Attachment E

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Received
Jan. 14, 2019
Clerk of the Board
JL, Deputy

NOTICE OF APPEAL

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 see attached.

1. **Please give the following information:**
   a) Your name See attached
   b) Phone Number See attached
   c) Address _____ City _____ Zip _____
   d) Appellant's name (if different) The Open Monterey Project; Save Carmel Point Cultural Resources

2. **Indicate the appellant's 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:** Pietro Family Investments LP

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:	PLN170611, PLN170612, PLN170613	Carmel Point	
b)	Zoning Administrator:		Carmel Area LUP (coastal zone)	
c)	Subdivision Committee:			
d)	Administrative Permit:			

5. What is the nature of the appeal?

a) Is the appellant appealing the approval ☒ or the denial ☐ of an application? (Check appropriate box)

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

See attached

6. Check the appropriate box(es) to indicate which of the following reasons form the basis for the 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 the appellant is appealing specific conditions, you must list the number of each condition and the basis for the 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). In order to file a valid appeal, you must give specific reasons why the appellant disagrees 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 will provide you with a mailing list. This requirement is not authorized by the CIP/Board of Supervisors. It is an illegal fee and TOMP and SCPCR challenge it and request a fee waiver.

9. Your appeal is accepted when the Clerk of the Board's Office accepts the appeal as complete on its face, receives the filing fee (Refer to the most current adopted Monterey County Land Use Fees document posted on the RMA Planning website at http://www.co.monterey.ca.us/planning/fees/fee_plan.htm) and stamped addressed envelopes. No fee for coastal zone appeals. See above.

This appeal substantially complies with the County requirements.

APPELLANT SIGNATURE Molly Erickson, authorized rep. **DATE** 14 Jan 2019

ACCEPTED _____ **DATE** _____

(Clerk to the Board)

March 2015

Michael W. Stamp
Molly Erickson

STAMP | ERICKSON
Attorneys at Law

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

January 14, 2019

John Phillips, Chair
Board of Supervisors
County of Monterey
Salinas CA 93901

Re: Appeal of PLN170611, PLN170612, PLN170613 – Pietro Family Investments LP large house projects on Carmel Point, extensive below-grade excavation in sensitive archaeological area

Chair Phillips and members of the Board of Supervisors:

I represent The Open Monterey Project and Save Carmel Point Cultural Resources in this matter. My clients hereby appeal the decisions of the County Planning Commission on a split vote, five to three, to approve the three projects stated above. This appeal encompasses all actions of the commission on the projects including approvals of environmental documents. References to commission approvals and actions are to each and all of the three projects, and these comments are intended to apply to each and every one of the projects.

The position of my clients is as follows:

> **An EIR is required for these projects due to potential impacts on cultural resources.**

The evidence shows that the impacts to cultural resources can be mitigated by removal of the basements. That is a feasible mitigation and was recommended. The commission approvals did not adopt that feasible mitigation. The approvals contain muddled mitigations that have not been reviewed in a circulated CEQA document and are not enforceable and do not mitigate the potential impacts to less than significant. That is inconsistent with CEQA and the LUP requirements. The Carmel Area LUP section 2.8 on archaeological resources states as follows:

> 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. Point Lobos Reserve supports one site considered to be a permanent village. 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 County approvals have not protected the project sites, which are areas considered to be archaeologically sensitive. The proposed excavation below grade does 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. For example, the County could require the houses to be at grade, with no excavation for large basements.

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 each and all of the projects may have a potentially significant impact on cultural resources. An EIR is required.

The County approvals ignore "OCEN's request for no disturbance." The County rejected the tribal request out of hand. The archaeological evidence shows there is a likelihood of Native American artifacts and human remains. The County improperly considered three reports from three different applicant-hired archeologists, then selected the information the County wanted to consider. The County approach is to pick two out of three. This approach is improper under CEQA and the LUP. Where

there is disagreement among experts, an EIR is required. That exists here. The question is whether there is substantial evidence to support a fair argument that there may be potentially significant impacts, and thus an EIR should be prepared. The project-specific archeological reports and other Carmel Point evidence in the County files are substantial evidence to support a fair argument here.

The County staff argued is that there is "enough evidence" to proceed based on the applicant's report. Wrong. It is basic CEQA law that the existence of contrary evidence does not controvert the evidence that triggers the requirement to prepare an EIR. Here, there was a positive archeological report. That is substantial evidence of potential impacts.

