Attachment A

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ATTACHMENT A
DISCUSSION

BACKGROUND

An application for the construction of a six-story single-family dwelling with an attached garage, attached accessory dwelling unit (ADU), attached junior accessory dwelling unit (JADU), covered and uncovered decks, patios, and exterior staircases, and associated site improvements including the removal of Coast live oaks and drilling a domestic well at 10196 Oakwood Circle in Carmel Valley was submitted by Rene Peinado on half of the Amy McDougal (applicant/property owner) in August of 2023. Staff reviewed the application materials and identified that the proposed design was inconsistent with several policies of the General Plan and Zoning Ordinance including, but not limited to, height, setbacks, and design criteria. These inconsistencies were communicated to the applicant and at the conclusion of those communications, the applicant elected to disagree with staff on the interpretation of County code and he ultimately declined to apply for variances or revise his application. In fact, in May of 2024, a similar application (PLN240139) was submitted by the applicant for development essentially the same project on the site. The second application was submitted as a builder remedy application, with the JADU being restricted for affordable rent at a low-income level. That second application is being reviewed and processed separately from this application (PLN230127). The 2023 application (PLN230127) is the focus of the appeal and is referred to as "the project" in this report. It should be noted that staff suggested that the applicant withdraw the original application to avoid the duplicative applications, however, both permits remain active.

The project was deemed complete in June of 2024 and scheduled for review at the Planning Commission in September of 2024. The hearing was continued twice, the first time due to inaction by the applicant to post notice of the hearing at the site and the second time at the request of the applicant. On December 11, 2024, the Planning Commission considered the proposal and unanimously denied the application due to multiple inconsistencies with adopted objective policies and standards in the County code.

The applicants appealed the Planning Commission's denial to the Board of Supervisors and, in the appeal, among other arguments, again state that the project includes affordable housing and is subject to the protections of the builder's remedy in the HAA.

APPEAL

The Appellants/Owners, Amy McDougall and Rene Peinado, filed an appeal with multiple contentions **(Attachment B)**, which staff has summarized below:

1. The Planning Commission's decision improperly determined the project was not subject to the Builders Remedy and thus improperly denied the project based on inconsistencies with zoning and general plan, and failed to make the necessary public health and safety findings under Builders Remedy;
2. The Applicant was not required to declare that the project was affordable;
3. The County of Monterey's Inclusionary Housing Ordinance does not apply to the project;
4. The project was deemed compliant as a matter of law on July 13, 2024;
5. The Planning Commission's decision violated the Housing Accountability Act by applying subjective design standards;
6. The Planning Commission incorrectly interpreted "Natural Grade";

7. The Planning Commission's hearing was impartial and not fair;
8. The Planning Commission's finding that the project was inconsistent with "Plans and Policies for Development" was not supported by evidence;
9. The Planning Commission's finding that the project would be detrimental to health and safety was not supported by evidence; and
10. The Planning Commission's decision disregarded the Applicant's arborist report and determined without evidence that trees on adjacent properties would be removed;

The appeal's contentions are largely based on the Applicant/Owner/Attorney's assertion about the project scope, namely its affordability, and how that influenced the application processing and the decision of the Planning Commission. The following discussion addresses these concerns:

- Staff's response to Contention Nos. 1, 2, 3, 5:
  The Appellant's letter asserts that the "County was notified prior to the December 11, 2024 Planning Commission hearing that it was required to comply with the Builder's Remedy and treat the project as a Builders Remedy project" because "at least 20% of the total units, more specifically the proposed JADU, shall be rented to lower income households as defined in Section 50079.5 of the Health and Safety Code". Based on this assertion, the appeal states "the Planning Commission improperly determined that the County was not subject to the Builder's Remedy and denied the project on an improper basis, and without making the required findings."

  There is no question that the County is subject to the Builder's Remedy, since it does not have a substantially compliant Sixth Cycle Housing Element certified by State Housing and Community Development. However, this does not mean that all projects are subject to the provision within the Housing Accountability Act known as the Builder's Remedy (Government Code Section 65589.5(d) (HAA)).

