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**W32a-c**

Appeals Filed: 6/6/2019  
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 Staff: Mike Watson - SC  
 Staff Report: 11/1/2019  
 Hearing Date: 11/13/2019

## **APPEAL STAFF REPORT: SUBSTANTIAL ISSUE DETERMINATION & DE NOVO HEARING**

**Appeal Numbers:** A-3-MCO-19-0039, A-3-MCO-19-0041, and A-3-MCO-19-0042

**Applicant:** Emerson Development Group, Inc.

**Appellant:** Save Carmel Point Cultural Resources

**Local Government:** Monterey County

**Local Decisions:** Coastal development permit (CDP) applications approved by the Monterey County Board of Supervisors on April 23, 2019 (application numbers PLN170611 (26307 Isabella Avenue), PLN170612 (26338 Valley View Avenue), and PLN170613 (26346 Valley View Avenue).

**Project Locations:** Three vacant lots located at 26307 Isabella Avenue (APN 009-463-012), 26338 Valley View Avenue (APN 009-463-017), and 26346 Valley View Avenue (APN 009-463-003) in the Carmel Point neighborhood of unincorporated Monterey County.

**Project Descriptions:**

**26307 Isabella Avenue:** Construction of a split-level 3,397-square-foot single-family dwelling with a 437-square-foot attached garage and a 1,366-square-foot basement, altogether totaling 5,200 square feet, grading of approximately 620 cubic yards, and related improvements.

**26338 Valley View Avenue:** Construction of a 2,285-square-foot single-family dwelling with a 450-square-foot attached garage and a 1,687-square-foot basement, altogether totaling 4,422 square feet, grading of approximately 830 cubic yards, after-the-fact

recognition of unpermitted utility trenching and tree removal, and related improvements.

**26346 Valley View Avenue:** Construction of a 3,028-square-foot single-family dwelling with a 440-square-foot attached garage and a 2,413-square-foot basement, altogether totaling 5,881 square feet, grading of approximately 1,255 cubic yards, after-the-fact recognition of unpermitted utility trenching, and related improvements.

**Staff Recommendation:** Substantial Issue Exists; Approval with Conditions

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**Important Hearing Procedure Note:** The Commission will not take testimony on the “substantial issue” recommendations unless at least three commissioners request it. The Commission may ask questions of the Applicant, any aggrieved person, the attorney general or the Executive Director prior to determining whether or not to take testimony regarding whether the appeals raise a substantial issue. If the Commission takes testimony regarding whether the appeals raise a substantial issue, testimony is generally and at the discretion of the Chair limited to three minutes total per side. Only the Applicant, persons who opposed the applications before the local government (or their representatives), and the local government shall be qualified to testify during this phase of the hearing. Others may submit comments in writing. If the Commission finds that the appeals raise a substantial issue, the de novo phase of the hearing will follow (unless it has been postponed) during which the Commission will take public testimony.

## SUMMARY OF STAFF RECOMMENDATION

Monterey County approved three coastal development permits (CDPs) for three single-family residences with attached garages, large underground basements, landscaping, and related development (including after-the-fact recognition of unpermitted utility trenching and tree removal for two of the three properties) within the Carmel Point neighborhood of unincorporated Monterey County. The Carmel Point neighborhood is an area of high archaeological sensitivity, and the three project sites are located within the boundaries of a known and recorded cultural resource area (i.e., an expansive shell midden and habitation site that encompasses a large swath of Carmel Point and contains both prehistoric materials and human remains). In fact, the Monterey County Local Coastal Program’s (LCP’s) Land Use Plan (LUP) describes the Carmel area shoreline from Carmel Point to the Point Lobos State Reserve as containing highly significant and sensitive archaeological deposits. In total, there are nine previously recorded prehistoric sites located within about one kilometer of the approved Carmel Point residential project sites.

Due to the similarity of the issues presented, and the fact that the residences are located in and affect the same area of Carmel Point, are in relatively close proximity to each other and to known archaeological resources, and were approved by the County at the same hearing (and have the same Applicant), this staff report is a combined staff report for all three appeals, and the hearing on them will also be a combined hearing.

The Appellant contends that the County’s CDP approvals raise questions regarding their

consistency with County LCP policies related primarily to archaeological resource protection, grading minimization, and landform protection and conservation objectives. The Appellant further contends that project mitigations do not and cannot remedy the inconsistencies of the projects with the LCP with respect to protection of archaeological resources, and that they are not meaningful or effective. Finally, the Appellant contends that the approved projects will ultimately lead to construction-related impacts to public access along the shoreline.

Staff recommends that the Commission find that the appeals raise substantial issues with respect to conformance with the County's LCP, and that the Commission takes jurisdiction over the CDP applications for the projects. Staff further recommends that the Commission approve CDPs for each of the projects with terms and conditions that can address and resolve identified LCP inconsistencies.

In terms of the substantial issue question, the County-approved projects raise issues with respect to LCP archaeological resource protection policies, including those that require applying siting and design techniques intended to avoid impacts to archaeological resources if possible, and minimize them where that is not feasible. The LCP further requires the preservation of sites with archaeological resources rather than excavation of the resource, and further prohibits extensive landform alteration and requires that development minimize tree removal. In contrast, the County-approved projects include substantial grading and landform alteration, including to accommodate significant underground basements in a highly sensitive cultural resource area. The County's approval of the basements and the significant amounts of grading raises questions about whether the County's approval meets core LCP requirements that require avoiding such impacts. In addition, the County's approval does not appear to incorporate the LUP-required siting and design requirements required to avoid and/or substantially minimize impacts to cultural resources. In fact, the County's approval does not minimize grading and/or landform alteration or emphasize preservation of archaeological resources over excavation of the site, which appears inconsistent with the LCP, and it also does not ensure that these resources will be protected and maintained for their scientific and cultural heritage value as required by the LCP. Lastly, violations of the LCP exist on the two Valley View Avenue properties associated with trenching and tree removal that occurred while the CDPs were pending locally. The County's approval does little to address such prior unpermitted activities, activities that also occurred without archaeological and/or tribal monitoring. For these reasons, the County's approval of CDPs for the single-family residential projects raises substantial LCP conformance issues with respect to the LCP's archeological, grading, and landform alteration policies.

On de novo review, the LCP directs that the landforms and culturally sensitive areas involved be avoided if possible, and for impacts to be minimized where avoidance is not possible. In this case, full avoidance would require denial of the residential projects, and denial could engender constitutional takings questions. Thus, if residential development is to be accommodated to avoid any takings questions, then the impacts in question need to be minimized. Fortunately, the sites and the proposed projects lend themselves to impact minimization techniques that can accommodate residential development at the same time as appropriately protect these resources. Specifically, the substantial basements and other subsurface development proposed must be eliminated from the project, as must all unnecessary grading and other landform alteration and grading (i.e., beyond standard foundation measures, home and utility access, minor impervious areas, etc.). With these measures applied, standard above-ground residential development can

still be accommodated to avoid takings concerns. Further, prior to construction, a surface level archaeological reconnaissance by an Ohlone/Costanoan-Esselen Nation (OCEN) representative will be required to help determine whether significant cultural materials are present at the surficial level and, if so, construction will not commence until a plan for their protection is approved and implemented. Similarly, OCEN monitors would also be required during all subsequent ground disturbing activities to ensure cultural resource protection otherwise, and would guide further archaeological work on the site. Other archaeological mitigation measures from the project archaeological reports that were vetted during the tribal consultation process would also be applied, as would measures further refined during the County approval process (including prohibiting the use of the same archaeological monitor during concurrent soil disturbing activities, requiring cultural resource awareness and response training, halting all work within 50 meters of materials or human remains discovered during construction, providing for reburial offsite of any found human remains, providing for project design contingencies if human remains are found onsite that cannot be reburied elsewhere, returning any discovered artifacts to the OCEN tribe, and recording a conservation easement to permanently protect any human remains that will remain onsite). With these measures, the Appellant indicates that their issues are resolved, as does the OCEN tribal chairperson.

In short, the projects, as conditioned and modified, can be found consistent with the certified LCP, and staff recommends that the Commission conditionally approve CDPs for the projects. Further, approval of this application pursuant to the staff recommendation, issuance of the permit, and the applicant's subsequent compliance with all terms and conditions of the permit will result in resolution of the above described violations. The substantial issue and CDP motions are found on pages 6-7 below.

