

Attachment B

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July 6, 2020

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 Adamski¹ purchased at a private sale a large undeveloped Valley View parcel for \$333,000 from Pietro LP. In contrast, that same year Adamski² 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.

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 the 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

STAMP | ERICKSON

Box 2448

Monterey, CA 93942

cc: California Coastal Commission Central Coast staff and enforcement staff
OCEN Tribe
NAHC
Alliance of Monterey Area Preservationists

August 31, 2020

Via email

Chris Lopez, Chair
Board of Supervisors
County of Monterey

Subject: September 1, 2020 agenda item 12 – proposed 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 to “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.” Unfortunately the staff efforts to date continue to introduce concepts that if adopted would be inequitable and have unintended consequences. Many comments in my July 6 letter have not been addressed.

Concerns with the latest version of the proposed ordinance.

- The fine would be at the unfettered discretion of the enforcement official. The text says the County “*may issue*” a fine but establishes no basis on which to base a determination of whether to issue the fine or not. The County staff often claims “prosecutorial discretion” for its enforcement activity; so there would be no recourse and no accountability even for demonstrably unfair and inequitable discretionary decisions by the County.
- The proposed language uses an unreliable basis for the cap. It says: “*The cumulative amount of fines imposed ... shall not exceed twenty-five percent (25%) of the assessed value of the real property at which the violation occurred as determined by the current Monterey County Assessors’ property tax roll at the time of the violation.*” The Assessor was not consulted with regard to this language. The property tax roll is not a reliable measure of property value. The Assessor closed the roll at the end of June 2020, which captured the sales in 2019. By the time the roll is closed, there is a backlog of property sales in 2020. The assessment may not catch up with the value until nine months after a sale. In the meantime, a property may have an outdated valuation which would mean that the cap would be artificially lower than the actual assessable value as of the date of the violation, which would mean the 25% is materially lower than it should be.

- If there is to be a cap, it should be based on market value. Where the assessed value is not current, an appraisal can be easily done by the Assessor's office. It would take perhaps a day or two. The County cost for the appraisal should be added to the fine.
- The text says that the fine "*may*" be imposed "*in the event that said condition of approval is violated*" but the preceding text includes activities for which there is no condition of approval. The text is internally inconsistent, makes no sense, and if adopted would be open to challenge. As my letter of July 6, 2020 stated, illegal earth moving has occurred without permits at all, and other illegal excavation has happened with a County ministerial permit that was issued – incorrectly – without the County prohibiting excavation. The fines should be applicable to all situations.
- The proposed ordinance would allow the enforcement official to impose a fine for one day of violation but not the second and subsequent days, even though there were multiple days of violations. This is another problem with unfettered discretion and the proposed text.
- The proposed language "*each day of the violation*" would mean that the fine could be imposed for a full day rather than a partial day of a violation. Partial days should receive the maximum fine because the harm is the same.
- The ordinance apparently would not apply to ministerial permits because it applies only to conditions and ministerial permits are not conditioned. This is a serious loophole because ministerial permits often require large amounts of excavation, as shown by the PG&E permit the County issued for two Valley View parcels.

A highlighted version of the September 1 draft text is attached for reference.

This version of the proposed ordinance has many of the same problems as the last iteration. The following comments from my July 6, 2020 letter remain relevant.

- 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 the harm, or to craft mitigation for the 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 anything to mitigate the potential harm to the protected resources. It likely would cause harm, as explained here.

- 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 of meaningful remedies if the conditions are violated. The sole approach is financial. The approach fails 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.
- The discretionary fine is not a meaningful remedy to violations of CEQA mitigations and LCP conditions. It could 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 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 in exchange for a fine. The price of houses in Pebble Beach and Carmel Point often exceeds \$5 million or \$10 million. The County’s building permit fee structure is laughably low for construction in these geographic locations. A fine could be far more desirable to some developers than compliance with the mandatory LCP conditions and CEQA mitigations.
- 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. My clients are aware of examples where the County imposed fines and later waived the fines it had imposed.
- 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 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 for every day or earth moving.
- 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 or the County issues a permit without an adequate understanding of what the job would involve?
 - This is what happened with the two Valley View properties when Pietro/Adamski/Emerson excavated a deep trench along two properties and excavated a large oak tree from one location and dug a large replacement hole for the tree, 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 a County permit for the site.
- 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 consider the fact that the County gives over the county permits to PG&E and 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 resulting in excavation of undeveloped land. These are material loopholes in the County process that the ordinance would not remedy.

In sum, the revised ordinance needs more work. The foreseeable consequences and the 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.

I was not cc'd on the board report, contrary to the staff claim.

My name is shown as cc on the board report but I was not sent a copy of it. I was not alerted to the agenda item despite my express request for notice.