  On December 5, 2024, the applicant submitted a letter claiming that the project could not be denied because it was subject to the HAA. This was the first mention from the applicant that the project is subject to Builder's Remedy laws and never requested to amend the project description. The original application materials affirmatively indicated the project did not include affordable housing (**Attachment E**). A bare statement in a comment letter submitted six days in advance of the hearing arguing against staff's recommendation for denial did not affect a change to the project. Accordingly, the Planning Commission reviewed the project in its original form, issuing a unanimous denial due to the proposed project's multiple inconsistencies with County policies and regulations.

  County staff recognize that the applicant can revise his application to become a builder's remedy project without being required to resubmit a preliminary application pursuant to Government Code section 65589.5(f)(7)(B), notwithstanding the need to submit the information required with a preliminary application pursuant to Government Code Section 65941.1. Staff informed the Applicant/Owner in a letter (sent via email) dated December 10, 2024, that if the application is revised to be a Builder's Remedy project, the applicant must submit a revised application with information that staff requires to meaningfully review the proposed revised project scope (as the current application forms

indicate that the project does not include affordable housing). The revised application would need to show that it qualifies for Builder's Remedy, specify the number of proposed below market rate units and their affordability level proposed, specify the number of bonus units, and any incentives, concessions, waivers, or parking reductions requested pursuant to Government Code section 65915 of the Government Code, and state whether any approvals under the Subdivision Map Act are being requested (as described in section 65941.1). Revising the application to be just to Builder's Remedy warrants additional review under the Permit Streamlining Act. Should the applicant revise his application to be subject to Builder's Remedy, Mr. Peiando must submit the necessary information to review the new project scope. This includes, but is not limited to, accurate project plans, a Geological Report prepared in accordance with applicable Title 21 and General Plan policies, evidence of adequate long-term water supply, and evidence demonstrating compatibility with the property's "Sanitary Sewer Easement".

Without a resubmittal of information revising the application, the Planning Commission's findings of denial were not limited to adverse impacts on public health and safety, as required by Government Code section 65589.5(d)(2). Though there are references to subjective design standards, the Planning Commission found that the project did not incorporate Carmel Valley Ranch Specific Plan objective compatible colors ("i.e., browns, siennas, beiges, and olive greens"). Additionally, because the project was inconsistent with objective standards and did not include an affordable unit, the Planning Commission's application of design standards did not violate the Housing Accountability Act.

Given the confusion over the project, and since the appeal of the Planning Commission's denial by the applicant again contends that the project is subject to the Builder's Remedy, staff is recommending that the applicant be provided the opportunity to revise their application (as described above), and that the Board of Supervisors remand the hearing back to the Planning Commission to consider the revised application, rather than acting on the appeal at this time.

The Appellant also contends that they were "not Required to Declare the Project was Affordable under State Law at the time the Application Was Submitted" because the application materials (e.g. application forms and checklist) do not contain requirements for identifying affordable housing units. Contrary to this statement, on July 31, 2023, the Applicant/Owner signed a Design Approval Form for PLN230127, representing that the applicant neither proposed nor was required to provide affordable housing. Applicant/Owner made no attempt to revise this statement until the third public noticing of a hearing to evaluate a project with no affordability component. Accordingly, the appeal's assertion that the project has been affordable is incorrect; the application was not submitted in August 2023 as an affordable project, the application was deemed complete without an affordability component, and the project was not revised prior to the Planning Commission's consideration to include an affordable JADU. Additionally, the County of Monterey does not have a checklist of information necessary to apply pursuant to the Builder's Remedy. Consequently, all Builder Remedy applications must be submitted with application information provided in a standard checklist provided by California Housing & Community Development. The County is relying on the preliminary application

requirements contained in Government Code section 65941.1. For this project, the applicant has neither submitted the State- provided checklist/application for a Builder Remedy project nor provided the preliminary application information required by section 65941.1 to date.