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### EXHIBITS

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Exhibit 2: Project Area Photos

Exhibit 3: Proposed Project Plans

Exhibit 4: Monterey County CDP Approvals

Exhibit 5: Appeal of Monterey County CDP Approvals

Exhibit 6: OCEN Letters

Exhibit 7: Archaeological Report Recommendations

## I. MOTIONS AND RESOLUTIONS

### A. Substantial Issue Determinations

Staff recommends that the Commission determine that a **substantial issue** exists with respect to the grounds on which the appeals were filed. A finding of substantial issue would bring the CDP applications for the proposed projects under the jurisdiction of the Commission for a de novo hearing and action. To implement this recommendation, staff recommends a **no** vote on the following motions. The Commission needs to make three motions to act on this recommendation, one each for each appeal. Failure of these motions will result in finding of substantial issue, will result in the Commission taking jurisdiction over the CDP applications, and will result in adoption of the following resolutions and findings. Passage of these motions will result in a finding of no substantial issue, and will result in the County's CDP actions becoming final and effective. The motions pass only by affirmative vote of a majority of the Commissioners present.

***Substantial Issue Motion #1:** I move that the Commission determine that Appeal Number A-3-MCO-19-0039 raises no substantial issue with respect to the grounds on which the appeal has been filed under Coastal Act Section 30603, and I recommend a no vote.*

***Substantial Issue Resolution:** The Commission hereby finds that Appeal Number A-3-MCO-19-0039 presents a substantial issue with respect to the grounds on which the appeal has been filed under Coastal Act Section 30603 regarding consistency with the certified Local Coastal Program and/or the public access and recreation policies of the Coastal Act.*

***Substantial Issue Motion #2:** I move that the Commission determine that Appeal Number A-3-MCO-19-0041 raises no substantial issue with respect to the grounds on which the appeal has been filed under Coastal Act Section 30603, and I recommend a no vote.*

***Substantial Issue Resolution:** The Commission hereby finds that Appeal Number A-3-MCO-19-0041 presents a substantial issue with respect to the grounds on which the appeal has been filed under Coastal Act Section 30603 regarding consistency with the certified Local Coastal Program and/or the public access and recreation policies of the Coastal Act.*

***Substantial Issue Motion #3:** I move that the Commission determine that Appeal Number A-3-MCO-19-0042 raises no substantial issue with respect to the grounds on which the appeal has been filed under Coastal Act Section 30603, and I recommend a no vote.*

***Substantial Issue Resolution:** The Commission hereby finds that Appeal Number A-3-MCO-19-0042 presents a substantial issue with respect to the grounds on which the appeal has been filed under Coastal Act Section 30603 regarding consistency with the certified Local Coastal Program and/or the public access and recreation policies of the Coastal Act.*

### B. CDP Determinations

Staff recommends that the Commission, after public hearing, **approve** CDPs, as conditioned, for the proposed developments. The Commission needs to make three motions to act on this

recommendation, one each for each CDP application. To implement this recommendation, staff recommends a **yes** vote on the following motions. Passage of these motions will result in approval of the CDPs as conditioned and adoption of the following resolutions and findings. Failure of this motion will result in denial of the CDPs. The motions pass only by affirmative vote of a majority of the Commissioners present.

***CDP Approval Motion #1:*** *I move that the Commission approve Coastal Development Permit Number A-3-MCO-19-0039 pursuant to the staff recommendation, and I recommend a yes vote.*

***CDP Approval Resolution:*** *The Commission hereby approves Coastal Development Permit Number A-3-MCO-19-0039 and adopts the findings set forth below on the grounds that the development as conditioned will be in conformity with the Monterey County Local Coastal Program. Approval of the permit complies with the California Environmental Quality Act because either 1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the development on the environment, or 2) there are no further feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the development on the environment.*

***CDP Approval Motion #2:*** *I move that the Commission approve Coastal Development Permit Number A-3-MCO-19-0041 pursuant to the staff recommendation, and I recommend a yes vote.*

***CDP Approval Resolution:*** *The Commission hereby approves Coastal Development Permit Number A-3-MCO-19-0041 and adopts the findings set forth below on the grounds that the development as conditioned will be in conformity with the Monterey County Local Coastal Program. Approval of the permit complies with the California Environmental Quality Act because either 1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the development on the environment, or 2) there are no further feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the development on the environment.*

***CDP Approval Motion #3:*** *I move that the Commission approve Coastal Development Permit Number A-3-MCO-19-0042 pursuant to the staff recommendation, and I recommend a yes vote.*

***CDP Approval Resolution:*** *The Commission hereby approves Coastal Development Permit Number A-3-MCO-19-0042 and adopts the findings set forth below on the grounds that the development as conditioned will be in conformity with the Monterey County Local Coastal Program. Approval of the permit complies with the California Environmental Quality Act because either 1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the development on the environment, or 2) there are no further feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the development on the environment.*

## II. STANDARD CONDITIONS

Each approved permit is granted subject to the following standard conditions:

1. **Notice of Receipt and Acknowledgment.** The permit is not valid and development shall not commence until a copy of the permit, signed by the Permittees or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
2. **Expiration.** If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
3. **Interpretation.** Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.
4. **Assignment.** The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
5. **Terms and Conditions Run with the Land.** These terms and conditions shall be perpetual, and it is the intention of the Commission and the Permittees to bind all future owners and possessors of the subject property to the terms and conditions.

## III. SPECIAL CONDITIONS

Each approved permit is granted subject to the following special conditions:

1. **Revised Plans.** PRIOR TO ISSUANCE OF EACH CDP, the Permittee shall submit two full-sized sets of revised plans for each approved single-family residence (one each at 26307 Isabella Avenue, 26338 Valley View Avenue, and 26346 Valley View Avenue, respectively) and related development, to the Executive Director for review and approval. The revised plans shall be in substantial conformance with the proposed plans (i.e., site plans and elevations prepared by Tom Meaney Architects and dated received May 22, 2019 in the Coastal Commission's Central Coast District Office, see **Exhibit 3**), but shall be modified to achieve compliance with this condition, including that the revised plans shall show the following required changes and modifications to each approved project:
  - a. **Limited Ground Disturbance/Subsurface Development.** With the exception of foundation elements, utility trenching, driveways, minor impervious surfacing, and limited landscaping, all as described below, all other ground disturbing and/or subsurface elements, including all basements, shall be prohibited. The only allowable ground disturbing and/or subsurface elements are as follows:
    1. **Foundations.** All foundations shall be standard perimeter foundations with standard pier and beam interior support that are sited and designed to minimize grading and ground disturbance.



- 2. Driveways.** All driveways shall be limited to 20 feet in width, and 25 feet in length, and otherwise sited and designed to minimize grading and ground disturbance and to limit their overall footprint.
  - 3. Utilities.** All utilities shall be installed underneath the driveways and sited and designed to minimize grading and ground disturbance, including limiting any trenching depth as much as possible.
  - 4. Other Impervious Surfaces.** Other impervious surfaces shall be minimized and limited to the areas immediately adjacent to the building footprint.
  - 5. Landscaping.** Landscaping shall be limited to use of native, drought-tolerant, non-invasive species and any associated irrigation shall be limited to low-flow, water conserving irrigation fixtures, all of which shall be sited and designed to minimize grading and ground disturbance.
- b. Height Limits.** Development height shall be limited to 18 feet above average natural grade. The revised plans shall be submitted with documentation demonstrating compliance with this requirement, including via site plans and scaled architectural elevations prepared by a licensed architect.

All requirements above and all requirements of the approved Revised Plans shall be enforceable components of each CDP. The Permittee may only undertake development in conformance with this condition and the approved Revised Plans, unless the Commission amends the CDP at issue or the Executive Director provides a written determination that no amendment is legally required for any proposed minor adjustments, which may be allowed by the Executive Director if such adjustments: (1) are deemed reasonable and necessary; and (2) do not adversely impact coastal resources.

- 2. Construction Plan.** PRIOR TO ISSUANCE OF EACH CDP, the Permittee shall submit two copies of a Construction Plan for each approved project to the Executive Director for review and approval. The Construction Plan shall, at a minimum, include the following:
  - a. Construction Areas.** The Construction Plan shall identify the specific location of all construction areas, all staging areas, and all construction access corridors in site plan view. All such areas within which construction activities and/or staging are to take place shall be minimized to the fullest extent feasible in order to have the least impact on archaeological and other coastal resources, including by using street areas and previously disturbed areas for staging and storing construction equipment and materials as feasible.
  - b. Construction Methods.** The Construction Plan shall specify the construction methods to be used, including all methods to be used to keep the construction areas contained on the sites (including using unobtrusive fencing or equivalent measures to delineate construction areas), and including verification that equipment operation and equipment and material storage will not significantly degrade archaeological and other coastal resources during construction to the maximum extent feasible. The Plan shall limit construction activities to avoid coastal resource impacts as much as possible.

