide the document(s) to you unless, of course, it is exempt from disclosure pursuant to Government Code §6254. Also, should later investigation identify additional disclosable records that meet your request, we will contact you.

Please let me know if I may be of further assistance.

Sincerely,

*Sandra Kandell*

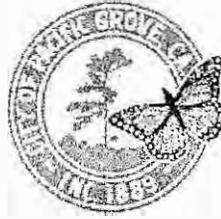
Sandra Kandell  
Deputy City Clerk

## **EXHIBIT F**

**Memorandum from Public Works Director Daniel Gho to the Beautification and  
Natural Resources Commission regarding the Eucalyptus Trees at Pacific Grove Golf  
Links**

dated October 6, 2015

(1 page)



TO: Beautification and Natural Resource Commission  
FROM: Daniel Gho, Public Works Director  
DATE: October 26, 2015  
RE: Eucalyptus Trees at Pacific Grove Golf Links

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This memorandum is to update recent activities associated with eucalyptus trees located on the 5<sup>th</sup> fairway of the Pacific Grove Golf Links.

The City and residents residing in the Monarch Pines Community have been in active litigation regarding the 6 eucalyptus trees adjacent to North side of the 5<sup>th</sup> fairway of the golf course. In 2012, the City removed four eucalyptus trees that had previously been aggressively pruned, but kept 6 others in place. Litigation pertaining to the remaining 6 trees was filed in 2015.

In its effort to defend the action, and to best identify potential hazards posed by the trees, the City retained highly qualified expert arborists to evaluate the trees using ultrasound technology and assess the quality of the trees and to detect flaws and irregularities. Testing was performed at breast height of the trees and also in the canopy of the trees. Results showed defects in the trees both within the trunk and also in the canopy. Each tree tested had varying results, but all of the trees showed signs of defects. Plaintiffs also engaged expert arborists to assess the quality of the trees and their root structures. All experts concluded the six trees posed present risks due to decay.

The City and Plaintiffs mutually concluded the best action is to remove the 6 remaining eucalyptus trees and replant those locations with cypress trees, a more suitable tree species for this location. The City and Plaintiffs agreed to split costs to remove trees; Plaintiffs will also pay to replant the cypress trees. The City also plans to evaluate the area for safety, and plans to install netting to protect the Monarch Pines Community from golf balls. Neither party prevailed in this case as the negotiations reached a result to satisfy both parties.

Please feel free to contact me if you have any questions.

## **EXHIBIT G**

**Letter from Council member Rudy Fischer to Monarch Pines Homeowners**

[undated]

(1 page)

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**Councilman Rudy Fischer**  
300 Forest Avenue  
Pacific Grove, CA 93950  
(831) 236-3431  
[rudyfischer@earthlink.net](mailto:rudyfischer@earthlink.net)

**Homeowners in the Monarch Pines Mobile Home Park;**

Now that the six eucalyptus trees at the golf course adjacent to your mobile home park are being taken down, I feel comfortable writing to you. As you know, some of your neighbors had a concern over the size, health, and location of those trees. Because this involved a lawsuit, however, I didn't think it a good idea to write before.

As you probably know, this situation involved the eucalyptus trees along the 5<sup>th</sup> fairway of the PG Golf Links. The question was whether the trees were - or were not - a hazard. I actually came out there to look for myself a while back and, whether a hazard or not, thought they were awfully big and awfully close to the homes.

In any case, to get to the truth the City called on some highly qualified arborists to evaluate the trees. They used ultrasound to evaluate the trees and find any flaws and issues with their structure. Although the trees were still viable, the results also showed some potential problems in both their trunk and canopy.

People in our city love trees, and it is always difficult to take down mature ones. In fact, we are being criticized by some for even this action. The City and the people affected agreed, however, that if there was the slightest risk to people the best thing to do would be to remove them and replant that area with cypress trees. I have been told that those types of trees are more suitable anyway. We are also installing netting to protect homes near the golf course from golf balls.