With respect to the applicability of the Inclusionary Housing Ordinance (IHO), the project includes the construction of three new residential units (a single-family dwelling, ADU, and JADU). Projects involving the construction of three or more units are subject to the Inclusionary Housing Ordinance. HCD staff have not applied the Inclusionary Housing requirements of the IHO for accessory units as a matter of practice and interpretation, however, nothing in the IHO precludes an applicant from providing more affordable units than are required by the IHO. If the project were revised to voluntarily include an affordable unit, the affordable unit would also be subject to deed restriction requirements to ensure affordability.

- Staff's response to Contention No. 4:
  The Appellants claims the project was deemed compliant with local regulations on July 13, 2024 because the County did not identify the project's inconsistencies within 30 days of deeming it complete, as required by Government Code section 65589.5(j)(2)(B). This is incorrect. The project's myriad inconsistencies with objective and subjective regulations were outlined in staff's numerous letters deeming the project incomplete. For example, in September 2023 and February 2024, staff informed the Applicant/Owner that, as proposed, the project would be inconsistent with site development standards and design standards. (**Attachment P**). Additionally, on November 1, 2023, the assigned planner, the Chief of Planning, the applicant, and the applicant's representatives met to discuss the September 2023 incomplete letter, which outlined the project's inconsistencies including height, setbacks, and design standards.

  Following this meeting, on November 30, 2023, the County Counsel's office sent the applicant a letter confirming both the County's position regarding "average nature grade" and the project's inconsistencies with required height, setback, and design standards (**Attachment P**). Applicant and representatives, the Director of HCD, and the assigned planner met again on April 17, 2024. That group discussed HCD's position with respect to project height, as measured from "average natural grade", and setback exceptions in the Oakshire subdivision. Staff clarified its position that, as proposed, the project was inconsistent with the zoning district's height and setback requirements. Staff explained that, to proceed with such inconsistencies, applicant would need to obtain a variance. HCD staff further explained these inconsistencies would require consideration of a variance and HCD staff would not be supportive of granting such variance for encroachment of the residence into the required setbacks or to exceed the maximum allowed height limit, but could support a variance to allow the uncovered decks and patios in the setbacks. Following that meeting, the applicant refused to apply for a variance or modify the project and requested to proceed with a review of the project as presented. There was no discussion of the Builder's Remedy or unit affordability at that time or any prior meeting.

  On May 6, 2024, the applicant filed a separate preliminary application for substantially the same project using the State provided forms for a Builder's Remedy application

(PLN240139). This preliminary application was accompanied by a letter stating that the application was filed pursuant to the Builder Remedy provisions of the HAA, inclusive of a proposal to deed restrict the JADU for rent and low income. However, due to a disagreement over appropriate permit processing fees, this preliminary Builder's Remedy application (PLN240139) was not officially submitted until June 27, 2024, at which the application became vested. On September 26, 2024, HCD staff had an additional lengthy discussion with the applicant and their representatives regarding height, average natural grade, current and historical topographic conditions, geological hazards, project square footages, and tree removal. At this meeting, there was again no indication from the applicant that the project, PLN230127, was subject to the Builder's Remedy.

The subject project (PLN230127) was deemed complete in mid-June of 2024. As described above, the applicant was informed in writing and verbally of height, setback, and design inconsistencies more than once before the project was deemed complete. When the subject project was deemed complete, the application materials for PLN230127 included applicant's affirmative representation that the project did not propose affordable housing. Additionally, applicant had made no mention of intent to invoke the Builder's Remedy as to PLN230127. Inconsistency with height and setbacks (adopted objective standards), as well as design requirements of the Carmel Valley Ranch Specific Plan, was considered by staff to be sufficient information to deem the project complete and recommend denial, which is what staff did. Had the project been subject to the Builder's Remedy at the time the project was deemed complete, staff would have followed the laws applicable to the project and the outcome or steps in the process may have looked different. Instead, applicant first mentioned the Builder's Remedy applying to this project in a letter sent only days before the scheduled Planning Commission hearing, in which applicant incongruously asserted that the Planning Commission could not deny the project based on the Builder's Remedy, an erroneous contention repeated in this appeal to the Board.