- c. Construction Timing.** All work may only take place during daylight hours (i.e., from one hour before sunrise to one hour after sunset), except for interior work. Nighttime work (other than interior work) and lighting of the exterior work area are prohibited.
- d. Construction BMPs.** The Construction Plan shall identify the type and location of all erosion control/water quality best management practices that will be implemented during construction to protect coastal water quality, including at a minimum the following:

  - 1. Runoff.** Silt fences, straw wattles, or equivalent apparatus, shall be installed at the perimeter of the construction sites to prevent construction-related runoff and/or sediment from discharging from the construction area, and/or entering into storm drains, drainages or otherwise offsite. Special attention shall be given to appropriate filtering and treating of all runoff, and all drainage points, including storm drains, shall be equipped with appropriate construction-related containment equipment and filtration/treatment materials. All erosion and sediment controls shall be in place prior to the commencement of construction as well as at the end of each work day
  - 2. Equipment.** Equipment washing, refueling, and/or servicing shall take place at an appropriate location to prevent leaks and spills of hazardous materials and preferably on an existing hard surface area (e.g., a road or driveway) or an area where appropriate collection of potentially problematic washing, refueling, and/or servicing materials is facilitated. All construction equipment shall be inspected and maintained at an off-site location to prevent leaks and spills of hazardous materials at the project site.
  - 3. Best Practices.** The construction sites shall maintain good construction housekeeping controls and procedures, including to clean up all leaks, drips, and other spills immediately; keep materials covered and out of the rain, including covering exposed piles of soil and wastes; dispose of all wastes properly, place trash receptacles on site for that purpose, and cover open trash receptacles during wet weather; and to remove all construction debris from the sites.
- e. Construction Site Documents.** The Construction Plan shall provide that copies of each signed CDP and the approved Construction Plan be maintained in a conspicuous location at the construction job sites at all times, and that such copies are available for public review on request. All persons involved with the construction shall be briefed on the content and meaning of the CDPs and the approved Construction Plans, and the public review requirements applicable to them, prior to commencement of construction.
- f. Construction Coordinator.** The Construction Plan shall provide that a construction coordinator be designated to be contacted during construction should questions arise regarding the construction (in case of both regular inquiries and emergencies), and that the construction coordinator's contact information (i.e., address, phone numbers, email, etc.) including, at a minimum, a telephone number and email that will be made available 24 hours a day for the duration of construction, is conspicuously posted at the job site where such contact information is readily visible from public viewing areas, along with indication that the construction coordinator should be contacted in the case of questions

regarding the construction (in case of both regular inquiries and emergencies). The construction coordinator shall record the name and contact information (i.e., address, email, phone number, etc.) and nature of all complaints received regarding the construction, and shall investigate complaints and take remedial action, if necessary, within 24 hours of receipt of the complaint or inquiry. All complaints and all actions taken in response shall be summarized and provided to the Executive Director on at least a weekly basis.

- g. Construction Specifications.** All construction specifications and materials shall include appropriate provisions that require remediation for any work done inconsistent with the terms and conditions of the CDP.
- h. Notification.** The Permittee shall notify planning staff of the Coastal Commission's Central Coast District Office at least 3 working days in advance of commencement of construction, and immediately upon completion of construction.

All requirements above and all requirements of each approved Construction Plan shall be enforceable components of each CDP. The Permittee shall undertake development in conformance with this condition and the approved Construction Plan, unless the Commission amends the CDP at issue or the Executive Director provides a written determination that no amendment is legally required for any proposed minor adjustments, which may be allowed by the Executive Director if such adjustments: (1) are deemed reasonable and necessary; and (2) do not adversely impact coastal resources.

- 3. Incorporation of County's Archaeological Mitigation Requirements.** The archaeological mitigation requirements adopted by Monterey County for its Mitigated Negative Declaration and for County CDPs PLN170611, PLN170612, and PLN170613 (i.e., Mitigation Measures 1 – 4, see **Exhibit 7**), as modified herein, are incorporated as conditions of each CDP. If any of the incorporated mitigations require materials to be submitted to the County and/or otherwise require County approval, then they shall be understood pursuant to this condition to require the materials to be submitted to the Executive Director for review and approval. For future condition compliance tracking purposes, the incorporated mitigations shall be considered subsections of this Special Condition 3 for each CDP. To the extent any such incorporated mitigations conflict with other CDP conditions, the other conditions specified herein for this approval shall take precedence.
- 4. Supplementary Archeological Mitigations.** PRIOR TO ISSUANCE OF EACH CDP, additional archeological reconnaissance and mitigation shall be required as follows:
  - a. Supplementary Reconnaissance.** The project archeologist shall perform additional surficial reconnaissance, in the presence of an Ohlone/Costanoan-Esselen Nation (OCEN) representative and the Applicant, comprised of at least six additional test units along the perimeter of each proposed building foundation to determine whether significant cultural materials are present. The supplementary archeological reconnaissance results, along with the project archaeologist's recommendation as to whether any discovered materials should be considered significant, and the comments of OCEN, shall be submitted to the Executive Director for a determination of the

significance of the discovery. If the Executive Director determines that the discovery is significant, the Permittee shall submit a CDP amendment application (for each affected CDP) to the Executive Director, including a Supplementary Archaeological Plan in accordance with subsection (b) below.

- b. Supplementary Mitigation.** A Supplementary Archaeological Mitigation Plan shall be submitted as part of any CDP amendment application required pursuant to subsection (a) above, and shall be prepared by the project archaeologist in consultation with OCEN, which shall identify proposed mitigation measures to ensure the protection and confidentiality of any significant archeological materials discovered as part of the supplementary reconnaissance. Such proposed mitigation measures may include in-situ preservation, recovery and transfer of the materials to OCEN, and relocation/reburial elsewhere on the project sites. A good faith effort shall be made to avoid impacts to cultural resources through methods such as, but not limited to, project redesign, capping, and placing any discovered cultural resources in an open space conservation easement.
- 5. Monterey County Requirements.** Each approved CDP has no effect on conditions imposed by Monterey County pursuant to an authority other than the Coastal Act, except as provided in the last sentence of this condition. The Permittee is responsible for compliance with all terms and conditions of each CDP in addition to any other requirements imposed by other local government permit conditions pursuant to any non-Coastal Act authority. In the event of conflicts between terms and conditions imposed by the local government and those of this approval, such terms and conditions of this approval shall prevail.
- 6. Real Estate Disclosure.** Disclosure documents related to any future marketing and/or sale of the subject property, including, but not limited to, specific marketing materials, sales contracts and similar documents, shall notify potential buyers of the terms and conditions of this approval, and a copy of each CDP shall be provided in all real estate disclosures for the corresponding parcel in question.
- 7. Deed Restriction.** PRIOR TO ISSUANCE OF EACH CDP, the Permittee shall submit to the Executive Director for review and approval documentation demonstrating that the Permittee has executed and recorded against the property governed by the respective CDP a deed restriction, in a form and content acceptable to the Executive Director: (1) indicating that, pursuant to the CDP, the California Coastal Commission has authorized development on the subject property, subject to terms and conditions that restrict the use and enjoyment of the property; and (2) imposing the terms and conditions of this approval as covenants, conditions and restrictions on the use and enjoyment of the property. Each deed restriction shall include a legal description and site plan of the entire parcel or parcels governed by each particular CDP. Each deed restriction shall also indicate that, in the event of an extinguishment or termination of the deed restriction for any reason, the terms and conditions of the corresponding CDP shall continue to restrict the use and enjoyment of the subject property so long as either the CDP or the development the CDP authorizes, or any part, modification, or amendment thereof, remains in existence on or with respect to the property in question.

## IV. FINDINGS AND DECLARATIONS

The Commission finds and declares as follows:

### A. PROJECT LOCATION AND BACKGROUND

The approved residential developments comprise three adjacent lots that front Isabella Avenue and Valley View Avenue (i.e., 26307 Isabella Avenue, 26338 Valley View Avenue, and 26346 Valley View Avenue) in the Carmel Point neighborhood of unincorporated Monterey County just south of the city limits of the City of Carmel-by-the-Sea (see **Exhibit 1** for a project location map). The vacant properties are less than one block from the bluff overlooking the Carmel River lagoon and Carmel River State Beach on the south side of Carmel Point proper. The lots contain mature Monterey cypress and oak trees growing alongside a variety of non-native plant species. The project sites are surrounded on all sides by residential development in the form of one- and two-story single family houses.

The sites of the approved projects also fall within the boundaries of a known recorded cultural resource area (i.e., an expansive shell midden and habitation site that encompasses a large swath of Carmel Point and contains both prehistoric materials and human remains associated with the Costanoan (Ohlone) tribal group), and are within one block of the boundaries of two additional known cultural sites. This tribal group dates its history back some 9,000 years, and followed a general hunting and gathering subsistence pattern and occupied sites most often near streams and other water courses. These people established few permanent coastal villages, instead setting up temporary settlements that shifted seasonally in response to food availability.