The initial study uncovered "substantial evidence that any aspect of the project, either individually or cumulatively, may cause a significant effect on the environment," and the County must prepare an EIR. (CEQA Guidelines, § 15063, subd. (b)(1).) An EIR is required whenever "'substantial evidence in the record supports a "fair argument" significant impacts or effects may occur ... .'" 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 County approvals do not comply with the CEQA directive:

> "[I]n marginal cases where it is not clear whether there is substantial evidence that a project may have a significant effect on the environment, the lead agency shall be guided by the following principle: If there is disagreement among expert opinion supported by facts over the significance of an effect on the environment, the Lead Agency shall treat the effect as significant and shall prepare an EIR."

(CEQA Guidelines, § 15064, subd. (g).) The County approvals use the wrong CEQA standard and do not properly apply CEQA. The County's fragmented, one-off approach to projects is harming the 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.

Here, the County has failed to consider the cumulative impacts of these three projects. There is no map that coherently presents all three projects and their location and relationship to each other. This lack of information makes if difficult for my clients and decision makers to understand the combined and overall impacts of the projects.

The projects are three houses on three lots. Two of the lots share a boundary, and one of these lots sharse a corner with the third lot. All three houses would have at least three bedrooms and 2.5 bathrooms on the ground level. Some are even larger: PLN170613 has four full bathrooms on the ground floor. The applications include excavation for even more bedrooms and bathrooms below grade. The applications for below-grade development also include underground gym, wine storage, bar, dens. For that, the cultural resources will be destroyed under the County approvals.

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.

The estimated cut for the projects would be 2,720 CY, based on County records. That is a very significant amount of cut. The approvals for PLN170611 fails to identify the 640 CY of cut for that project, which is an informational failure.

The County documents fail to adequately show the cumulative effect and total impacts of the three Pietro projects. My clients have reviewed County documents and have not seen any map that shows all three proposed project on a single map, clearly showing the proposed development and excavations of all three. As a result, my clients and the decision makers have not been adequately informed of the potential impacts, the potential excavation, and the potential effectiveness of the mitigations.

The adopted 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.

As to mitigation measures requiring an archaeological monitor to be "present during soil disturbing activities" the mitigation is inadequate. There is no requirement that the monitor be watching the activities. As written, the applicant could have a single monitor in the general area who is generally available but not actually observing the active soil disturbance at the site. The performance standards and criteria are inadequate under the circumstances, including the three adjacent projects by the same

applicant, the record of the site already being used as an illegal construction staging area, and the illegal grading at the site. Each project site should have a skilled observer dedicated to that site who is actively observing all soil disturbing activities. The sites should not share observers on any given day. The potential for site disturbing activities to take place outside of the direct view of the "observer" is significant.

The mitigations inconsistently use the terms "qualified archaeological monitor," "principal Archaeologist," "qualified professional Archeologist," and "qualified Archaeologist." It is not clear if those are different people or the same person. The mitigations do not adequately define "qualified archaeological monitor" and their expertise and experience and role, which does not meet required performance criteria and standards. It is not clear whether the archeologist under contract with the developer has to be the same as the one consulted when remains and artifacts are found.

The mitigations limit the scope of the mitigations to "potentially significant archaeological resources." This is overly limited and does not protect all resources. The scope should include all archaeological resources uncovered, unless and until they are determined not to be potentially significant.

The mitigations place responsibility on "the OCEN Monitor or other appropriately NAHC-recognized representative." The mitigations fail to define what is a "NAHC-recognized representative." Given the demonstrated controversies within the tribal groups as to who is the true representative, the County's failure to establish criteria and standards is significant. There would be no reliable or predictable way to resolve disputes as to who or what is qualified.

The mitigations refer to "a tribal monitor," which does not include objectives and criteria. It is not clear whether that is the same person of different from "the OCEN Monitor or other appropriately NAHC-recognized representative."

The mitigations allow halting the soil disturbance only if the find if "determined to be significant." This fails to allow for work to be stopped for *potentially* significant finds, and fails to set clear, objective and enforceable standards for significance. A small artifact may not be significant in and of itself, but could be indicative of additional nearby resources.

The mitigations allow halting work only is "intact features" are discovered. (E.g, MM 1.) This is overly limited in scope and does not adequately protect the resources. A feature that has been bashed by a backhoe is not likely to be "intact." And 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.

