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Via email
Chris Lopez, Chair
Board of Supervisors
County of Monterey

Subject: July 7, 2020 consent agenda item 41 – proposed counterproductive ordinance re discretionary fines for failure to monitor for archeological and tribal resources. The ordinance is not exempt from CEQA.

Dear Chair Lopez and members of the Board of Supervisors:

This office represents Save Carmel Point Cultural Resources (SCPCR) and The Open Monterey Project (TOMP). SCPCR and TOMP appreciate the intention behind the 2019 Board referral and the Board's recent direction to staff to stop delaying and to get going. However, the staff-proposed ordinance would have the potential to harm the very resources that the board intends to protect.

The original Board referral is described as "Strengthen Monterey County's ordinance regarding archeological on-site monitoring requirements for development projects to better protect Native American and other cultural resources and provide increased daily fines for violations to better ensure compliance." Contrary to your intent, the ordinance would not "strengthen on-site monitoring requirements" and would not improve protection of the resources. The proposed fines would likely have the perverse effect of incentivizing violations because the fines remain low and violators are unlikely to be caught.

Concerns with the proposed ordinance include these:

- There is no evidence that the fine would preserve or protect archaeological resources or tribal cultural resources. To the contrary, the fine creates an apparent "pay as you go" alternative to complying with the CEQA conditions required by CEQa and the LCP to have monitors present. It would be cheaper for developers to excavate without monitors and to risk getting caught and paying the fine.

- There is no discussion of meaningful remedies to prevent the harm in the first place, and to meaningful remedies if the conditions are violated. The sole approach is financial. The approach is not to ensure compliance with the LCP conditions and CEQA conditions.. That compliance should be the first and primary focus, as shown by the Board referral to "Strengthen Monterey County's ordinance regarding archeological on-site monitoring requirements for development projects to better protect Native American and other cultural

resources." The County staff has not focused on that and instead has distracted the Board with this draft ordinance.

- There is no evidence to support the proposed $50,000 cap and no explanation of what the staff report means by "creating equity with varying property values." Why is a proposed penalty intended to "create equity"? "Property value" is a vague and ambiguous term at best. Who decides what are the "property values" and with what discretion and on what basis – the appraised value, the assessed value, the market value after the development is completed, or something else? As one example, in 2018 Adamski[1] purchased at a private sale a large undeveloped Valley View parcel for $333,000 from Pietro LP. In contrast, that same year Adamski[2] bought the undeveloped 26308 Isabella Avenue property – less than half the size of Valley View – for more than $915,000 on the open market. The two parcels are less than half a block apart.

- There is no dedicated fund for collected fines to be placed, and no dedicated purpose for which the fines would be used that would mitigate the harm done by unmonitored excavation. The County has made no effort to quantify that harm, or to craft mitigation for that harm. The ordinance would create what in effect likely would be perceived and used a substitute for the LCP conditions and CEQA mitigations that require monitoring of all excavation. The substitute – the payment of fines – would not do a thing to mitigate the potential harm to the protected resources. It likely would cause harm, as explained here.

- The proposed ordinance would create a false sense that the County is doing something to protect the archaeological and tribal cultural resources, when in fact the ordinance foreseeably could have exactly the opposite effect. It would allow developers to avoid the mandatory requirements of the LCP, which require that resources be avoided if at all possible, and mitigated to the full extent if avoidance is not possible. The ordinance would allow untold damage for the mere payment of a fine. The price of houses in Pebble Beach and Carmel Point often exceeds $5 million and $10 million. The County's building permit fee structure is laughably low for construction in these geographic locations. A fine of $50,000 would be far more desirable to some developers than compliance with the mandatory LCP conditions and CEQA mitigations.

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[1] Adamski (aka Emerson Devt.) under the corporate name of Valley Point LLC.

[2] Adamski (aka Emerson Devt.) under the corporate name of Isabella 2 LLC.

- The discretionary fines and the confusing and vague discretionary calculations in the draft are not meaningful remedies to violations of CEQA mitigations and LCP conditions. They would create untold harm and mischief through their discretionary administration which could result in uneven enforcement and amounts of penalties, from one project to the next, from one developer to the next, from one contractor to the next, from those represented by one land use attorney to those represented by a different land use attorney.