The LCP's Land Use Plan (LUP) describes the Carmel area shoreline, from the Carmel Point area to the Point Lobos State Reserve and including the project sites, as containing one of the densest remaining concentrations of indigenous shellfish gathering activities in central California. Point Lobos is considered to be the location of a rare permanent cultural village, and the archaeological deposits in this area have been identified as a highly significant and sensitive resource. In total, there are nine previously recorded prehistoric sites located within about one kilometer of the approved Carmel Point residential project sites. In sum, the area in question is rich in archaeological resources.

See **Exhibit 1** for a project location map and **Exhibit 2** for site photos.

### B. PROJECT DESCRIPTION

The County approved three separate CDPs to authorize the construction of three residences on each of three vacant lots owned by the Applicant. Each lot is designated by the LCP for medium density residential (MDR) development. The projects are more specifically described as follows:

**26307 Isabella Avenue:** Construction of a split-level 3,397-square-foot single-family dwelling with a 437-square-foot attached garage and a 1,366-square-foot basement, altogether totaling 5,200 square feet, grading of approximately 620 cubic yards, and related improvements.

**26338 Valley View Avenue:** Construction of a 2,285-square-foot single-family dwelling with a 450-square-foot attached garage and a 1,687-square-foot basement, altogether totaling 4,422 square feet, grading of approximately 830 cubic yards, after-the-fact recognition of unpermitted utility trenching (for an electric service panel) and tree removal (where a coast live oak tree was relocated from the public right-way onto the interior of the property), and related improvements.

**26346 Valley View Avenue:** Construction of a 3,028-square-foot single-family dwelling with a 440-square-foot attached garage and a 2,413-square-foot basement, altogether totaling 5,881 square feet, grading of approximately 1,255 cubic yards, after-the-fact recognition of unpermitted utility trenching (for an electric service panel), and related improvements.

The County-approved projects each includes extensive grading to create the finished floor elevations of the basements, which reach up to 12 feet below average natural grade (and up to 14 feet below existing natural grade),<sup>1</sup> along with additional grading for general site preparation and to address foundation issues in the sandy soil substrate. The County-approved projects further include mitigations intended to protect and maintain archaeological resources, to require landscape restoration plans, water quality and erosion control plans, biological resource protections, and lighting plans.

See **Exhibit 3** for the approved project plans for all three residences and associated development.

### **C. MONTEREY COUNTY APPROVAL**

On December 5, 2018, the Monterey County Planning Commission approved with conditions CDPs PLN170611, PLN170612, and PLN170613 for the proposed residential projects. The Planning Commission's approvals were appealed to the County Board of Supervisors. On April 23, 2019, the Board denied the appeals and upheld the Planning Commission's CDP approvals. The County's Final Local Action Notices for the CDP actions were received in the Coastal Commission's Central Coast District office on May 22, 2019. The Coastal Commission's ten-working-day appeal period for these actions began on May 23, 2019 and concluded at 5pm on June 6, 2019. One valid appeal for each of the County's CDP decisions was received during the appeal period (see below and **Exhibit 4**).

### **D. APPEAL PROCEDURES**

Coastal Act Section 30603(a) provides for the appeal to the Coastal Commission of certain CDP decisions in jurisdictions with certified LCPs. The following categories of local CDP decisions

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<sup>1</sup> The County-approved projects' elevations identify a finished floor elevation of +43 feet above sea level for the basement and an average natural grade of +54.3 feet for the residence at 26307 Isabella Avenue; a finished floor elevation of +35.5 feet for the basement and an average natural grade of +47.5 feet for the residence at 26338 Valley View Avenue; and a finished floor elevation of +34.5 feet for the basement and an average natural grade of +45.5 feet for the residence at 26346 Valley View Avenue. In other words, the basements are 11.3 feet, 12 feet, and 11 feet respectively below average natural grade. Because average natural grade is calculated via averaging the highest and lowest point of the natural grade of that portion of the building site covered by the structure, these numbers tend to understate the depth of the basements. For example, at their deepest point, the basements are actually up to 14 feet below existing grade (as opposed to average natural grade).

are appealable: (a) approval of CDPs for development that is located (1) between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide line of the sea where there is no beach, whichever is the greater distance, (2) on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, or stream, or within 300 feet of the top of the seaward face of any coastal bluff, and (3) in a sensitive coastal resource area; or (b) for counties, approval of CDPs for development that is not designated as the principal permitted use under the LCP. In addition, any local action (approval or denial) on a CDP for a major public works project (including a publicly financed recreational facility and/or a special district development) or an energy facility is appealable to the Commission. The CDP approvals for these projects are appealable to the Commission because development located within 750 feet of a known archaeological resource represents a conditional use in the LCP, and because the LCP does not designate one single principally permitted use within the MDR zoning district and thus all uses within this district are appealable.

The grounds for appeal under Section 30603(b) are limited to allegations that the development does not conform to the certified LCP or to the public access policies of the Coastal Act. Section 30625(b) of the Coastal Act requires the Commission to conduct the de novo portion of the hearing on an appealed project unless a majority of the Commission finds that “no substantial issue” is raised by such allegations. Under Section 30604(b), if the Commission considers the CDP de novo (upon making a determination of “substantial issue”) and finds that the proposed development is in conformity with the certified LCP, the Commission may approve a CDP. If a CDP is approved for a project that is located between the nearest public road and the sea or the shoreline of any body of water located within the coastal zone, Section 30604(c) also requires an additional specific finding that the development is in conformity with the public access and recreation policies of Chapter 3 of the Coastal Act. These projects are not located between the nearest public road and the sea, and thus this additional finding would not need to be made if the Commission were to approve the projects following de novo hearings (subsequent to a finding of substantial issue for each appeal).

The only persons qualified to testify before the Commission on the substantial issue question are the Applicant (or its representatives), persons who made their views known before the local government (or their representatives), and the local government. Testimony from other persons regarding substantial issue must be submitted in writing. Any person may testify during the de novo CDP determination stage of an appeal.

## **E. SUMMARY OF APPEAL CONTENTIONS**

The Appellant contends that the County’s actions raise consistency issues with the County’s certified LCP policies and standards related to the protection of archaeological resources, grading minimization requirements, and landform protection and conservation objectives. In addition, the Appellant contends that the projects will have an adverse impact on public access and recreation, and lead to conflicts between recreational and residential use of the area. Specifically, the Appellant contends that the County’s approval is inconsistent with LCP provisions that: 1) prohibit excessive grading and landform alteration; 2) promote maintenance and protection of archaeologically sensitive resources for scientific and cultural heritage values; 3) require that site planning and design features avoid impacts to archaeological resources; 4) require timely identification and evaluation of archaeological resources during the conceptual

design phase of land use planning or project planning, and that project design place an emphasis on preserving the entire site rather than on excavation of the resource; 5) require that tree removal be minimized; and 6) address access to recreational activities at Carmel River State Beach and Scenic Road. In addition, the Appellant claims that the projects' mitigations do not and cannot remedy the inconsistencies of the approved projects with the LCP (with respect to archaeological resources), and are not meaningful or effective. See **Exhibit 4** for the full text of the appeals.

## **F. SUBSTANTIAL ISSUE DETERMINATIONS**

The term substantial issue is not defined in the Coastal Act. The Commission's regulations simply indicate that the Commission will hear an appeal unless it "finds that the appeal raises no significant question." In previous decisions on appeals, the Commission has considered the following factors in making such determinations: (1) the degree of factual and legal support for the local government's decision that the development is consistent or inconsistent with the certified LCP and with the public access policies of the Coastal Act; (2) the extent and scope of the development as approved or denied by the local government; (3) the significance of the coastal resources affected by the decision; (4) the precedential value of the local government's decision for future interpretation of its LCP; and (5) whether the appeal raises only local issues, or those of regional or statewide significance. Even where the Commission chooses not to hear an appeal, Appellants nevertheless may obtain judicial review of the local government's coastal permit decision by filing a petition for a writ of mandate pursuant to Code of Civil Procedure, Section 1094.5.

In this case, for the reasons discussed further below, the Commission determines that the County's approval of CDPs for the projects presents a substantial issue.

### **1. Cultural Resources**

The Carmel Area LUP's archaeological resource policies require the protection and maintenance of archaeological resources. New development is required to minimize and avoid impacts to archaeological resources via site planning and design features (LUP Key Policy 2.8.2). Site surveys are required of all proposed projects within close proximity of known archaeological sites (LUP Policies 2.8.3.1 and 2.8.3.2), and said surveys must be performed by qualified individuals (LUP Policy 2.8.3.5). When development is proposed for parcels where archaeological resources are located, project design must avoid or substantially minimize impacts to such sites, and preserving the entire site rather than excavating the resource is mandatory (LUP Policy 2.8.3.4). In addition, the LUP's visual resource policies require development to harmonize and be clearly subordinate to the natural and scenic character of the area. To that end, structures are required to be located and designed to minimize tree removal and grading of the building site. Extensive landform alteration is not permitted (LUP Policies 2.2.3.7 and 2.7.4.1). See the "Cultural Resources" section in the CDP Determination portion of this report that follows the full text of these applicable LCP policies.