Reiterated request for notice

Again, to repeat my July 6, 2020 request: Please put TOMP and SCPCR on all notification 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. Sending me an agenda as part of a group distribution is not adequate notice because it assumes that I can dig my way through many pages of an agenda to find something that I had requested notice.

Reiterated 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. I also offered this in July and the County RMA did not consult with me before revising the ordinance.

The County has ignored and is ignoring opportunities to better protect Native American and other cultural resources.

Day after day the County is missing opportunities to better protect Native American and other cultural resources . The County has not proposed or made any effort to educate contractors, property owners, and others who are likely to be involved in earth moving activities. The County can do this at minimal cost.

The County outreach should require all job sites in resource-rich areas such as Carmel Point, Pebble Beach and Moss Landing to post standard County signs in English and Spanish. The signs should describe the archeological and tribal cultural resources of the area, the legal protections for them, and the requirement to have monitors present. The signs should be posted facing into the job site and also adjacent to and facing the street. That would educate workers, neighbors, and passers by as to the resources, the laws, and the protections. This would instill pride and share knowledge about these unique resources.

The County has not done anything like this to date. The County has not made an effort to educate stakeholders of these issues. Many property owners at Carmel Point did not know about the protections for resources until the recent SCPCR appeal and Coastal Commission decision. My clients urge you to direct County staff to take these simple and low-cost steps promptly.

Thank you.

Very truly yours,

STAMP | ERICKSON

/s/ Molly Erickson

Molly Erickson

Attachment: as stated (2 pp.)

cc: Les Girard, County Counsel
California Coastal Commission Central Coast staff and enforcement staff
OCEN Tribe
Alliance of Monterey Area Preservationists

ORDINANCE NO. ____

**AN ORDINANCE OF THE COUNTY OF MONTEREY, STATE OF CALIFORNIA,
ADDING NEW SECTION 1.22.105 TO CHAPTER 1.22 OF THE MONTEREY COUNTY
CODE RELATING TO ADMINISTRATIVE REMEDIES FOR VIOLATIONS OF
REQUIREMENTS TO MONITOR AND PROTECT ARCHEOLOGICAL AND
CULTURAL RESOURCES.**

County Counsel Summary

This Ordinance amends Chapter 1.22 of the County of Monterey Code, which governs administrative remedies for code enforcement by adding Section 1.22.105 to establish penalties for the failure to monitor and protect archeological and cultural resources at any land use project site where such monitoring and protection is required by the conditions of approval for the project.

The Board of Supervisors of the County of Monterey ordains as follows:

SECTION 1. PURPOSE AND FINDINGS. Pursuant to Article XI, section 7 of the California Constitution, and Government Code sections 25845 and 53069.4, the County of Monterey may adopt and enforce ordinances and regulations not in conflict with general laws to protect and promote the public health, safety, and welfare of its citizens.

The preservation of archeological and cultural resources is of significant public importance and this ordinance provides enhanced protection of such resources by establishing fines as a civil penalty for the failure to both monitor and protect archeological and cultural resources when so required.

SECTION 2. Section 1.22.105 is hereby added to the Monterey County Code to read as follows:

1.22.105 Administrative fines for archeological monitor violations.

A. Notwithstanding Section 1.22.100, for any activity, including but not limited to construction authorized by a land use entitlement or permit, which requires an onsite archeological or tribal monitor, or both, and the protection of archeological or cultural resources as a condition of approval for the activity, an Enforcement Official may issue to a responsible person an administrative citation that imposes the following fines in the event that said condition of approval is violated:

1. A fine of \$25,000 for each day of the violation beginning from day 1.

B. The cumulative amount of fines imposed on a responsible person pursuant to this section shall not exceed twenty-five percent (25%) of the assessed value of the real property at which the violation occurred as determined by the current Monterey County Assessors' property tax roll at the time of the violation.

SECTION 3. SEVERABILITY. If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid, such decision shall not affect the validity of the remaining portions of this ordinance. The Board of Supervisors hereby declares that it would

Highlighted County draft ordinance - Sept. 1, 2020 board agenda item 12
(Total of two pages w/though County footer says there are three pages.)

have passed this ordinance and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses, or phrases be declared invalid.

SECTION 4. CEQA. Adoption of this ordinance is categorically exempt from the California Environmental Quality Act as an action to preserve and protect the environment pursuant to Title 14 California Code of Regulations section 15308, and to establish additional enforcement mechanisms for a regulatory agency pursuant to Title 14 California Code of Regulations section 15321.

SECTION 5. This ordinance shall become effective on the thirty-first day following its adoption.

PAESSED AND ADOPTED on this ____ day of ____, 2020, by the following vote:

AYES:

NOES:

ABSENT:

Chris Lopez, Chair,
Monterey County Board of Supervisors

A T T E S T:

VALERIE RALPH
Clerk of the Board of Supervisors

By: _____
Deputy

APPROVED AS TO FORM:

LESLIE G. GIRARD
County Counsel

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