- <u>Staff's response to Contention No. 6</u>:

  The Applicant/Owner asserts that the Planning Commission incorrectly determined that "natural grade" means "existing grade." This is not accurate. The Planning Commission found the project did not comply with the applicable zoning district standards. Height was one of the main subjects of discussion at the November 1, 2023, April 17, 2024, and September 26, 2024 meetings between the applicant and HCD staff. The Applicant contends that the historic (natural) grade of the site was altered when subdivision improvements were constructed in the 1980's. No evidence of this former condition has been provided by the applicant. Additionally, the claim that the historic "natural" grade was more than 25 feet higher than it is today is illogical, and if true, would lead to absurd conclusions. Current conditions at the site include a 9-foot retaining wall supporting Oakwood Circle. From the base of that retaining wall along Oakwood Circle, the site slopes steeply down and away from the road following similar topography extending in all directions from the site. Based on the conditions and surrounding topography, it is not reasonable to conclude that the natural grade was modified as suggested by the applicant.

  Plans submitted with the application show two grade lines, the claimed historic grade of the site and the current grade of the site. On the plans, these two lines are essentially parallel running down the hill from Oakwood Circle. The claimed historic grade is 27 feet higher

than the existing grade and the applicant has used this claimed natural grade line to measure the proposed height of the structure at 26 feet, 5 inches above the "average natural grade." This measurement/average is nearly 30 feet higher than average grade calculated based on the current topography of the site. This means that if the applicant's contention were supported, the proposed structure would be approximately 70 feet above existing grade on the north elevation and approximately 40 feet above existing grade on the south elevation. The maximum height limit on the property is 30 feet from average natural grade.

Continuing with this assertion, the Applicant/Owner claims that the "historical" (pre-subdivision) grade should be considered when calculating the project's average natural grade (from which height is measured). To support the Applicant/Owner's claim that the project site's historical conditions differ from today's conditions, two topographic surveys were submitted. To confirm which topographic survey and corresponding terrain line on Sheet A13 represents current conditions, HCD-Planning staff contacted the project surveyor (Monterey Bay Engineers, Inc.) and consulted United States Geological Survey (USGS) maps. The project surveyor provided staff with a letter (**Attachment I**) explaining what conditions the two surveys represent, why the elevations differ by 27 feet, and which is the most accurate survey. Contrary to the Applicant/Owner's contention, and per Monterey Bay Engineers, both surveys illustrate the project site's conditions that existed in 2016 and 2023. No development or grading has occurred on the project site, and therefore both surveys represent today's conditions. The applicant has not recognized that submitted topographic surveys show the same conditions (today) and there is no evidence demonstrating that a different or historical grade used to exist.

- Staff's response to Contention No. 7:
  The appeal claims that mutual agreement is required to schedule items before the Planning Commission, and by not doing so, the Planning Commission's hearing was not fair or impartial. This claim was also raised in the Applicant/Owner's December 5, 2024 letter. HCD requested the authority to support such claim as Monterey County Code does not require that the Applicant/Owner agree to a hearing date and only establishes noticing requirements, including notifying the Applicant/Owner/Agent and the public of the scheduled item. Though mutual agreement is not required, it is County practice to communicate hearing dates with Applicants/Owner. After scheduling the project for the August 28, 2024 hearing, the Applicant/Owner submitted a letter on September 23, 2024 to the County of Monterey Planning Commission stating, "I will not be working at sea during the entire month of December 2024 so I can accommodate almost any date that month for a hearing." Following the September 25, 2024 Planning Commission hearing where the Commission directed staff to obtain an agreeable hearing date from your client, HCD-Planning staff met with the Applicant/Owner and informed them that the item would be scheduled for either the December 11, 2024 or January 8, 2025 hearing depending on agenda availability. The Applicant/Owner verbally agreed to either date. Subsequently, the project was scheduled to be heard at the Planning Commission at its December 11, 2025 meeting. The Applicant/Owner then requested a 6-month extension, which staff informed them it could support. The project was then scheduled and noticed in accordance with Brown Act requirements, as well as County noticing requirements.