The mitigations are materially flawed because they do not address the foreseeable circumstance that the tribal monitor believes that a find is significant and the archeologist does not so believe. These potential conflicts are foreseeable, especially in light of the lack of clear standards for significance, as discussed above. The mitigations are inadequate because they do not address what happens in the event of a dispute, and how the County would resolve that.

The same problem is presented by the mitigations' statements about how if human remains are determined to be Native American, that certain steps would take place only if the MLD and "a qualified archaeologist" concur. It is foreseeable that the two will not concur, or that two different archaeologists have two different conclusions, one of which agrees with the MLD and one of which does not.

The mitigations use internally inconsistent language – in the same mitigation that uses "concurrence" between the MLD and the archeologist, another part of the mitigation says that the tribal monitor will make a determination "in consultation" with the archaeologist is used, which sound like no concurrence is necessary so long as consultation has occurred.

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, 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 who at the County should review the proposed contracts, and what expertise that person should have. This is important, given the County's demonstrated lack of expertise in specific environmental issues, including biological and archaeological and contracts.

The tribal monitor should be a different person from the MLD. The MLD should not be the paid tribal monitor, in order to avoid the potential for a conflict of interest.

The County mitigations require removal from the site of historic artifacts and human remains. Removal is contrary to the desires of the tribal groups, who want items preserved in place. The initial study improperly ignores the adverse impacts of the removal of the remains and artifacts. A delay by a year for a final technical report is far too long and would mean that additional projects could be approved during that time at that location without the benefit of the important information about the discovery. In light

of the facts around Native American customs, the discovery of cultural artifacts makes it likely that human remains could be found. The County recites but evidently does not understand "OCEN's request for no disturbance." "No disturbance" means no grading and no excavation, which means no basement.

In mitigation measure 2, the bullets, sub-bullets, indented paragraphs, combine to make the mitigation very confusing, and ambiguous as to what applies and where. The descriptions are vague. There are inconsistent periods and semicolons – it is not clear whether all bullets apply, or only some of them. Indentations are confusing so the hierarchy and sequence is not clear.

The mitigation for the discovery of human remains contains the following proposed language:

> • "If the remains are determined to be Native American, and the most likely descendant, in concurrence with a qualified archaeologist, determines that:
>
> a. The remains are evidence of a larger burial of human remains, which would qualify as a "unique archaeological resource", as defined in Public Resources Code Section 21083.2(g) that would be disturbed by further excavation; or
>
> b. There is no acceptable location on the parcel to re-bury the remains which would not be affected by excavation"

The mitigation is not clear on what happens next. It is not clear whether the subsequent bullet point is dependent on the preceding bullet points, or is a standalone requirement. The precedence is not clear and the roles and authority of the various players is not clear and enforceable. It is not established who would determine whether there is an "acceptable location on the parcel to re-bury the remains" and on what basis that decision would be made. No objectives and standards are provided in the mitigation. The proposal of reburial elsewhere is repugnant to the tribal wishes, the LCP, CEQA, and the right thing to do. It is not clear whether in determining what is an "acceptable location" whether the most likely descendant (MLD) could be outvoted by the archaeologist or the property owner or the County. There is no support for the requirement that the reburial must be in an area "which would not be affected by excavation."

The County can and should impose a mitigation requiring preservation of the remains in place, and requiring the development to be redesigned to avoid the resources. The developer is on plenty of notice that the property may have cultural resources. The mitigation does not establish meaningful standards that would be used

to determine the remains are "evidence of a larger burial of human remains." The mitigations do not establish whether the County would choose the archeologist or the developer would be allowed to select the archeologist.

MM-2 fails to address the foreseeable event that bone is uncovered and it cannot be immediately determined whether the bone is human. The mitigation should require immediate cessation of all soil disturbance within 50 meters on all parcels in the area. That should be a standard condition of approvals in areas of high archaeological sensitivity.

MM-2 purports to bind the coroner to acting in specific ways "within 24 hours" but the County cannot bind an independent elected official.

The County claims its approvals will "identify and manage recovered human remains and artifacts." but that County action does not comply with the LUP standard that requires minimizing and voiding impacts to archaeological resources.

MM-2 merely allows that the MLD "may make a recommendation" to the handling of the human remains but nothing in the County approvals requires to project applicant or owner to respect that recommendation or the OCEN wish that remains not be disturbed. The County approvals allow the landowner to throw out the human remains in the trash or at the County dump.