This was a win-win for both the city and your neighbors in the Monarch Pines Mobile Home Park, and I am happy that we were able to work this out. If you ever have any other concerns which you feel need to be addressed, don't hesitate to e-mail me at [rudyfischer@earthlink.net](mailto:rudyfischer@earthlink.net) or contact me at 236-3431.

Thanks and regards,

  
Rudy Fischer  
Councilmember

MR. MORELLI -  
I'M GLAD EVERYTHING IS  
WORKING OUT, I WAS AT THE  
GOLF COURSE LAST WEEKEND, AND  
THEY ARE REALLY CLEANING THAT  
ARE UP. MERRY CHRISTMAS!

## **EXHIBIT H**

**Collectively, letters from Monarch Pines residents to City Council objecting to 14-foot netting**

various dates ranging from April 8-10, 2016

(7 pages)

April 8, 2016

Dear City Council Members:

We were shocked that the City Council Members interpreted the Court's order to mean that protective netting could be any height the Council deemed appropriate. We think any reasonable person would expect that netting would be the same height as the netting to which it is an extension and the other netting in the golf course.

We met with the City on the golf course behind our houses and were told the netting would be the same height as the netting already in place. It has always been our understanding that City employees have the authority to make these decisions.

The Eucalyptus trees did not stop the golf balls, but since the trees have been removed, the houses in Monarch Pines directly behind the golf course as well as those across the street and below the berm have received many more golf balls than previously. In addition, golf balls hit the street with regularity thereby increasing cars and walkers' chance of being hit. We'd be happy to bring a bag or two to City Hall of the golf balls that have landed in our yard.

Many, many of the golf balls hit with an explosive sound the roofs of our houses---a height greater than 14 feet. A handyman on my roof washing the skylights narrowly missed being hit. One neighbor's house with a double paned domed skylight has a golf ball sitting inside the skylight after the ball broke through the first pane and lodged on the second pane. I always wear my bicycle helmet in the backyard after having a ball slam into the pavement beside me.

We understand the Council thought there was lack of interest from the residents of Monarch Pines; therefore, health and safety was not an issue for us.

First, we thought the issue was settled. Second, as one of the younger members on the street at age 75, my husband and I represented all the neighbors at the Planning Commission. Most residents are in their 80's and two immediate neighbors are over 90. Various health issues make night meetings outside their realm. However, their concern isn't less, but more as they are home much of time and are more exposed to the risk of being hit by a golf ball.

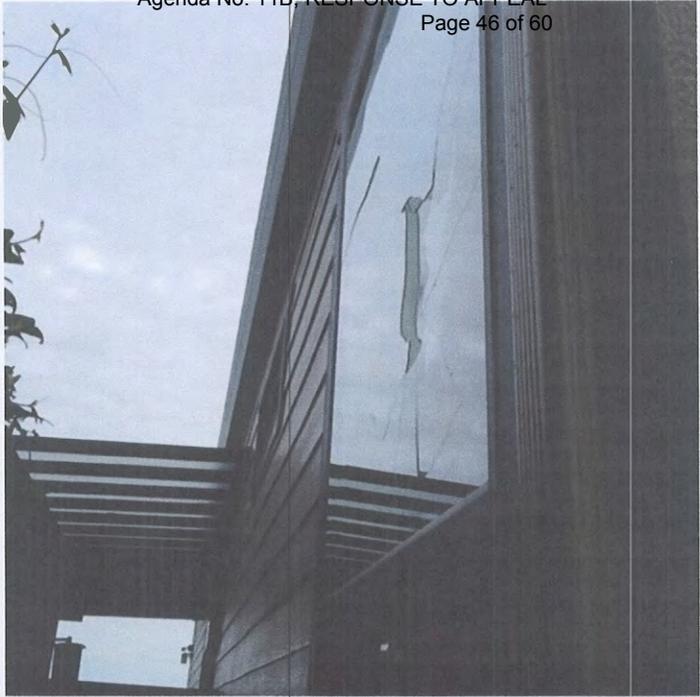
Pacific Grove does not protect "view" from trees, so why from netting that will soon be masked by the replacement Cypress trees?