  Despite the County complying with noticing requirements, communicating hearing dates

to the Applicant/Owner, and the Applicant's commitment to the December 11, 2024 hearing, the Applicant continuously delayed and obstructed the appropriate authority's consideration of PLN230127. On or around December 5, 2024, the Applicant/Owner removed on-site notices for the second time. A member of the public subsequently re-posted the notices near the project site. Based on the above facts, the Planning Commission's decision was not unfair or impartial.

- Staff's response to Contention No. 8:
  The appellant asserts that the Planning Commission's finding that the project was inconsistent with "Plans and Policies for Development" was not supported by evidence because 1) the Carmel Valley Ranch Specific Plan establishes design guidelines and does not impose design restrictions; and 2) there is no evidence that the colors detailed in the Carmel Valley Ranch Specific Plan are used exclusively throughout Carmel Valley. The Carmel Valley Ranch Specific Plan (CVRSP) only applies to properties within its Specific Plan area, which includes the subject subdivision. Thus, the required "browns, siennas beiges, and olive greens" required by the CVRSP are not enforced throughout all of Carmel Valley. However, the Carmel Valley Master Plan, which applies to the subject property as well as Carmel Valley, does separately require that development shall incorporate a rural architectural theme (Policy CV-1.1). The CVRSP's design standards are mandatory - written with "will" and "shall", not "encouraged" or "recommended". Therefore, these standards are enforceable design restrictions, not design recommendations. Photos of current neighborhood properties confirm their compliance with CVRSP colors, building materials, and style requirements (**Attachment F**). Finally, current construction materials are available that meet higher fire-resistant standards and the required CVRSP colors and building material requirements, however, the Applicant/Owner refuses to incorporate such colors and materials.

- Staff's response to Contention No. 9:
  The Applicant/Owner has refused to submit information necessary to confirm whether the project would be detrimental to public health and safety. Staff raised an issue with the proposed development being located within California American Water Company private sewer easement and requested that the Applicant/Owner provide evidence resolving the incompatible development. No evidence has been submitted.

  Potable water would be partially provided by CalAm using a 0.30-acre-foot water entitlement purchased from the Malpaso Water Company (Water Use Permit No. 582). This water permit would serve approximately 30 fixture units. Based on a review of the project plans, more than 40 fixture units are proposed and thus the purchased water entitlement would not provide sufficient water supply. Accordingly, the subject property is not currently served with adequate water to support the proposed residence.

  The plans indicate that the Applicant/Owner proposes to drill a domestic well to supplement the public water supply. However, the Applicant has also recently informed the Environmental Health Bureau that he does not know if he will seek permission to drill a well. The question may be immaterial, though, since, it is unknown if the well, once drilled, would produce adequate water quantity and quality to serve the development as needed to supplement the water supply from CalAm. It is also unclear from the project

application whether the well water would serve just a portion of the residential structure (e.g., just the ADU or JADU) or would be mixed with public water to supply the entire structure.

Additionally, Monterey County GIS (Parcel Report), the USGS's U.S. Quaternary Faults Map, and the California Department of Conservation's Fault Activity Map of California indicate that a trace of the Tularcitos Fault runs through the middle of the subject property. General Plan Policy S-1.5 discourages development within 50 feet of active faults unless measures recommended by a registered engineering geologist are implemented to reduce the hazard to an acceptable level. The submitted Geotechnical Investigation (Design Phase) (County of Monterey Library No. LIB230213) makes routine recommendations, such as complying with California Building Code and recompacting the soils to 90%, but does not address the project site's potential geological and seismic hazards. A geological report was requested for PLN240139 (the Applicant/Owner's Builders Remedy Application), which proposes a similar residential development as PLN230127. The Applicant/Owner has yet to comply with this request, arguing reliance on the Carmel Valley Ranch Specific Plan EIR, a hydrogeologist-stamped fault setback map, and generic soils report conclusions. The Carmel Valley Ranch Specific Plan EIR was not project specific (only contemplated creation of the subdivision, not specific development proposal on each lot) and is 50 years old, indicating that its conclusions are likely stale and based on outdated information, including fault locations. See the below discussion on *Geological Hazards*.