The Monterey Bay region is represented by the Ohlone/Costanoan-Esselen Nation (OCEN), which is comprised of over 600 enrolled tribal members of Esselen, Carmeleno, Monterey Band, Rumsen, Chalon, Soledad Mission, San Carlos Mission (Carmel) and/or Costanoan Mission Indian descent. The County consulted with the OCEN and met and discussed the project with a



tribal representative on October 10, 2017. Commission staff similarly had phone calls and exchanged emails with the OCEN tribal chairperson. OCEN objected to the proposed basements and excavation of the project sites due to the possible presence of culturally significant resources. OCEN believes that excavation and disturbance within their known ancestral lands will destroy their sacred ancestral burial sites and that basements should be prohibited in these areas.<sup>2</sup> OCEN notes that prior objections to previous projects have not led to material siting and/or design changes or to the protection of culturally significant resources. In addition to a prohibition on basements, OCEN requests consultation on *all* projects and activities affecting its homelands, including all ground disturbing activities associated with such projects, and requests that any significant cultural materials unearthed during construction be returned to the tribe. See **Exhibit 5** for OCEN letters to Monterey County and the Commission.

As described above, the sites of the approved residences are located within the boundaries of a known cultural resource area where significant archaeological resources and artifacts have been discovered in the past, and adjacent to two known and documented cultural sites. In accordance with LUP requirements, a separate archaeological survey was conducted on each of the three project parcels, which resulted in three separate reports. The reports found scant evidence of intact cultural materials during Phase I surface reconnaissance and subsequent sub-surface tests. Bits of shell fragments and debitage<sup>3</sup> were recovered, though these were considered to be either of low quality or found in association with modern debris. Similarly, four sub-surface auger test holes (each four inches in diameter and ranging in depth from 3 to 9.5 feet) on each parcel revealed only one cultural object (namely, a fragment of Franciscan chert).<sup>4</sup> Nevertheless, despite these conclusions during initial investigations, the reports noted that based on previous discoveries in the area,<sup>5</sup> there remains the possibility of buried cultural resources being discovered during deep excavation to construct the basements. The reports included a series of recommendations and archaeological mitigation measures that were included by the County as conditions of approval (e.g., that: a qualified archaeological monitor be present during grading activities; work stoppage take place within 50 meters of any cultural resources encountered; construction workers receive cultural awareness training; and that the Applicant coordinate with the Native American Heritage Foundation, etc.).

Notwithstanding the location within a known archaeological resource area and despite the objection of the OCEN representative's objection to the basements, the County approved the three single-family residences, including with significant below-grade basement elements. The basements (occupying and removing 1,366 square feet, 1,687 square feet, and 2,413 square feet, respectively, of the sites) will require significant amounts of grading and landform alteration

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<sup>2</sup> See March 28, 2018 letter from Louise Miranda Ramirez, OCEN Tribal Chairperson, to Monterey County Board of Supervisors.

<sup>3</sup> "Debitage" is an artifact type and is the collective term used by archaeologists to refer to the sharp-edged waste material left over when creating a stone tool.

<sup>4</sup> Chert is a sedimentary rock composed of microcrystalline or cryptocrystalline quartz (i.e., the mineral form of silicon dioxide).

<sup>5</sup> The archaeological reports prepared for the projects are confidential to protect the sensitive nature of the resources. As noted, the subject parcels lie within the boundaries of a known recorded cultural resource area and within one block of two additional recorded cultural resource sites.

(620 cubic yards, 830 cubic yards, and 1,255 cubic yards, respectively).<sup>6</sup> The finished floor elevations of the underground basements range between 11 – 12 feet below average natural grade on each of the three properties (and up to 14 feet below actual grade).<sup>7</sup> As noted above, in the archaeological reports for the projects, the deep excavation for the basements and site preparation for the approved foundations could uncover and disturb or destroy sensitive archaeological resources not detected in preliminary surface ground surveys. Further, despite the findings of the archaeological reports, during the time when the CDPs were pending at the County level, the Applicant commenced construction at the two Valley View properties, including trenching for utilities, grading and site preparation, and relocating a coast live oak tree from the public right-of-way to the interior of the site (see also Violation finding below).

The County's approval includes the recommended mitigation measures contained in the archaeological reports for the project and builds upon those recommendations to: 1) prohibit the use of the same archaeological monitor during concurrent soil disturbing activities, 2) allow reburial of human remains, 3) provide project design contingencies if human remains are found onsite that cannot be reburied elsewhere, 4) return any found artifacts to the tribe, and 5) require recordation of a conservation easement to permanently protect human remains that will remain onsite. Nevertheless, while the County incorporated many significant mitigation measures to address potential archaeological discoveries, the County's approval of these large basements and related project subsurface development, which requires significant amounts of grading, raises questions about whether the County's approvals meet the core LCP objectives of avoiding such archaeological and cultural resource impacts in the first place. It would appear that there are other feasible alternatives that would reduce and even avoid such grading and potential disturbance, including elimination of the basements, and better meet LCP requirements. The County's approvals of these significant subsurface elements in an area of known archaeological significance, including as this significance is documented by local tribal experts, does not appear to incorporate the LUP-required site and design criteria (see, for example, LUP Policies 2.7.4.1, 2.8.2, and 2.8.3.4) necessary to avoid and/or substantially minimize impacts to cultural resource sites. The County's approvals do not minimize grading and landform alteration (LUP Policies 2.2.3.7 and 2.7.4.1) or emphasize preservation of archaeological resources (LUP Policies 2.8.2 and 2.8.3.4) over excavation of the sites in accordance with the LUP, and also do not ensure that these resources will be protected and maintained for their scientific and cultural heritage value as required by the LCP (LUP Policy 2.8.2). Lastly, the County's approvals do not address the unpermitted grading/trenching activity and unauthorized tree relocation done on two of the properties without the required CDPs and without archaeological and tribal monitors being present. For these reasons, the approved CDPs for these single-family residential projects raise substantial LCP conformance issues with respect to the LCP provisions cited above.

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<sup>6</sup> For scale, 620 cubic yards of grading is equivalent to 69 commercial truckloads of material and 1,255 cubic yards of grading is equivalent to 139 commercial truckloads of material.

<sup>7</sup> The basements are 11.3 feet, 12 feet, and 11 feet respectively below average natural grade. Because average natural grade is calculated via averaging the highest and lowest point of the natural grade of that portion of the building site covered by the structure, these numbers tend to understate the depth of the basements. For example, at their deepest point, the basements are actually up to 14 feet below existing grade (as opposed to average natural grade).

## 2. Public Access and Recreation

The Coastal Act protects public recreational access to the coast. Relevant Chapter 3 policies include:

***Section 30210:** In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.*

***Section 30211:** Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.*

***Section 30212:** (a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where: (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources; (2) adequate access exists nearby...*

***Section 30212.5:** Wherever appropriate and feasible, public facilities, including parking areas or facilities, shall be distributed throughout an area so as to mitigate against the impacts, social and otherwise, of overcrowding or overuse by the public of any single area.*

***Section 30213:** Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided. Developments providing public recreational opportunities are preferred. ...*

***Section 30220:** Coastal areas suited for water-oriented recreational activities that cannot readily be provided at inland water areas shall be protected for such uses.*

***Section 30221:** Oceanfront land suitable for recreational use shall be protected for recreational use and development ...*

***Section 30223:** Upland areas necessary to support coastal recreational uses shall be reserved for such uses, where feasible.*

In addition, LUP Background Text 4.3.1 Recreational Uses states, in relevant part:<sup>8</sup>

*Within the Carmel area, recreational activity is concentrated along the coastal strip. Point Lobos State Reserve, Carmel River State Beach, and the Scenic Road corridor along Carmel Point are the major recreation destinations. ... Scenic Road is used mainly for pleasure driving and sightseeing as part of the tourist route from the City of Carmel to the Carmel Mission Basilica and Highway 1. It is also popular for walking, jogging, and bicycling. ...*

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<sup>8</sup> See Carmel Area LUP page 62.

*There is presently little data on visitor use levels at Carmel Point. However, the average daily traffic volume of more than 1,900 vehicles per day along this narrow, residential road indicates both the high-use levels it receives as well as its primary use visitors, i.e., scenic driving. ...*

*There are several planning issues relating to public recreation at Carmel Point: heavy traffic volumes along a narrow, residential road; lack of suitable parking sites; conflicts among pedestrian, bicyclists and motorists; conflicts between the recreational and residential use of the area. ...*

LUP Policy 4.4.3 C.1 states, in relevant part:

*Use of areas designated as Resource Conservation and Scenic and Natural Resource Recreation on the plan map shall be limited to passive and low-intensity day-use recreation and educational activities.*

Among the most important goals and requirements of the Coastal Act is the mandate to protect, provide, enhance, and maximize public recreational access opportunities to and along the coast, consistent with strong resource conservation principles. The Coastal Act Section 30210 direction to maximize access represents a different threshold than to simply provide or protect such access, and is fundamentally different from other like provisions in this respect. In other words, it is not enough to simply provide access to and along the coast, and not enough to simply protect access; rather such access must also be maximized. This terminology distinguishes the Coastal Act in certain respects, and provides fundamental direction with respect to projects along the California coast that raise public access issues.