We urge you to protect our lives, health and safety with the 35 foot protective netting the City promised. Nothing should be more in the public interest.

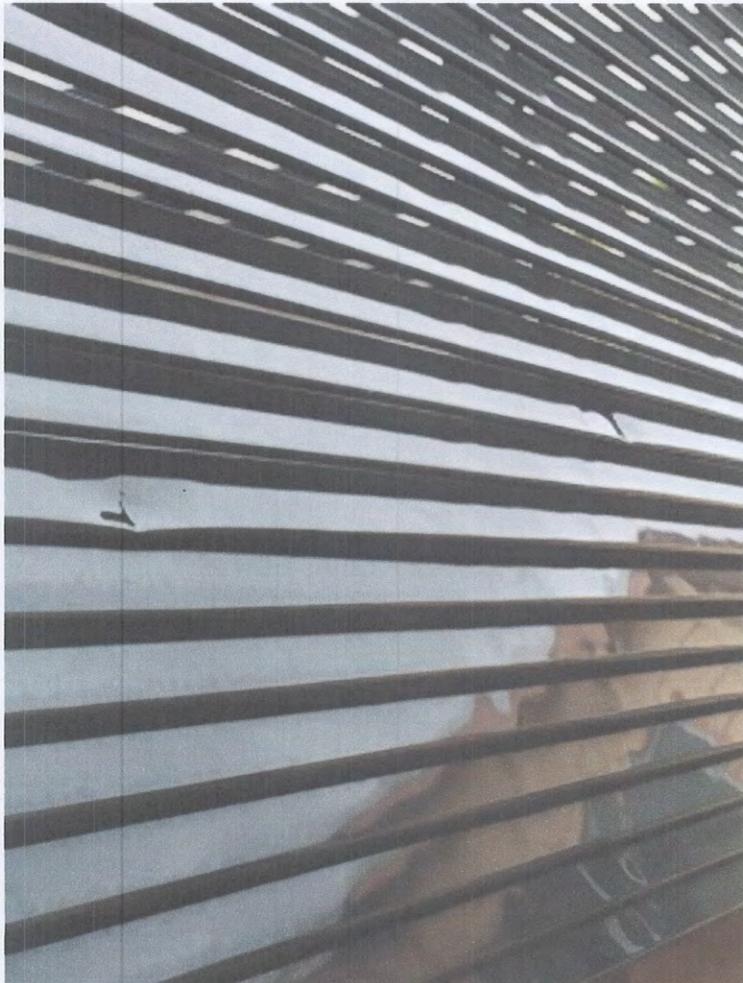
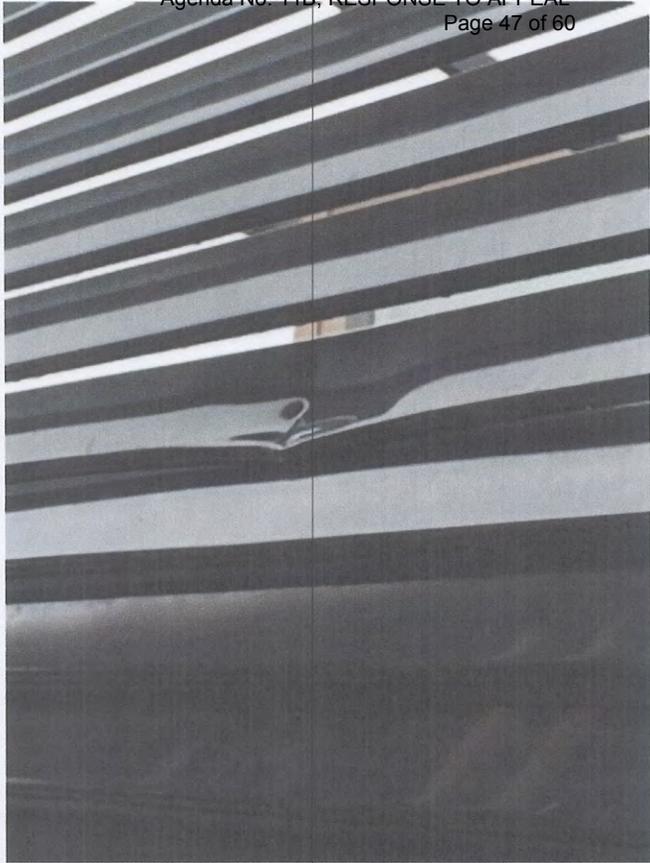
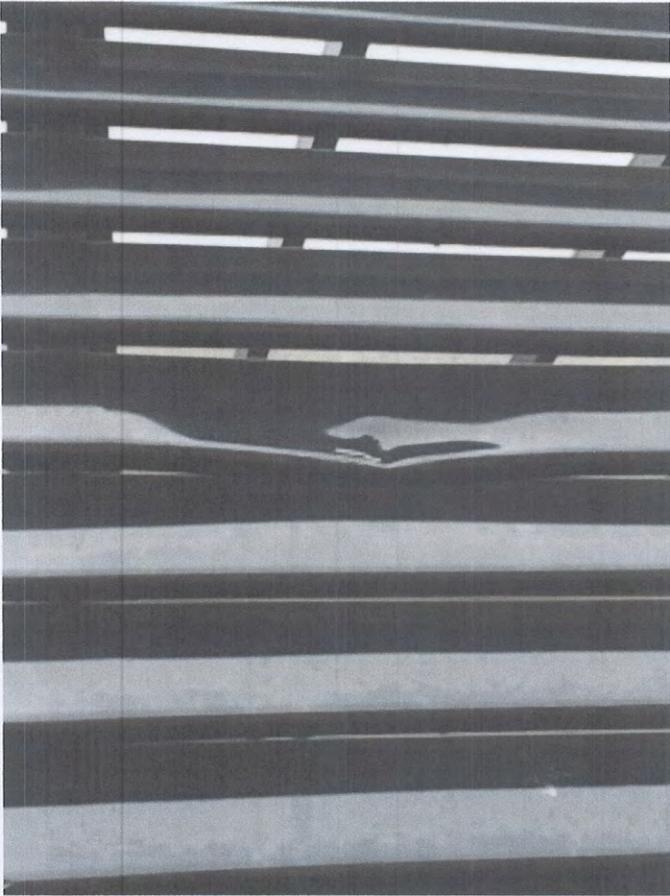
Yours truly,