A geological memorandum was recently submitted with PLN240139, but does not provide the required subsurface investigation needed to determine either the presence of a fault line or whether site specific recommendations are needed to ensure the development is safe from or will not contribute to seismic hazards. Accordingly, the submitted reports do not satisfy the geological report requirements established in Title 21 and the General Plan.

The Permit Streamlining Act requires that a local jurisdiction provide a developer with a list of required items to analyze the project. Although a geological report was not submitted, HCD-Planning staff deemed PLN230127 complete under the Permit Streamlining Act because it had received enough evidence to determine that the project, with or without a geological report, was inconsistent with applicable Monterey County Code and therefore recommended the Planning Commission deny the project. Without a project-specific geological report, there is substantial evidence in the record, namely State and Federal mapping, that indicates the proposed project would be constructed on an active or potentially active fault. Evidence has not been submitted that fully demonstrates that the site is physically suitable, the development will neither create nor significantly contribute to geologic instability or geologic hazards, or that the potential hazard has been reduced to an acceptable level. Therefore, without a site-specific geological report, the proposed project poses a potentially significant threat to its occupants and the surrounding neighborhood's health, safety, and general welfare and the Planning Commission appropriately found that the project may have an impact on public health and safety.

- <u>Staff's response to Contention No. 10</u>
  The applicant-commissioned arborist report recommends the removal of three Coast live oaks trees, but HCD-Staff informed the Planning Commission that at least 7 protected trees

were likely to be removed or significantly impacted with implementation of the project based on their analysis of the project plans and a site visit. The Applicant asserts that the Planning Commission's decision disregarded the submitted arborist report and determined without evidence that trees on adjacent properties would be removed.

Following the Planning Commission's decision, HCD-Planning staff met with the project arborist, Topes Tree Services, a County-approved arborist, and discussed the project (**Attachment H**). Through this meeting, it was discovered that Applicant/Owner failed to provide the arborist with project plans and instead only provided a topographic survey and verbally described what the project entailed. The project includes developing to the property line and excavating approximately 9 to 20 feet deep. After looking at site photos (**Attachment M**) and project plans (**Attachment D**), the arborist concurs with HCD-Planning that, without additional information (e.g. civil or grading plans), the project's footprint and required excavation would be likely to significantly impact two mature oaks that exist off-site but near the western property line. One of these trees almost straddles the property line. The proposed excavation and/or height of the structure is likely to significantly impact these trees' root systems or result in the removal of a significant portion of the canopy, both of which would likely result in significant decline or death. In addition, the two recently planted Coast live oak trees (as required by TRM170241) would also likely have long term impacts as a result of the proposed residence due to either construction impacts or the structure significantly limiting the amount of sunlight that may reach these immature trees. Therefore, the Planning Commission appropriately determined that additional trees on-site and off-site would likely need to be removed, a finding that has been confirmed by a County-approved arborist.

Based on the above contentions and staff's responses, staff recommends that the Board find that this Combined Development Permit is not ready for its consideration and thus remands this matter back to the Planning Commission, with the direction to staff to attempt to resolve the confusion by obtaining necessary information from the Applicant. In addition to the confusion raised by the appellant, the project materials continue to present inaccuracies and inconsistencies that have yet to be addressed, including topographic conditions, project square footage, height above average natural grade, design review, setbacks, Accessory Dwelling Units and Junior Accessory Dwelling Units, utilities, tree removal, slopes in excess of 25%, and geological hazards. These inconsistencies and inaccuracies are described in **Attachment C** and in more detail in the December 11, 2024, Planning Commission staff report. Staff also recommends the Board of Supervisors direct staff to attempt to resolve these inaccuracies and inconsistencies.