The LUP notes that the Scenic Road corridor along Carmel Point is a major recreation destination, used mainly for pleasure driving and sightseeing as part of the tourist route from the City of Carmel to the Carmel Mission and beyond to Big Sur. The average daily traffic volume is more than 1,900 vehicles. Scenic Road is also popular for walking, jogging, and bicycling. The LUP notes that there are several planning issues related to public access and recreation in this area, including heavy traffic volumes, lack of suitable parking, conflicts between vehicles and pedestrians/bikes, and conflicts between recreational and residential use of the area. The project sites are located one-half block (450 feet) from Scenic Road.

The Appellant contends that the County-approved projects are inconsistent with these access and recreational policies acknowledging that Carmel Point is a major visitor destination with a lack of adequate facilities to accommodate the heavy use, and a requirement that all future uses be limited to passive, low-intensity, day use recreation and education activities. Specifically, the Appellant notes that use of the Scenic Road corridor has increased significantly since the certification of the Carmel Area LCP, and the Appellant is concerned that construction of the three residential projects will occur over a prolonged period, which will significantly impact adjacent roadways (including Scenic Road) and have adverse impacts to public access and recreation in the area.

While it is true that construction of the three residences could collectively take a year or more to complete, this would be a temporary impact that is not out of the ordinary for residential projects

in this area. Also, in the time since certification of the LCP, Scenic Road has been converted into a one-way only (southbound) travel lane for motor vehicles, in part to provide additional space and safety for pedestrians and cyclists and to reduce or eliminate user conflicts. And finally, as noted above, the projects involve three single-family residences on three vacant, residentially-zoned parcels approximately one block from Scenic Road and Carmel River State Beach. The LUP Policy cited by the Appellant applies to parcels of land zoned for resource conservation and recreation along Carmel River State Beach and Carmel River Lagoon, and thus LUP Policy 4.4.3 C.1 is not applicable in this instance.

In short, these projects are not out of the ordinary for construction projects in the Carmel area, and standard construction provisions should be adequate to address any potential public recreational access issues. Accordingly, the County's approval does not raise a substantial public recreational access conformance issue.

### **3. The “Five Substantial Issue” Factors**

When considering a project that has been appealed to it, the Commission must first determine whether the project raises a substantial issue of LCP conformity, such that the Commission should assert jurisdiction over a de novo CDP for such development. At this stage, the Commission has the discretion to find that the project does or does not raise a substantial issue of LCP conformance. The Commission has in the past considered the following five factors in its decision of whether the issues raised in a given case are “substantial:” the degree of factual and legal support for the local government's decision; the extent and scope of the development as approved or denied by the County; the significance of the coastal resources affected by the decision; the precedential value of the County's decision for future interpretations of its LCP; and, whether the appeal raises only local issues as opposed to those of regional or statewide significance.

The County-approved projects here all raise the same substantial conformance issues because: (1) the County lacked factual and legal support to demonstrate the approved residences with large underground basements were the least environmentally damaging alternative with regard to the protection and maintenance of prehistoric cultural resources located in an archaeologically sensitive resource area, as required per various applicable LCP policies, including LUP Key Policies 2.8.2, 2.8.3, and 2.8.4; (2) the extent and scope of the proposed grading and landform alteration necessary to accommodate the subgrade elements such as basements and garages are significant, which is also necessarily informed by relation to the concerns of potential impacts to sensitive archaeological resources which may be caused by the extent and scope of the proposed grading and landform alteration; (3) the project sites are located within the boundaries of a known recorded cultural resource area and within one kilometer of nine additional recorded prehistoric sites, which are afforded heightened protection under the County's LCP; (4) the County's decision to allow basements and/or excessive grading may impact future interpretations of its LCP with regard to archaeological resource protection and avoidance as such a decision appears clearly inconsistent with the protection requirements of the relevant LCP policies; and (5) the appeals raise significant regional or statewide issues related to development and the protection of cultural resources since, as historical and cultural artifacts, they cannot simply or easily be replaced or “mitigated for” in case of significant adverse impacts to said resources.

Therefore, the Commission finds that **a substantial issue** exists with respect to the County's approval of CDPs for the projects in terms of conformance with the provisions of the certified Monterey County LCP, and thus the Commission takes jurisdiction over the CDP applications for the projects.

## **G. COASTAL DEVELOPMENT PERMIT DETERMINATIONS**

The standard of review for this CDP determination is the Monterey County certified LCP. All Substantial Issue Determination findings above are incorporated herein by reference.

### **Applicable Policies**

The Carmel Area LUP, as well as its implementing measures and countywide implementing measures, protect and maintain cultural resources in the following manner:

*2.8.2 Key Policy: Carmel's 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.*

*2.8.3 General Policies: 1. Monterey County shall encourage the timely identification and evaluation of archaeological, historical and paleontological resources in order that these resources be given consideration during the conceptual design phase of land-use planning or project development.*

*2. Whenever development is to occur in the coastal zone, the Archaeological Site Survey Office or other appropriate authority shall be contacted to determine whether the property has received an archaeological survey. If not and the parcel [sic] are in an area of high archaeological sensitivity, such a survey shall be conducted to determine if an archaeological site exists. The Archaeological Survey should describe the sensitivity of the site and recommend appropriate levels of development and mitigation consistent with the site's need for protection. ...*

*4. When developments are proposed for parcels where archaeological or other cultural sites are located, project design shall be required which avoids or substantially minimizes impacts to such cultural sites. To this end, emphasis should be placed on preserving the entire site rather than on excavation of the resource, particularly where the site has potential religious significance.*

*5. Archaeological surveys shall be required for all new subdivisions and for all other development within close proximity of known sites. Such surveys shall be performed by qualified individuals.*

*Specific Policies: ... 6. When other site planning constraints do not permit avoidance of construction on archaeological or other types of cultural sites, adequate preservation*

*measures shall be required. Mitigation shall be designed in accord with guidelines of the State Office of Historical Preservation and the State of California Native American Heritage Commission.*

In addition, the Carmel Area LUP describes the area around the proposed development as follows:<sup>9</sup>

*The Carmel area experienced intensive prehistoric use. The aboriginal peoples of this area were called Costanoans, so named by the Spanish because of their coastal habitat. It appears that these peoples established few permanent coastal villages. Rather, they probably set up temporary villages that were shifted seasonally according to food availability.*

*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.*

Other relevant policies from the Carmel Area LUP include:

**2.2.2 Key Policy (Visual Resources):** *To protect the scenic resources of the Carmel area in perpetuity, all future development within the viewshed must harmonize and be clearly subordinate to the natural scenic character of the area. ...*

**2.2.3 General Policies (Visual Resources):** *Structures shall be located and designed to minimize tree removal and grading for the building site and access road. Where earth movement would result in extensive slope disturbance or scarring visible from public viewing points and corridors, such activity will not be allowed. Extensive landform alteration shall not be permitted.*

**2.7.4 Specific Policies (Hazards):** *All development shall be sited and designed to conform to site topography and to minimize grading and other site preparation activities.*

...

And the LCP's zoning for the three parcels are medium density residential with an 18-foot height limit above average natural grade.

### **Consistency Analysis**

The main objective of the Carmel Area LUP archaeological resource policies is the protection and maintenance of archaeological resources for their scientific and cultural heritage values. All new development/uses are required to incorporate *all* site planning and design feature necessary to minimize and *avoid* impacts to archaeological resources (LUP Key Policy 2.8.2). Site surveys are required of all new development projects (LUP Policies 2.8.3.1 and 2.8.3.2) in close proximity of known archaeological sites and are required to be performed by qualified

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<sup>9</sup> See Carmel Area LUP page 49.

individuals (LUP Policy 2.8.3.5). When development is proposed for parcels where archaeological resources are located, project design shall be required which avoids or substantially minimizes impacts to such sites. Emphasis on preserving the entire site rather than excavation of the resource is mandatory (LUP Policy 2.8.3.4 and 2.8.4.6). In addition, the LUP visual resource policies require development to harmonize and be clearly subordinate to the natural and scenic character of the area (LUP Policy 2.2.2). To that end, structures are required to be located and designed to minimize tree removal and grading of the building site. Extensive landform alteration is not permitted (LUP Policies 2.2.3.7 and 2.7.4.1).