*Robert A. Morelli*  
*Marion Trentman - Morelli*  
Robert A. Morelli

Marion Trentman-Morelli  
700 Briggs Avenue # 6  
Pacific Grove, CA 93950



THE BALL THAT  
BROKE THE WINDOW



Protective barrier installed on side of carport to protect vehicle from golf balls

April 9, 2016

Dear City Council Members:

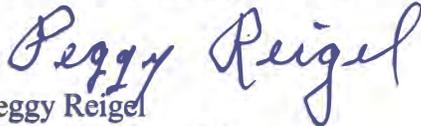
I have lived in Monarch Pines for more than 20 years. I'm an avid gardener and like to be outside. Before my husband died in 2005, he always made me wear a hard hat when working outside as he was so afraid that I would be hit and injured by one of the many golf balls that plow into our property.

I was so relieved when I was told that the judge said we must be protected by netting. My next door neighbors have netting and don't get the many, many golf balls that crash onto my roof, carport, house and shed. My house has dents to prove it. I get even more golf balls since the trees were cut down although I'm very glad those dangerous trees are gone. I used to sleep in the living room during storms because of the trees. I have had windows broken by the golf balls and feel fortunate that the balls haven't hit me.

I am home most of the time and want to be out in my backyard gardening and puttering around, but I am afraid.

Please consider our lives and our safety and put up the high netting we were told we would finally get after all these years.

Thank you for caring about us.

