Hearing Submittal
Agenda Item No. 1 and 2
Planning Commission
December 5, 2018

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Keith Vandevere, Chair
Planning Commission
County of Monterey
Salinas CA 93901

Re: PLN170611, PLN170612, PLN170613, and all projects with a basement on Carmel Point

Dear Chair Vandevere and members of the Planning Commission:

I represent The Open Monterey Project and Save Carmel Point Cultural Resources in this matter. The position of each 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. County now proposes to abandon that mitigation. The County proposes to add muddled mitigations that have not been reviewed in a circulated CEQA document. This is bad planning. This is as example of last-minute actions responding solely to the wishes of the developer and the developer's representatives.

There is a fair argument based on substantial evidence in the record – including two site-specific archeological reports and a rich array of evidence as to the Carmel Point – that the project may have a significant impact on cultural resources. That means an EIR is required. The County should not proceed on the basis of a mitigated negative declaration.

The County staff report acknowledges and ignores "OCEN's request for no disturbance." In the newly revised initial study, the County has taken the new position that "A second consecutive negative report on the subject parcel provides enough evidence to continue this track." The County's approach is unsupported, unwise, and inconsistent with CEQA. Where there is disagreement among experts, an EIR is required. 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 are substantial evidence to support a fair argument here.

The County staff's argument 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, and a second report in late November that showed cultural resources that the developer-hired archeologist called "insignificant."

In the County planning staff's view, the applicant-hired consultant gets to have a controlling influence over the County's analysis. Contrary to the County's approach, this is not a "choose two out of three" analysis.

The initial study has 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)). If you have any questions, 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 may want to review that decision carefully before proceeding.

You as decision makers should be guided by the following 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).)

We provide some comments on the new last-minute uncirculated analysis and muddled vague mitigations that the County apparently scrambled to craft with the developer's active participation. There are more problems with the new County language than we can possibly describe in this letter, because all of the new mitigations are difficult to understand, are inadequate under CEQA, do not contain performance criteria, and are ineffective to reduce the impacts to less than significant.

The new mitigations would require removal of historic artifacts and human remains from the site. Removal is contrary to the desires of the tribal groups, who want

items preserved in place. The initial study 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. The proposal for an easement has no specific performance standards and is ambiguous. For example, it would not necessarily prevent all construction and all development as defined in the Coastal Act.

The late-added language in the initial study is confusing and thus unenforceable. 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. A new part of the proposed 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. 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 reason 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.

A new proposed mitigation proposes to halt excavation only on the parcel, and not on the adjacent parcels that are also proposed for development by the same applicant, Pietro. The applicant has control over all the parcels and the County mitigation should require halting of excavation and construction on all Pietro parcels within at least a 50-meter range.

The revised mitigations improperly reject and fail to implement much more effective and feasible mitigation, such as eliminating the basement elements of the projects. One newly 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 "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 County should impose a mitigation to eliminate the basement element(s) if human remains are found. That is a feasible mitigation. The proposed County mitigation seeks to foreclose that as an option.

The proposed County mitigations do not adequately address the foreseeable situation where no location would allow 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 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. The bodies were buried with possessions and household items, so the area to be protected would be much larger than the skeleton itself.

It is not clear what is meant by “Compliance or Monitoring Actions to be Performed, contained in this Condition of Approval.” No explanation of the capitalized terms is provided. The mitigation confusingly refers to itself 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 the November 2018 meeting. I refer you to all that information which I incorporate here by reference as if fully presented herein. It was presented t 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.

At the very least, if the County still wants to proceed on the basis of a mitigated negative declaration, recirculation of the initial study is required with inclusion of all reports and clearly written mitigations, and an independent archeological report with adequate testing of underground impacts of the basements from an expert retained by the County and with whom the applicant has no contact. Then the County decision makers can act.

The new last-minute additions and changes 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. There were two positive arch reports; the second positive arch report found resources that the archeologist claims 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.

Consider the harm, as compared to the minor burden on the applicant.

- 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 merely means no basements. The owner would still be able to develop the properties.

The answer is clear. Another agenda item on your special meeting is to consider historic designation of the Carmel Point. You should not approve these projects and their 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 are on full notice of the laws and the rich resources of Carmel Point, and they chose to proceed and take the risk.

Offer to Meet

We offer to meet with the County to discuss these important issues before the County acts. The County controls the schedule. My clients do not.

Request for Notification

Please put each of my clients, individually, in care of my Office, on the distribution list for all notification and hearings and decisions, including all notification under (1) Public Resources Code section 21092.2 and (2) the Coastal Act. If you are not the correct person to do this, please forward this request to the correct person and tell me who that person is. Thank you.

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.

Very truly yours,

STAMP | ERICKSON

/s/ Molly Erickson

Molly Erickson

cc: Wendy Strimling, Charles McKee
Coastal Commission Central Coast staff