The project area falls within the boundaries of a known previously recorded cultural resource area, an area previously occupied by the Costanoan (Ohlone) group, and within one block of the boundaries of two additional documented and recorded cultural sites.<sup>10</sup> In accordance with LUP requirements, archaeological surveys and reports for each respective parcel were prepared.<sup>11</sup> The Applicant's first report (prepared by Albion Environmental) noted that the field surveys produced pieces of lithic debitage, low density fragmented marine shell, one piece of bone, and modern items. However, no anthropogenic soils were observed and no intact archaeological deposits were discovered. The report concluded that there was no need for further surveying, notwithstanding a finding of cultural materials at all three locations during both a Phase I surface reconnaissance and an extended Phase I sub-surface survey using shovel probes (though the cultural materials found in the shovel probes were determined to be inconclusive as to the presence of cultural or tribal cultural resources).

The Applicant's additional surface reconnaissance and report (prepared by Archaeological Consulting) concluded that none of the materials typically associated with prehistoric cultural resources were observed in the surface soils of the project area. However, based on previous surveys in the area, the report acknowledged the possibility of buried cultural resources being discovered during deep excavations. Finally, results from the Applicant's third report (prepared by Morley) similarly concluded that the fragments found were not archaeologically significant and the findings were deemed negative for the presence of archaeological resources. Yet, despite the findings of all three reports, all three archaeologists acknowledged within their respective reports the possibility of buried cultural resources being discovered during construction and/or the deep excavations necessary for the basements. Though the reports do not specify exactly what constitutes "deep excavation," the reports also use the term "considerable depth" to describe basement excavations. The proposed basements would include excavations to depths of 14 feet from existing grade over 5,466 square feet of the three sites<sup>12</sup> requiring significant amounts of grading and landform alteration (over 2,705 cubic yards of excavation on the three sites combined,<sup>13</sup> and the proposed garages require excavation to roughly five feet (covering some 1,500 square feet of the sites and representing nearly 300 cubic yards of excavation just for the embedded garages). In short, as opposed to *avoiding* sensitive areas and *limiting* landform

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<sup>10</sup> In total there are nine previously recorded prehistoric sites located within about one kilometer of the proposed residential project sites.

<sup>11</sup> See Appendix A: List of Substantive File Documents.

<sup>12</sup> That is 1,366 square feet, 1,687 square feet, and 2,413 square feet, respectively.

<sup>13</sup> That is, 620 cubic yards, 830 cubic yards, and 1,255 cubic yards, respectively. For scale, this is the equivalent of some 300 heavy duty commercial truckloads of materials.



alternation and grading, it appears that the proposed projects are premised on *maximizing* landform alteration and excavation on these sites, which is simply inconsistent with the LCP.

As discussed above, the Monterey Bay region is represented by the Ohlone/Costanoan-Esselen Nation (OCEN), which is comprised of over 600 enrolled tribal members of Esselen, Carmeleno, Monterey Band, Rumsen, Chalon, Soledad Mission, San Carlos Mission (Carmel) and/or Costanoan Mission Indian descent. In accordance with AB52, the County consulted with OCEN and met and discussed the projects with tribal representatives on October 10, 2017. Commission staff similarly had phone calls and exchanged emails with the OCEN tribal chairperson regarding the projects. The number one priority for OCEN is that its ancestor's human remains discovered within its ancestral burial and village sites be protected and undisturbed. Hence, OCEN objects to the basement portion of the projects due to the extent of excavation and possible presence of culturally significant items at greater soil depths. They object to these activities even in areas described as previously disturbed and of no significant archaeological value. OCEN believes that excavation and disturbance within their known ancestral lands will destroy their sacred ancestral burial sites and that the basement portion of the projects should be denied. OCEN notes that prior objections to previous projects in this area have not led to material design/siting changes or to the protection of culturally significant resources. OCEN has requested consultation on all projects and activities affecting its aboriginal homelands, including all ground disturbing activities associated with these projects, and requests that any significant cultural materials unearthed during construction be returned to the tribe. OCEN recognizes that it is not possible to avoid *all* land disturbance activities during construction of the residences; however, it considers the basement portion of the projects to be unnecessary and unwarranted in light of the potential cultural resource damage that could be incurred. See **Exhibit 5** for OCEN letters to Monterey County and the Commission.

The proposed projects include three large single-family residences (3,834 square feet, 2,735 square feet, and 3,468 square feet respectively, including garages), but not taking into account the proposed below grade basement elements which would increase the size of the residences to 5,200 square feet, 4,422 square feet, and 5,881 square feet respectively. The proposed basements (1,366 square feet, 1,687 square feet, and 2,413 square feet, respectively) extend as far as 14 feet below existing grade and would require significant amounts of grading and landform alteration (620 cubic yards, 830 cubic yards, and 1,255 cubic yards, respectively). As currently proposed, the extensive excavation for the basements and their foundations does not comport with certified LUP policies that require archaeological resources to be maintained and protected for their scientific and cultural values or to incorporate all site planning and design features to avoid and substantially minimize impacts to archaeological resources (LUP Policy 2.8.2). The project design does not reflect the fact that the parcels are located within a known recorded archaeological resource site, does not minimize grading and landform alteration (LUP Policies 2.7.4.1 and 2.2.3.7), and certainly does not emphasize preservation over excavation of the resource (LUP Policy 2.8.3.4 and 2.8.4.6).

As noted above, tribal members from OCEN have objected to projects with extensive grading and landform alteration due to the amount of disturbance to known ancestral lands and the accompanying destruction /desecration of culturally significant items, as well as their sacred ancestral burial grounds. The extensive excavation for the basements, foundations, and related excavation does not avoid or substantially minimize impacts as required by the LUP.

In fact, the LCP directs that the landforms and culturally sensitive areas involved be avoided if possible, and for impacts to be minimized where avoidance is not possible. In this case, full avoidance would require denial of the residential projects, and denial could engender constitutional takings questions. Thus, if residential development is to be accommodated to avoid any takings questions, then the impacts in question need to be minimized. Fortunately, the sites and the proposed projects lend themselves to impact minimization techniques that can accommodate residential development at the same time as appropriately protect these resources. Specifically, the substantial basements and other subsurface development proposed must be eliminated from the project, as must all unnecessary grading and other landform alteration and grading (i.e., beyond standard foundation measures, home and utility access, minor impervious areas, etc.). With these measures applied, standard above-ground residential development can still be accommodated to avoid takings concerns.

Further, prior to construction, a surface level archaeological reconnaissance by an Ohlone/Costanoan-Esselen Nation (OCEN) representative will be required to help determine whether significant cultural materials are present at the surficial level and, if so, construction will not commence until a plan for their protection is approved and implemented. Similarly, OCEN monitors would also be required during all subsequent ground disturbing activities to ensure cultural resource protection otherwise, and would guide further archaeological work on the site. Other archaeological mitigation measures from the project archaeological reports that were vetted during the tribal consultation process would also be applied, as would measures further refined during the County approval process (including prohibiting the use of the same archaeological monitor during concurrent soil disturbing activities, requiring cultural resource awareness and response training, halting all work within 50 meters of materials or human remains discovered during construction, providing for reburial offsite of any found human remains, providing for project design contingencies if human remains are found onsite that cannot be reburied elsewhere, returning any discovered artifacts to the OCEN tribe, and recording a conservation easement to permanently protect any human remains that will remain onsite). With these measures, the Appellant indicates that their issues are resolved, as does the OCEN tribal chairperson.

It should be noted that the sizes of the proposed single-family residences sans basements and other deep excavations are not insignificant. And while, denial of any reasonable economically beneficial use whatsoever on each of the project sites may raise issues related to a constitutional taking of private property, denial of the proposed basements and excessive grading would not result in an unconstitutional taking of private property, as the Applicant would clearly enjoy a reasonable economically beneficial use through approval of the single family residences as substantially proposed other than prohibition on the basements and excessive grading and landform alteration for the protection of cultural resources as required per the LCP.

Accordingly, **Special Condition 1** requires the submittal of final plans demonstrating that the basement and other substantial subsurface elements have been eliminated from each of the projects. Specifically, with the exception of foundation elements, utility trenching, driveways, minor impervious surfacing, and limited landscaping, all as described below, all other ground disturbing and/or subsurface elements, including all basements, shall be prohibited. The only allowable ground disturbing and/or subsurface elements are: (1) standard perimeter foundations with standard pier and beam interior support that are sited and designed to minimize grading and

ground disturbance; (2) driveways that are limited to 20 feet in width, and 25 feet in length, and otherwise sited and designed to minimize grading and ground disturbance and to limit their overall footprint; (3) utilities installed underneath the driveways and sited and designed to minimize grading and ground disturbance, including limiting any trenching depth as much as possible; (4) other impervious surfaces shall be minimized and limited to the areas immediately adjacent to the building footprint; and (5) native, drought-tolerant, non-invasive landscaping and associated irrigation (limited to low-flow, water conserving irrigation fixtures), all of which are to be sited and designed to minimize grading and ground disturbance.