The mitigation measures proposes to halt soil disturbance only "on the parcel" where something is found, and not on the adjacent parcels that are also proposed for development by the same applicant, Pietro Family Investments LP. The applicant has control over all the parcels and the County mitigation should require halting of excavation and soil disturbing activities on all Pietro parcels within at least a 50-meter range. 50 meters is 164 feet. That could include construction on all three Pietro parcels, which are within 164 feet of each other. The excavation on the two adjacent parcels are within 10 feet of each other, and the excavation on the Isabella parcel is within 164 feet of the two Valley View parcels. The mitigation as written is largely ineffective because it would allow soil disturbance/mechanical grading to proceed on two props even if artifacts/human remains were found ten feet away on an adjacent property.

The commission approvals improperly rejected much more effective and feasible mitigation, such as eliminating the basement elements of the projects. A portion of a revised mitigation requires merely as follows:

> "The Owner/Applicant/Contractor will work with RMA Planning to move/shrink/modify/redesign the basement

> portions of the project which will have further impact on those areas of the site containing remains."

This is not an effective mitigation. The County proposes to allow maximum flexibility to the property owner and to tie the County's hands. The mitigation says "The redesign should be done in a way that allows for maximum use of the property" which would prematurely commit the County to an unidentified future redesign, in violation of the California Supreme Court decision in *Save Tara v City of West Hollywood*. The redesign could have unanalyzed and unmitigated environmental impacts of its own. The mitigation does not require that the redesign have any public review or notice, or that the redesign would be a project not exempt from CEQA. The Chief of Planning would have unfettered discretion to approve revisions.

The proposed County mitigations do not adequately address the foreseeable situation where a reburial location would prohibit a basement, or that other parts of the development must be redesigned in order to respect the artifacts or remains. There is no guidance and performance standards in the event that no "reburial" location fits the proposed vague County mitigation. Nor do the proposed mitigations contemplate the foreseeable scenario that there are multiple sets of remains needing reburials on the site, and not adequate room at the site for the reburials. The mitigations provide inadequate direction as to what happens then. Or the foreseeable scenario that there are multiple sets of artifacts unearthed at the site(s), and multiple impacts on one or more of the Pietro projects that could be avoided by redesigning the approved project development, including the basements. The County's failure to do an adequate analysis in the initial study has led to inadequate mitigations and unanalyzed potentially significant impacts that have not been adequately mitigated.

The County should impose a mitigation to eliminate the basement element(s) if human remains are found at the site. That is a feasible and meaningful mitigation. Again, there are a minimum of three bedrooms and 2.5 bathrooms on the ground level of each of the houses. Eliminating the below-grade elements simply means the houses would not have fourth and fifth bedrooms and third, fourth, fifth and sixth bathrooms.

The idea of limiting a protective easement to only the exact area where human remains is found is not meaningful and is not mitigation for harm already done to the remains. The damage to the skeleton would likely have been done. It is known that the local Native Americans buried their dead with possessions and household items, so the area to be protected would be much larger than the skeleton itself.

MM action no 2c is inadequate, confusing, and overly limited in scope in some respects and overly invasive in others. The mitigation requiring hand shoveling would be triggered only by a determination that there is a "significant" artifact but there is no requirement for making that determination immediately or after time has passed and

more harm has occurred to the resource. Shovels can cause harm in themselves. If excavation uncovers something at a depth of 12 feet, there should be no need to excavate another 3.3 feet to 15.3 feet depth, as the mitigation requires. That would cause additional disturbance where none is necessary or appropriate.

Some of the mitigations confusingly refers to themselves as a "condition of approval" instead of a mitigation, perhaps in an effort to avoid accountability under CEQA. If resources are found, there is no requirement to delimit the perimeter with unmistakable and enforceable markings that are communicated to all persons on site. The finding of archeological resources that are determined on the fly, as proposed, to be "insignificant" likely would mean there are more significant resources buried nearby, according to the information in the initial study.

The County has available other options to investigate and evaluate the sites, as presented to the Planning Commission at its November 2018 meeting. I refer you to all that information which I incorporate here by reference as if fully presented herein. It was presented to the Commission and is in County files, and apparently was prompted by the Pietro developments. If you want me to provide the information (again) to you let me know and I will happily email it all to you.

The adopted mitigations are confusing, vague, incomprehensible and unenforceable, and they do not contain adequate performance standards, and the information and new conclusions were not recirculated. They do not reduce the mitigations to less than significant in any event. The applicant provided three archaeological reports to the County from three different archaeologists.

