

Attachment C

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NOTICE OF APPEAL

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MONTEREY COUNTY

2020 MAR -3 AM 11:27

CLERK OF THE BOARD

DEPUTY

*Monterey County Code
Title 19 (Subdivisions)
Title 20 (Zoning)
Title 21 (Zoning)*

*No appeal will be accepted until a written decision is given. If you wish to file an appeal, you must do so on or before ___*___ (10 days after written notice of the decision has been mailed to the applicant).
Date of decision ___*___.*

1. Please give the following information:

- a) Your name Molly Erickson for The Open Monterey Project
- b) Address see attached City _____ Zip _____
- c) Phone Number _____

2. Indicate your interest in the decision by checking the appropriate box:

- Applicant
- Neighbor
- Other (please state) public interest

3. If you are not the applicant, please give the applicant's name:

Haley

4. Indicate the file number of the application that is the subject of the appeal and the decision making body.

- | | File Number | Type of Application | Area |
|---------------------------|-----------------|---------------------|---------------------|
| a) Planning Commission: | <u>PN180434</u> | | <u>Carmel Point</u> |
| b) Zoning Administrator: | _____ | | |
| c) Subdivision Committee: | _____ | | |
| d) Administrative Permit: | _____ | | |

5. What is the nature of your appeal?

a) Are you appealing the approval or the denial of an application? (Check appropriate box)

b) If you are appealing one or more conditions of approval, list the condition number and state the condition(s) you are appealing. (Attach extra sheets if necessary).

see attached

6. Check the appropriate box(es) to indicate which of the following reasons form the basis for your appeal:

There was a lack of fair or impartial hearing; or

The findings or decision or conditions are not supported by the evidence; or

The decision was contrary to law.

You must next give a brief and specific statement in support of each of the bases for appeal that you have checked above. The Board of Supervisors will not accept an application for appeal that is stated in generalities, legal or otherwise. If you are appealing specific conditions, you must list the number of each condition and the basis for your appeal. (Attach extra sheets if necessary).

see attached

7. As part of the application approval or denial process, findings were made by the decision making body (Planning Commission, Zoning Administrator, Subdivision Committee or Director of Planning and Building Inspection). In order to file a valid appeal, you must give specific reasons why you disagree with the findings made. (Attach extra sheets if necessary).

see attached

8. You are required to submit stamped addressed envelopes for use in notifying interested persons that a public hearing has been set for the appeal. The Resource Management Agency - Planning Department will provide you with a mailing list.

9. Your appeal is accepted when the Clerk to the Board's Office accepts the appeal as complete on its face, receives the filing fee \$ _____ and stamped-addressed envelopes.

APPELLANT SIGNATURE

coastal zone
Molly

DATE

3/2/2020

ACCEPTED

(Clerk to the Board)

DATE

STAMP | ERICKSON
Attorneys at Law

479 Pacific Street, Suite One
Monterey, California 93940
T: (831) 373-1214

March 2, 2020

Clerk of the Board
County of Monterey
Salinas, CA 93901

Re: PLN180434 – “Lot Line Adjustment” plus construction of new house project on Carmel Point, extensive below-grade excavation in highly sensitive archaeological area – January 29, 2020 PC approvals

Dear Clerk:

This is an appeal by The Open Monterey Project from the Planning Commission approvals of January 29, 2020. The appeal is of all project-related approvals including environmental review and determinations. The appeal is based on the following

- The mitigations proposing monitors are inadequate because there is no accountability for failure to have one or both monitors. On nearby Scenic Road a property owner excavated hundreds of cubic yards of soil. No monitor was present. All resources were lost forever. The County fined the property owner a mere \$4,300, which was less than the owner would have paid the monitor had s/he been present as required by the condition/mitigation on the County permit. The \$4,300 fine is an incentive to violate the monitoring conditions, because it is cheaper to violate the conditions than to comply with them. Inadequate assurance that actions will be taken in accordance with conditions/mitigations in light of County recent action to ignore violations of some conditions on Scenic and to impose small fine of \$4300 for failure to have arch monitor present. Serves as incentive to ignore requirements to County has insisted that is only remedy it has.
- Nearby on Carmel Point four sets of Native American remains were found only one or two feet below ground surface. They were discovered after removal of a patio. Here, the project includes a replacement and/or new patios. The tribal and archeological monitors should be present for that removal/demolition/construction work. The current conditions are ambiguous or ineffective on this issue.
- Inadequate identification in the approval resolution of the plans that are intended to be approved. The date on the plan page and specific identifying page number should be specifically stated. County has a very poor record of identifying plans (with dates, pages numbers, etc.), which leads to ambiguity, misunderstanding by contractors, planners, and inspections. Ambiguous and unclear references mean that approved plans can be substituted with other plans, and it would be very difficult to

determine the substitution. The County Planning Department has a demonstrated poor record with record keeping, including on Carmel Point projects when there is little or no room for error. The planners have failed to identify important changes including when plans change, lot lines change, and dimensions change. These have been approved over the counter by staff who do not understand the full scope of the project changes. These have been approved by staff who have not noticed that the plans show different dimensions of the lot that have material implications for lot size, FAR, and lot coverage.