- The County does not need more controversy. The County needs to get a handle on these issues and to impose meaningful remedies,

- The ordinance does not address the foreseeable circumstances where there is no there is an arch monitor but no tribal monitors, or vice versa, and how much the fines are in the event neither are present. $50,000 is a low price to pay in comparison for a work stoppage when remains are found or crushed.

- The proposed penalties and the amount thereof are discretionary, which means there is no assurance that any penalty in any amount would ever be administered or paid.

- It is not clear whether “activity” in the draft ordinance means same thing as “development” as defined in the Coastal Act. This should be addressed with certainty and clarity.

- The ordinance claims it is for “code enforcement” and not condition compliance or mitigation compliance. The County should explain the difference, if any, and when one applies and not the others, in the County’s view.

- The ordinance does not explain what it means to enforce against a “responsible person” and how the penalties would be applied, if at all. If Contractor A violates the monitoring requirement for three days, and then Contractor B violates the monitoring for the next three days, what are the penalties and how are they calculated? If Contractor A comes back the following month and violates the monitoring requirements at a different job at the same site for four days, after having violated the same site on the first job for three days, what are the penalties and how are they calculated? Would the fine and the calculations be site-specific, project-specific, permit-specific, lot-specific, parcel-specific, yearly by the calendar year, or something else? How would the County avoid inconsistent interpretations and applications as to each of these issues?

- All of the daily fines are stated as "not exceeding" a specific amount. Who makes that determination and on what basis? How would the County fairly apply these fines?

- When and how would the ordinance be effective? Would it apply to all non-finaled permits? Would a permit for which a permit had not been approved be subject to the same requirements as a permit that was nearing completion?

- How would the County prove the lack of monitoring and the number of days?

- The County should place the burden for proof of monitoring on the developers, with statements under penalty or perjury by the developer and the required monitors.

- How would the County calculate penalties for violations by development for which a condition should have been placed but was not placed, whether due to County error or another reason, such as when a developer does the development without a permit or outside the permit scope? This is what happened with the two Valley View properties when Pietro/Adamski/Emerson excavated a large oak tree from one location and dug a large replacement hole for the tree elsewhere on the property, all without the required excavation permit and thus without the mandatory monitoring conditions? In 2019, four sets of Native American remains were reportedly uncovered by landscapers working outside the scope of the County permit.

- How would the County calculate the number of days of violation? The County should not take the developer's word under the circumstances, because they are the ones who excavated without monitoring, and such an approach would create a moral hazard.

- The ordinance fails to take into consideration the fact that the County gives over the county permits to PG&E and perhaps others for trenching for utilities, all without a condition requiring monitoring by archeological and tribal monitors, even though the excavation is in high sensitivity areas such as Carmel Point, where monitoring is required for all excavation. This is what happened at the two Valley View projects owner by Pietro/Adamski, when the developer's attorney Lombardo's staff pulled permits over the counter for major excavation of undeveloped land. These are material loopholes in he County process that the ordinance would not remedy.

In sum, this ordinance as drafted likely would do the opposite of what the Board has stated as its intention. There is a real potential that the proposed ordinance would

harm cultural resources. These unintended consequences can and should be avoided. You should direct the staff to go back and do it right.

The ordinance is not exempt from CEQA.

The project is not exempt from CEQA for each and every one of the reasons stated above. No project is exempt from CEQA where, as here, the project could adversely impact a historical resource. (E.g., Pub. Resources Code, §§ 21084.1, 21084(e).) The ordinance is subject to CEQA and is not exempt.

Request for notice including under Public Resources Code section 21092.2.

Please put TOMP and SCPCR on all notifications lists for this topic, including the FLAN, and all notice under Public Resources Code section 21092.2. Please send all notices in care of my office. If you are not the correct person to receive this request, please forward the request to the correct person and tell me the name for the person so I can follow up with them. Thank you.

Request and offer to meet.

TOMP and SCPCR urges you to consider all of these issues carefully before you act to adopt any transition plan. TOMP and SCPCR do not control the schedule. The County controls the schedule. The project is not exempt from CEQA and it would have unanalyzed and unmitigated impacts and unintended consequences. TOMP and SCPCR offers to meet with you with the hope of trying to resolve the concerns before the County acts on the project. Thank you.

Very truly yours,

STAMP | ERICKSON

/s/ Molly Erickson

Molly Erickson

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cc: California Coastal Commission Central Coast staff and enforcement staff
OCEN Tribe
NAHC
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