A handwritten signature in blue ink that reads "Peggy Reigel". The signature is written in a cursive, flowing style.

Peggy Reigel  
700 Briggs Ave. # 4  
Pacific Grove, CA 93950

Nancy Dolton  
700 Briggs Avenue # 8  
Pacific Grove, CA 93950

April 10, 2016

Dear City Council,

For all the years since the mid 1990s that I have lived here, I and my property have been assaulted by golf balls. On many occasions, we have asked that the protective netting installed from 700 Briggs Ave #1 – 3 be extended to houses # 3 through 17. Nothing has resulted from these requests.

Now we finally have a court order to extend the netting for part of this area. Why is City Council trying to diminish the court order from the 35 foot high netting installed in many places around the golf course to a 14 foot high netting? What is the rationale? 14 feet of netting will not stop the many golf balls that hit my roof and the sides of my house above 14 feet.

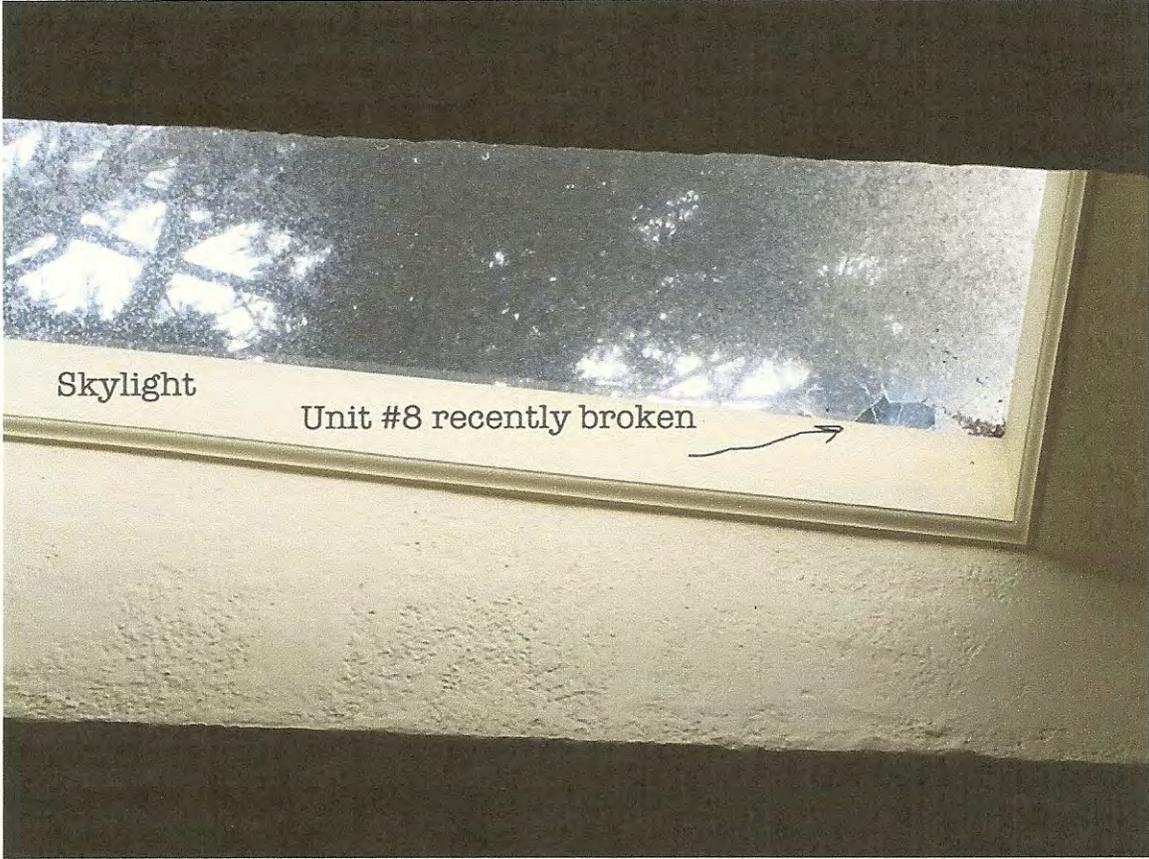
We have always had way too many golf balls bouncing off our roofs, sides of our houses and the ground around our houses. The removal of the very, very dangerous Eucalyptus trees have only exacerbated the problem.