- If archeological or tribal cultural items are discovered and work is stopped under the mitigations, then all work on all projects should be stopped – at the adjacent parcel and at all development within 50 meters. It is not adequate to stop work only on the small lot or parcel at issue. (E.g., conditions 17, 18.)
- The positive archeological report means further research is required. The positive report from 2001 merely excavated “a *single* test unit.”
- There is no accountability for and confirmation of the maximum amount of grading is not adequately quantified or capped. This means the applicant could excavate uncapped amounts of soils, and the initial study did not analyze or mitigated the potential impacts.
- The mitigations require certain steps to take place only if “intact” cultural features are discovered. (E.g, condition 15.) This is overly limited in scope and does not adequately protect the resources. A feature or artifact that has been bashed by a backhoe or shovel is not likely to be “intact.” The mitigation is moral hazard because it provides an incentive to smash or destroy the resource in part so that it is not “intact” and thus does not come within the scope of the mitigation language. A mitigation should protect any and all archaeological features, regardless of whether they are “intact.” And there should be mitigations to prevent harm to artifacts and resources in the first instance. The County has not adopted any. By allowing excavation, the County would allow harm to occur to existing resources at the sites.

Further Discussion

The Carmel Area Land Use Plan (LUP) says this:

2.8.1 Overview

The Carmel area experienced intensive prehistoric use.

The Carmel area shoreline from Carmel Point to Point Lobos Reserve contains one of the densest remaining concentrations of shellfish gathering activities in central California. These archaeological deposits have been identified as a highly significant and sensitive resource.

The Carmel Area LUP requires specific action to protect these resources.

2.8.2 Key Policy

Carmel is archaeological resources, including those areas considered to be archaeologically sensitive but not yet surveyed and mapped, shall be maintained and protected for their scientific and cultural heritage values. New land uses, both public and private, should be considered compatible with this objective only where they incorporate all site planning and design features necessary to minimize or avoid impacts to archaeological resources.

General Policy 2.8.3.3.

All available measures, including purchase of archaeological easements, dedication to the County, tax relief, purchase of development rights, etc., shall be explored to avoid development on sensitive prehistoric or archaeological sites.

The Carmel Point is a significant historic resource. It is eligible for the National Register of Historic Places and the California Register of Historical Resources. The past County project approvals have not protected the project sites, which are areas considered to be archaeologically sensitive. Here, the proposed excavation below grade may not comply with this LUP policy and objective. The County approvals have not incorporated all site planning and design features necessary to minimize or avoid impacts to archaeological resources.

A positive archeological report is substantial evidence of potential impacts. There is a fair argument based on substantial evidence in the record, including site-specific archeological reports and a rich array of evidence as to the Carmel Point, that the project may have a potentially significant impact on cultural resources. Further environmental review should be required before you consider the project. This would allow the County time to investigate, analyze and mitigate for the impacts.

The County's fragmented, one-off approach to projects involving digging at Carmel Point is harming the protected resources in steps, and the effect is the same as a wholesale destruction. The harm is occurring on a project-by-project basis because the County is not protecting the overall resource in a responsible and required manner.

The County has failed to consider the cumulative impacts of this project and other known projects, including the three nearby Pietro projects.¹

The County documents fail to adequately show the cumulative effect and total impacts of the Carmel Point excavation projects. The Commission should request a map that coherently presents all Carmel Point projects and their location and proximity to each other. This lack of information makes it difficult for you and for my clients to understand the combined overall impacts of the projects. As a result, you have not been adequately informed of the potential impacts, the potential excavation, and the potential effectiveness of the mitigations. The County initial studies for the three nearby Pietro projects on Isabella and Valley View stated that the County had uncovered "substantial evidence that any aspect of the project, either individually or cumulatively, may cause a significant effect on the environment." An EIR is required whenever "substantial evidence in the record supports a "fair argument" significant impacts or effects may occur" (See CEQA Guidelines, § 15063, subd. (b)(1).) In the CEQA context, substantial evidence "means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (CEQA Guidelines, § 15384, subd. (a).) Substantial evidence includes "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts" (*id.*, subd. (b)). The Sixth District Court of Appeal has reviewed the standards in its decision *Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714. The County should review that decision carefully before proceeding.

The proposed mitigations are ambiguous, inequitable with other Carmel Point projects, and do not mitigate the impacts to less than significant, among other problems.

The proposed mitigations are difficult to understand, are vague on matters essential to enforceability, are inadequate under CEQA, do not contain adequate and enforceable performance criteria and performance objectives, and are ineffective to reduce the impacts to cultural resources to a less than significant level. We address several of these in this letter. Furthermore, the County's bare conclusions that impacts to cultural resources would be "mitigated to a less-than-significant level" does not quantify the impacts or the claims reduction and is not supported by facts or analysis.