- The first report did not look significantly below grade and concluded that due to positive surface-level identification of cultural materials, "significant archaeological/cultural materials may be located with in the Project Area."

- The second positive arch report found resources that the archeologist claimed are not significant, and so the County has called it as a "negative" report. This is not consistent with the information in the County files for this project that shows that "insignificant" items were buried with humans. It is also not consistent with the circles showing the protected known cultural sites that center on Carmel Point and the parcels at issue here. Additionally, the County approvals fail to adequately credit the importance of the second report's recommendations and statements about "the possibility of finding deeply buried cultural resources."

- The third report, also provided by the applicant, was based on auger testing and, reportedly for PLN170612 and -13, a shovel test pit of unknown width and only 10 feet deep. It is not clear if that was two test

> pits or only one, and where on the site the test pit was dug relative to the proposed excavation. That is three feet short of the proposed excavation of up to 13 feet of excavation. The third report revealed that a Franciscan chert biface was discovered at PLN170611 at up to 6 feet in depth. The auger did not go deeper than 3 feet in one location and 6 feet in another. The locations are unknown relative to the areas proposed to be excavated. The third report's recommendation is more concerned about "delay" to the applicant than about analyzing and mitigating the potential impacts to cultural resources at the sites. Delay is not a proper subject for an archaeological consultant to opine on, and the County's deference to the opinion is not appropriate.

Chert is a sedimentary rock type commonly used for chipped-stone toolmaking by California tribes. Bifaces are high-input stone tools. Native Californians traditionally used a variety of natural materials for making tools, clothing, jewelry, and other items: stone, bone, shell, wood, plant fibers, sinew, feathers, and the like. Most of these items are highly perishable and do not survive well in the archaeological record. The exceptions are bone, shell, and stone. Stone – flaked, ground, battered, and otherwise modified – makes up more than 90% of most archaeological assemblages in California. There is no support in the record for the claim that the chert biface was an "isolate." Given the known use of Carmel Point by Native Americans and the richness of the cultural resources at Carmel Point the claim should be rejected.

The County has not published the reports and has controlled the information. Appellants understand the confidentiality of the underlying information but under the circumstances are concerned about the expertise and independence of County staff. Key questions remain about the adequacy of the testing. There are other more accurate methods of testing and investigation available, as shown in the County records and the LUAC discussion where the LUAC voted against the projects. The County did not require the alternative methods. As a separate concern, the shovel test pit may have been in the area where the "large mound of imported sand and gravel" was found on the site – evidence of illegal grading without benefit of permit by the applicant. This would skew the results. The applicant should not be rewarded by illegally changing the baseline at the site through unpermitted grading, but that is what the County has done. The County is accommodating the applicant's argument that the top 6 feet are unstable and must be replaced and compacted. It is an open question as to the factual basis for the contractor's claim about the top 6 feet on the two Valley View parcels, what kind of excavation was done to support this claim, and whether archaeologists were on site to review the excavation, and whether all results were reported to the County.

The County has an open code enforcement file due to evidence of demolition, evidence of major removal of indigenous vegetation, and the "large mound of imported sand and gravel" was found on the PLN170613 site – evidence of illegal grading without

benefit of permit by the applicant. The County agenda items fail to disclose that the project approvals are in part to clear the code enforcement violation.

The reliance on three applicant-paid consultants calls into question the independence of the County. The County can and should retain an independent archaeologist, paid for by the applicant, to investigate the three sites in detail and make independent recommendations free from the influence of the applicant, who has a vested interest in wanting the projects to be approved.

The County has not consider the harm to the resources, as compared to the minor burden on the applicant of following the law and protecting the resources.

- The permanent impact to the cultural resources would be very significant, and the harm could not be undone.

- The impact of effective mitigations on the property owner would still be able to develop the properties, and merely would mean no basements with gyms, wine storage, fourth and fifth bedrooms, and extra bathrooms.

The answer should be clear. Another agenda item at the Planning Commission special December 2017 meeting was to consider historic designation of the Carmel Point. The County should not approve these three projects with basements before the area has been protected. There is no prejudice in taking the time to do it right and follow the law. The applicants have been on full notice of the laws and the rich resources of Carmel Point, and they chose to proceed and take the risk.