Golf balls have broken my house and car windows.

All Pacific Grove residents deserve your protection for our lives and safety. That should come first. Please do not reinterpret the judge's order to appease political favors.

Yours truly,

  
Nancy Dolton



Jeannine Farrell 700 Briggs Avenue #5 Pacific Grove, CA 93950

April 10, 2016

Dear City Council,

I am a long term resident at Monarch Pines. I was so relieved when I was told a judge had ordered that netting to stop golf balls was going to be put behind my house. I look at the story poles installed behind my backyard and know I am going to feel like I can go outside during golf course hours without being hit by a golf ball.

For many, many years it was hard to know whether we were more afraid of the trees or the golf balls. Both were such threats. We have always had many golf balls landing on our roof, our yard, sidewalk and the street in front of our house. They sound like bombs when they land on our roof. Now we have more balls than ever. The trees stopped some, but not a lot.

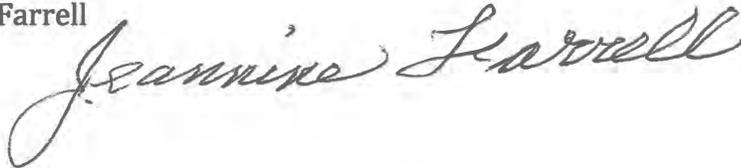
14 feet of netting is not going to protect us at all. Balls land in my rain gutters and plug up the down spouts. That's a lot higher than 14 feet.

I hope that the City Council thinks that our lives are as important, or more important than the view of the bay that people on Jewell Avenue think they are losing.

Are people in Monarch Pines less important than other citizens of Pacific Grove?

Please care about and protect our safety.

Jeannine Farrell

A handwritten signature in cursive script that reads "Jeannine Farrell". The signature is written in black ink and is positioned to the right of the typed name.

## **EXHIBIT I**

**Letter from Joel Franklin to City Attorney David Laredo regarding Use Permit  
Appeal 16-093 for Golf Course Netting at 77 Asilomar Ave.**

dated May 18, 2016

(4 pages)

TELEPHONE  
(831) 649-2545

LAW OFFICES OF  
JOEL FRANKLIN  
2100 GARDEN ROAD, SUITE G  
MONTEREY, CALIFORNIA 93940

FACSIMILE  
(831) 649-2547

May 18, 2016

**VIA ELECTRONIC MAIL**

David C. Laredo, City Attorney  
DE LAY & LAREDO  
606 Forest Avenue  
Pacific Grove, California 93950

Re: Use Permit Appeal 16-093 for Golf Course Netting at 77 Asilomar Ave.

Dear David:

We are writing to address recent correspondence to the City Council from Pamela Silkwood, Esquire, dated May 12, 2016, on behalf of the Appellants in this matter. We simply want to bring to your attention what we believe are errors in her legal reasoning, misunderstandings of the City's lease with CourseCo. ["Lease"], and the status of the Stipulated Judgment in Dolton, et al. v. City of Pacific Grove (Mont. Co. Super. Ct. Case No. M131643). We of course defer to your judgment in advising the City Council, and offer our remarks for whatever assistance they may provide you in formulating such advice.

We are concerned that the Appellants see this as a case of simply passing indemnity responsibility to CourseCo. without dealing with the safety issues involved or the enforceability of the Stipulated Judgment.

Ms. Silkwood urges the City Council to resolve the appeal of Use Permit 16-093 by making either of two determinations:

- (1) Allow CourseCo., the tenant leasing and managing Pacific Grove Golf Links, to take full control of the premises consistent with the Lease by making its own determination of whether netting is required and, if so, submitting an application for netting; or
- (2) Install 14-foot netting along the City property adjacent to Monarch Pines "consistent with the City Council's decision and the settlement agreement."