Further, to ensure consistency with the LCP's visual resource policies (including LCP Key Policy 2.2.2), **Special Condition 1** limits the overall residence height of 18 feet from average natural grade.

Implementation of **Special Condition 1** eliminates the need for excessive excavation to construct the basements and foundations while still allowing for residential use of the parcels, ensures LCP height consistency, and otherwise ensures that sensitive cultural resources are protected and maintained in accordance with the LUP.

**Special Condition 2** requires implementation of best management practices during construction to prevent unnecessary disturbance, erosion, sedimentation, and the discharge of pollutants.

The Commission's action on this CDP has no effect on conditions imposed by Monterey County pursuant to an authority other than the Coastal Act. However, **Special Condition 5** specifies that in the event of conflict between the terms and conditions imposed by the local government pursuant to an authority other than the Coastal Act/LCP and those of this CDP, the terms and conditions of these CDPs shall prevail.

The County adopted archeological mitigation measures, which were recommended in the archaeological reports and vetted during the tribal consultation process, into its CEQA determinations and local permit conditions, and as modified these are incorporated into this CDP through **Special Condition 3**. The County-approved measures build upon and amplify the recommendations contained in the archaeological reports including by prohibiting the use of the same archaeological monitor during concurrent soil disturbing activities, requiring cultural resource awareness and response training, halting all work within 50 meters (164 feet) of materials or human remains discovered during construction, allowance for reburial offsite of any found human remains, providing for project design contingencies if human remains are found onsite that cannot be reburied elsewhere, return of any discovered artifacts to the tribe, and recordation of a conservation easement to permanently protect Native American human remains discovered during construction that will remain onsite. The County's adopted mitigation measures are necessary to protect archaeological resources onsite during construction.

Additionally, OCEN is concerned that monitoring during construction grading activities will not adequately protect potential cultural resources that might not have been identified by the limited archaeology surveys undertaken to date and that, as a result, there may be additional archaeological materials present that could be irreparably damaged as a result of grading activities. To ensure that adequate archeological reconnaissance is completed, **Special Condition 4** requires additional surficial reconnaissance in the form of six additional test units around the

perimeter of each proposed home, which must be performed in the presence of an OCEN representative and the Applicant prior to issuance of the CDP. This condition further requires submission of a CDP amendment application to propose a Supplementary Archeological Mitigation Plan if significant cultural materials are discovered during any of the additional archeological surveys. The Plan shall identify, in consultation with OCEN, proposed mitigation measures to protect any significant materials, including returning such materials to OCEN, in-situ preservation, recovery and/or relocation/reburial elsewhere on the project site, or project redesign.

The terms and conditions of this approval are meant to be perpetual. **Special Condition 6** therefore requires the Permittee to notify any prospective purchasers of the property about these permit requirements, thus ensuring that future owners are made aware of these conditions. For the same reason, this approval is also conditioned for a deed restriction to be recorded against each property involved in the application (see **Special Condition 7**). These deed restrictions will record the terms and conditions of these permits as covenants, conditions and restrictions on the use and enjoyment of each of the properties.

With these conditions, the proposed residences and related development has been sited and designed to avoid and substantially minimize grading and landform alteration in accordance with the above-cited LCP policies to ensure that archaeological resources will be protected and maintained into the future.

## **H. VIOLATION**

Violations of the LCP exist on the two Valley View Avenue properties. After the Planning Commission approved the CDPs for the projects, and after appeals of the Planning Commission's actions were appealed on January 14, 2019 to the Board of Supervisors, the Applicant began site preparation activities, trenching for utilities, and tree relocation, all without CDPs and all without archaeological and/or tribal monitoring. Monterey County issued a stop work order and opened code enforcement cases for the violations, and these cases remain open at this time. Issuance of this CDP, and compliance with all of the terms and conditions of this permit, will result in resolution of the aforementioned violations of the LCP on the subject properties. Specifically, the trenching spoils previously undertaken without proper archaeological controls will now be required to be examined by the project archaeological monitor and appropriately handled should any artifacts of significance be uncovered, all pursuant to the terms and conditions of this CDP. And any further trenching and/or ground disturbing activities will occur under the supervision of both an approved archaeological monitor and Tribal monitor in accordance with the approved CDP conditions. And with respect to the oak tree, the County determined that the tree was relocated from the public right-of-way onto the Applicant's property by PG&E crews during electrical maintenance activities, and has been successfully replanted. As such, the CDP as conditioned will appropriately address and resolve these violations.

Although development has taken place without a CDP at these sites, consideration of this CDP application by the Commission has been based solely upon the policies of the Monterey County LCP. Commission review and action on this CDP does not constitute a waiver of any legal action with regard to the alleged violations, nor does it constitute an implied statement of the

Commission's position regarding the legality of development, other than the development addressed herein, undertaken on the subject site without a CDP. In fact, approval of this permit is possible only because of the conditions included herein and failure to comply with these conditions would also constitute a violation of this CDP and of the LCP and/or Coastal Act. Accordingly, the Applicant remains subject to enforcement action just as it was prior to this permit approval for engaging in unpermitted development, unless and until the conditions of approval included in this permit are satisfied.

Failure to comply with the terms and conditions of this permit may result in the institution of enforcement action under the provisions of Chapter 9 of the Coastal Act. Only as conditioned is the proposed development consistent with the Monterey County LCP.

### **I. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)**

Section 13096 of the California Code of Regulations requires that a specific finding be made in conjunction with CDP applications showing the application to be consistent with any applicable requirements of CEQA. Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect that the activity may have on the environment.

Monterey County, acting as the lead CEQA agency, prepared a Mitigated Negative Declaration that concluded that, with the addition of mitigation measures, the projects would not have significant environmental impacts. The mitigation measures, as discussed above, include both long-term and short-term protections for cultural resources. The County incorporated said mitigation measures into its April 23, 2019 approvals of the CDPs for the projects.

The Coastal Commission's CDP program has been certified by the Secretary of the Natural Resources Agency as being the functional equivalent of environmental review under CEQA. The preceding substantial issue and CDP findings discuss the relevant coastal resource issues with the proposal, including impacts to cultural resources, and has required appropriate project changes to avoid and/or lessen any potential for adverse impacts to said resources.

The Commission finds that only as modified and conditioned by these permits will the proposed projects avoid significant adverse effects on the environment within the meaning of CEQA. As such, there are no additional feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse environmental effects which approval of the proposed projects, as conditioned, would have on the environment within the meaning of CEQA. Thus, if so conditioned, the proposed projects will not result in any significant environmental effects for which feasible mitigation measures have not been employed consistent with CEQA Section 21080.5(d)(2)(A).

## **APPENDIX A – SUBSTANTIVE FILE DOCUMENTS<sup>14</sup>**

- *Cultural Resources Assessment (APNs 009-463-003, 009-463-017, & 009-463-012)*, Albion Environmental Group Inc., March 2016.
- *Preliminary Archeological Assessment (APN 009-463-012)*, Archaeological Consulting, (Gary S. Breschini), December 6, 2017.
- *Preliminary Archeological Assessment (APN 009-463-017)*, Archaeological Consulting, (Gary S. Breschini), December 6, 2017.
- *Preliminary Archeological Assessment (APN 009-463-003)*, Archaeological Consulting, (Gary S. Breschini), December 6, 2017.
- *Cultural Resources Auger Testing (APNs 009-463-003, 009-463-017, & 009-463-012)*, Susan Morley, November 2018.
- *Geologic Evaluation (APN 009-463-012)*, Chris S. Harwood, November 22, 2017.
- *Geologic Evaluation (APN 009-463-017)*, Chris S. Harwood, November 22, 2017.
- *Geologic Evaluation (APN 009-463-003)*, Chris S. Harwood, November 22, 2017.
- *Geotechnical Investigation (APN 009-463-012)*, Haro, Kasunich, and Associates, Inc., December 18, 2017.
- *Geotechnical Investigation (APN 009-463-017)*, Haro, Kasunich, and Associates, Inc., December 18, 2017.
- *Geotechnical Investigation (APN 009-463-003)*, Haro, Kasunich, and Associates, Inc., December 18, 2017.
- *Biological Assessment (APN 009-463-012)*, Thompson Wildland Management, September 25, 2017.
- *Biological Assessment (APN 009-463-017)*, Thompson Wildland Management, September 23, 2017.
- *Biological Assessment (APN 009-463-003)*, Thompson Wildland Management, September 24, 2017.

## **APPENDIX B – STAFF CONTACT WITH AGENCIES AND GROUPS**

- Monterey County Resource Management Agency
- Ohlone/Costanoan-Esselen Nation (OCEN)

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<sup>14</sup> These documents are available for review in the Commission's Central Coast District office in Santa Cruz.