The mitigation for an easement (MM-4) has no specific performance standards, criteria, and objectives. It is ambiguous and ineffective. For example, a "conservation and scenic easement deed" would not necessarily prevent all excavation and all development as defined in the Coastal Act. Easements can vary widely in scope and protections. It would not necessarily be in perpetuity, which conflicts with the commission "evidence"; there are no objectives or standards that state when protection in perpetuity would be "necessary" as the a future County body could remove the protection.

The timing of "prior to final building permits" is vague and unenforceable. It cannot be objectively determined. A "final building permit" is not defined and is not an understandable term. If an easement is to be effective, it must be in place before any building permits are issued. Another problem is that there is no requirement that the applicant/owner fund the easement. Responsible agencies and organizations do not accept easements unless they are adequately funded so the recipient can enforce the easement.

MM#3 states that the tribal monitor shall have the authority to halt work but does not give that authority to the archaeologist. That is a serious omission.

As to MM action 4c, the County approval states that action shall take place by a third party. The County cannot bind a third party and thus the mitigation is ineffective and unenforceable. There is no statement as to whom a letter shall be submitted, nothing about the accuracy of the letter, or that it shall be submitted under penalty of perjury. The timing is "Prior to final" which is vague and ambiguous because it does not say to what "final" refers. Many building permits are never finaled, so this is not enforceable. The County should impose a definite and enforceable date, such as perhaps prior to allowing occupancy. The County approvals proposed to enforce Mitigation Measure 3 by "action 4a," "4b" and "4c." The mixed-up numbers are confusing and likely to hamper effective administration and enforcement.

Nothing protects the sites in perpetuity from further excavation.

The proposed metal roofs are not consistent with the LUP requirement for structures blending into the environment. Metal does not blend into the wooded, rocky coastal environment. Merely because other examples were found by the applicant does not support a finding that metal roofs are appropriate here. There is no evidence that the metal roods on other houses went through a design review process by the County, or even if they did, that metal roofs are subordinate to the area.

Condition 16 refers to a measurement "on the building permit." This is unwise. The condition should be based on what the County decision makers approved, not what is on the ministerial building permit. All references to "final building inspection" should be clarified to be "until approval of final building inspection."

The various conditions referencing inspection (e.g., 21, 22, 23) have inadequate compliance actions. The action should require the site to pass the inspection, not merely to "schedule" an inspection as the language states.

Condition 26 requires an action by "RMA-Development" but no such RMA department is listed on the County website.

Condition 27 refers to "construction" permit, while others refer to building or grading permits. The County should define the terms or use consistent terms.

Carmel Point is located in County supervisorial District 5. The two planning commissioners from District 5, Keith Vandevere and Martha Diehl, both voted against the projects. They have by far the most experience on the Planning Commission, of some 20 years or so each. They have the most familiarity with the issues and legal standards applicable to this project. All other commissioners are significantly newer.

The November 30, 2018 memorandum from RMA official Brandon Swanson to the Commission claimed it attached two revised initial studies. It did not. The memo attached only the materially revised initial study for PLN170612/PLN170613. The initial study for PLN170611 was not attached.

The County processes are procedurally incorrect and improper. County staff purported to sign the commission resolutions on December 20, 2018, mail the resolutions on January 2, 2019, and revise and mail them on January 3, 2019. Each revised document states "REVISED January 3, 2019 (This resolution supersedes the previous resolution mailed on January 2, 2019." The County did not sign the revised version; the County revised a document signed two weeks earlier. The County claims it mailed a document on January 2 that was revised and mailed on January 3. I notified the County (Holm, Dugan, Swanson) of these problems last week and asked them to take corrective actions and extend the appeal period. The County did not respond.

Offer to Meet

We offered to meet with the County to discuss the issues before the County acted. The County refused. The County controls the schedule. My clients do not.

Conclusion

For each of the reasons described here and in the record, there is substantial evidence that the projects may have potentially significant impacts. An EIR is required. The Board should either (1) require an EIR for the projects, or (2) deny the projects on the basis of potential impacts to cultural resources. The applicant could easily get approval of houses at each of the three sites for houses at grade containing 3 to 4 bedrooms and 3 to 4 bathrooms with no or very limited excavation. This is a very reasonable alternative that should be considered.

Very truly yours,

STAMP | ERICKSON

/s/ Molly Erickson

Molly Erickson

cc: Carl Holm and Brandon Swanson, County Resource Management Agency
Wendy Strimling, Charles McKee, County Counsel
Coastal Commission Central Coast staff

Attachments: Report to Planning Commission, Oct. 2018 – Carmel Point preservation issues; Fee waiver request