As we discuss below, both recommendations are inconsistent with the terms of the Stipulated Judgment, the Lease between CourseCo. and the City, and the City's responsibilities under its own Municipal Code and California law.

We urge the City to instead move forward with PARSAC's liability analysis and authorize the proposed Golf Ball Trajectory Study to support the Planning Commission's proper determination that 35-foot netting is required to protect the health and safety of Monarch Pines residents.

Letter to City Attorney

Re: Use Permit Appeal 16-093 for Golf Course Netting at 77 Asilomar Avenue

May 18, 2016

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Preliminarily, it is important to note that Ms. Silkwood's suggestion to install a 14-foot net "consistent with the City Council's decision and the settlement agreement" does not accurately reflect any decision made by the City Council to date, or the terms of the Stipulated Judgment, which do not specify a netting height.

More important, Ms. Silkwood's conclusion that the City does not have any obligation to install netting on premises leased by CourseCo. is not supported by the terms of the Lease.

### Tenant's Duty to Repair and Maintain Premises

As identified by Ms. Silkwood, paragraph 9.1 of the Lease provides that CourseCo. "assumes full and sole responsibility for the condition, operation, repair and management of the Premises and any permitted Improvements or Alterations, from and after the Commencement Date...."

An Improvement is defined in Article 2 to include fences and plantings installed on the Premises by CourseCo. Paragraph 8.2 of the Lease, which is not included in Ms. Silkwood's letter of May 12, requires CourseCo. to apply for permission to the City to install any Improvement costing more than \$25,000. Consequently, although Ms. Silkwood concludes that the City should not "assume liability" by installing netting, the terms of the Lease require the City to make the ultimate determination regarding whether netting is needed under these circumstances. We are not aware of the bid price for the current netting proposal adopted by the Planning Commission, but assume that it may well exceed the \$25,000 price point.

The provision in paragraph 9.1 providing that CourseCo. assumes responsibility for repair and management of permitted Improvements therefore does not apply to the City's determination of whether a particular improvement – such as netting – is needed in the first place. Instead, paragraph 9.1 indicates that should the City Council approve netting to shield the Monarch Pines residences from golf balls, CourseCo. will be responsible for maintaining this netting after it is installed.

Furthermore, paragraph 9.1 explicitly states that CourseCo.'s repair and maintenance of Improvements only applies to those Improvements occurring from and after the Commencement Date of the Lease, which is identified in Article 1 as October 1, 2014. The six dangerous and decaying Eucalyptus trees adjacent to Monarch Pines that were removed and must be replaced with netting pursuant to the Stipulated Judgment were in existence long before the Lease's Commencement Date. The City's installation of netting as required by the Stipulated Judgment is a continuation of the City's settlement with the Monarch Pines residents regarding a health and safety condition that existed prior to CourseCo. leasing property from the City. (A review of the record before the City will reveal that Monarch Pines residents had been urging removal of then 10 (ten) decaying Eucalyptus trees as early as 2010, and the initial expert reports from the Plaintiffs urging removal were given to the City in 2012, years before the CourseCo. lease was operative.)

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Letter to City Attorney

Re: Use Permit Appeal 16-093 for Golf Course Netting at 77 Asilomar Avenue

May 18, 2016

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### Waiver and Indemnity Provisions

Ms. Silkwood's May 12 letter further states that CourseCo. has agreed to waive all rights against the City and indemnify the City for all claims arising out of CourseCo.'s performance and obligations. Reproducing a portion of paragraph 17.1 entitled "Waiver of Claims," Ms. Silkwood emphasizes that the City is not liable to CourseCo., even for negligent or willful misconduct. A proper examination of this paragraph in fact leads to the opposite conclusion: CourseCo. waives all rights against the City except for certain situations that include "the negligence or willful misconduct of City or its employees, Agents or contractors...." Paragraph 17.1 collectively identifies City negligence in addition to other circumstances as "Exceptions" – an identification that Ms. Silkwood fails to point out in her letter.