Mitigation measure 1 is not adequate. It merely requires an archeological monitor to be "present." The archaeological monitor must be required to actively

¹ The Pietro projects are three new houses on three vacant lots on Isabella and Valley View. All three houses would have at least three bedrooms and 2.5 bathrooms on the ground level. The applications include excavation for even more bedrooms and bathrooms below grade, plus a gym, wine storage, bar, dens. The total finished construction below grade would include 5,466 square feet, according to the County. The excavation foot prints are significantly larger than that because the walls have to be excavated and supported, and large light wells and escape wells are features of all three projects.

observe during all soil disturbing activities, rather than sitting in his vehicle or on his phone. The potential for earth disturbing activities to take place outside of the direct view of the “observer” is significant. There is no requirement that the monitor be watching the earth disturbance. Each project site should have a skilled observer dedicated to that site who is actively observing all soil disturbing activities.

The initial study is not consistent in the discussion of excavation. In one place the initial study claims excavation will be “two feet” (p. 65) and in another place the initial study says “the site soils are erodible when disturbed, and the project would involve *“over-excavation by approximately two feet below the building area”* (p. 47). The RMA appears to be confused by this. Overexcavation means soil removed in an effort to investigate or remediate *in addition to the minimum amount*.

Erodible soils mean the sides of the hole typically cave in when soils are excavated, so as a result applicant have argued that even more excavation is required on all sides. The Pietro applicants, represented by the same attorney as this PLN180434 project, have argued that the soils at their nearby sites must be overexcavated and that many feet of additional excavation was necessary due to the erodible soils.. That applicant stated that

sub-excavation 4-9 feet (actual depth determined at the time of construction by a geotechnical engineer) of loose soil, scarification 12 inches deep at the bottom of the excavation, and a mat of engineered fill extended a minimum 5 horizontal feet beyond the outer edge of the foundation and slab elements in each direction.

The County RMA staff agreed. (RMA staff report for Pietro projects, 4/23/2019, Att. A, p. 15.) In contrast, the RMA staff has taken a very different approach to this project without explanation, and is claiming that two feet of subexcavation is needed, instead of the “4-9 feet” claimed nearby. The Commission should get more information to determine which claim is accurate. If the overexcavation is 4-9 feet, then this project would have much more cut than the amount analyzed in the initial study.

The mitigation action 1b does not include performance standards or criteria for the responsibilities and involvement of the archaeological monitor. There are no standards to guide the applicant and its paid consultant, and no standards on which the County is required to rely as a basis to accept or reject a proposed contract. There also is no requirement for accountability by the archaeologist to the County, as there should be. There is no requirement as to whom at the County should review the proposed contracts, and what expertise that person should have. This is important, given the County RMA’s demonstrated lack of expertise in specific environmental issues, including archaeological and contract expertise. It also is important as shown by the County’s failures regarding the Scenic Road property owner who violated the County permit conditions requiring a monitor, and the County’s \$4,300 fine would not deter

others from similarly violating these monitoring conditions. To the contrary, the County's \$4,300 fine has provide an incentive to violate the conditions, because it is cheaper to violate the monitoring condition than to comply with it.

Proposed mitigation #2 is inadequate and vague. Mitigations must be clear and quantifiable in order to be enforceable and to adequately protect the resources that are intended to be protected. If human remains or cultural materials are found and the monitor stops the work, the specific distance must be specified. It is not adequate to say "work shall be halted to within a safe working distance" as the initial study proposes. (P. 61.) The County mitigation should require a halt all work within 50 meters which is the same standard the County has used for other projects at Carmel Point. Any other standard would be special and inequitable treatment for this site.

The County has failed to place any mitigation requiring reburial at the site. The County has failed to follow the following OCEN statements during the OCEN consultation as follows:

"OCEN request consultation with the lead agency, that mitigation measures reflect the request for an OCEN Tribal Monitor, reburial of any ancestral remains, burial artifacts, placement/return of all cultural items to OCEN ..."

The County has failed to explain why these OCEN requests were not met and has failed to include that information in the circulated initial study. The failures violates AB52 and CEQA.

The County should place a mitigation that requires redesign of the project to avoid the human remains and important materials that are uncovered. That is what the Carmel Area Land Use Plan requires when it says that "New land uses, both public and private, should be considered compatible with this objective only where they incorporate all site planning and design features necessary to minimize or avoid impacts to archaeological resources."

The mitigations and conditions should be dated on each page as to the version of the approval documents, and the approval resolution should clearly describe the date of the attached mitigation and condition document. See discussion elsewhere in this letter of the mischief that can and has happened with inadequately referenced documents.

Additional Comments

TOMP reserves the right to add to the appeal materials, given the County's processing and belated production of various versions of revised and corrected resolutions and its release and posting of other project documents.

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Save Carmel Point Cultural Resources supports the TOMP appeal of this matter, in order to support better processes and improvements in the County actions with regard to protection of archaeological and triable cultural resources at Carmel Point.

Conclusion

You should require additional information and investigations, better written mitigations, and mitigations that are equitable with the other mitigations required at Carmel Point, before proceeding with review of this project. My clients and I appreciate your consideration of these comments. Thank you.

Very truly yours,

STAMP | ERICKSON

/s/ Molly Erickson

Molly Erickson

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