The indemnity provision in paragraph 17.2 of the Lease similarly states that indemnity does not apply to the Exceptions identified in paragraph 17.1.

Rather than constituting a waiver of City liability, the provision cited by Ms. Silkwood in fact establishes that the City could be liable for negligence or willful misconduct, such as failing to comply with a court order by not requiring installation of any netting, or installing netting below the 35-foot standard set by current netting along this fairway. We are not suggesting that such liability exists, only that CourseCo. might avail itself of such defenses if indemnity claims were shifted to CourseCo. as Ms. Silkwood suggests they should be.

### Conclusion

We do not want to see the netting issue become a point of contention between the City and CourseCo. and believe further that the Court can fully interpret the Judgment in Dolton to set the appropriate level of safety and protection for Monarch Pines residents, if necessary. However, at this point in time, we await the appointment of a netting safety expert and look forward to reviewing the expert's report and recommendations to the City Council.

We merely want to point out that Ms. Silkwood's May 16, 2016 letter on behalf of residents appealing Use Permit No. 16-093 is not accurately supported by the provisions of the Lease between the City and CourseCo. identified above, and should not be considered persuasive.

Moreover, as I am sure you are aware, failing to install netting as required by the Stipulated Judgment or installing netting that does not adequately protect the Monarch Pines residents from golf balls could subject the City and CourseCo. to further judicial proceedings. For example, the Court of Appeal in Sierra Screw Products v. Azusa Greens Inc. (1979) 88 Cal.App.3d 358, 362-364 upheld a mandatory injunction issued by the superior court that required the defendant "to redesign and reconstruct the golf course holes adjacent to plaintiffs' property to the extent necessary to abate the private nuisance" resulting from an excess of golf balls landing on Plaintiffs' property.

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Letter to City Attorney

Re: Use Permit Appeal 16-093 for Golf Course Netting at 77 Asilomar Avenue

May 18, 2016

Page 4

We support the City's continued efforts to comply with the proper standards for providing safe netting along this portion of the fairway, and believe it is the City's role to make this determination. We look forward to receiving PARSAC's recommendations and participating in the eventual hearing before the City Council.

Thank you for your consideration of this information. Please feel free to give me a call if you would like to discuss any of these issues.

Very truly yours,

A handwritten signature in blue ink that reads "Joel Franklin". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Joel Franklin  
LAW OFFICES OF JOEL FRANKLIN

## **EXHIBIT J**

**Collectively, photographs identifying existing netting, fencing, and other protections surrounding the fifth fairway of the golf course**

(2 pages)



Photograph taken on June 2, 2016, showing the 35-foot netting that presently exists in front of Lots 1-3 of Monarch Pines



Composite of three photographs taken on June 2, 2016, showing the 35-foot netting that presently exists along the east end of the fifth fairway bordering the Sally Griffin Center and the entrance to Monarch Pines.



Baffling installed between the entry to Monarch Pines and approximately Lot 4

Fencing visible from several of Appellants' residences

Row of Eucalyptus trees that shields the Jewell Ave. residences from errant golf balls

Additional fencing along Jewell Ave.

Screenshot of the fifth fairway taken on June 7, 2016 using the program Apple Maps. Note that this aerial representation portrays the six Eucalyptus trees that have been removed pursuant to the Stipulated Judgment. The yellow rectangle roughly identifies which trees were removed, and represents an area that is currently afforded no protection from errant golf balls, in contrast to other residences and buildings surrounding the fifth fairway.



**Expanded view of the three photographs taken on June 2, 2016 showing the 35-foot netting that presently exists along the east end of the fifth fairway, bordering the Sally Griffin Center and the entrance to Monarch Pines**



**Additional photographs taken on June 2, 2016, showing the 35-foot netting that presently exists along Lots 1-3 of Monarch Pines**



**Aerial photograph taken by a drone in May 2016 via Sotheby's Realty, showing the lack of protection currently afforded to Lots 3 through 11**