

CALIFORNIA COASTAL COMMISSION

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Appeal Filed: 6/6/2019
Action Deadline: None
Staff: Mike Watson - SC
Substantial Issue: 11/13/2019
Staff Report: 6/19/2020
Hearing Date: 7/9/2020

STAFF REPORT: DE NOVO HEARING

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

Applicants: Pietro Family Investments (for A-3-MCO-19-0039 and A-3-MCO-19-0041) and Valley Point, LLC (for A-3-MCO-19-0042)

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 (A-3-MCO-19-0039): 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 (Pietro Family Investments).

26338 Valley View Avenue (A-3-MCO-19-0041): 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 (Pietro Family Investments).

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26346 Valley View Avenue (A-3-MCO-19-0042):
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 (Valley Point LLC).

Staff Recommendation: Approval with Conditions for each application

SUMMARY OF STAFF RECOMMENDATION

The Applicants propose to construct 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)¹ 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).

On November 13, 2019, the Commission found that Monterey County's actions approving coastal development permits (CDPs) for the three projects raised a substantial issue of conformance with County Local Coastal Program (LCP) policies related primarily to archaeological resource protection, grading minimization, landform protection, and conservation objectives, and thus the Commission took jurisdiction over the CDP applications. Specifically, the County's approval of the basements and the significant amounts of grading and excavation associated with them raised questions about whether the County's approval met core LCP requirements that require the protection of archaeological resources via siting and design measures that avoid impacts, including grading and landform alteration minimization. The LCP emphasizes preservation of archaeological resources over excavation of the site and directs that the landforms and culturally sensitive areas be avoided if possible, and for impacts to be minimized where avoidance is not possible. The Applicants at that time exercised their right to a postponement of the de novo hearings on the CDP applications, and thus this matter is now back in front of the Commission for deliberations.

The proposed projects include three large single-family residences (at 3,834 square feet, 2,735 square feet, and 3,468 square feet, respectively, including garages) but without 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

¹ Consistent with advice from both the State Attorney General and the Coastal Commission Chief Counsel (see memos dated June 20, 2014, and August 1, 2014, respectfully), Commissioners should not engage in any ex parte communications related to these violations.

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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), totaling 2,705 cubic yards of excavation on the three sites combined,² and the proposed garages require excavation to roughly five feet (covering some 1,500 square feet of the sites and representing nearly 300 additional cubic yards of excavation (or 30 truckloads of materials) for the embedded garages). In short, as opposed to *avoiding* sensitive areas and *limiting* landform alternation and grading, the proposed projects *maximize* landform alteration and excavation on these sites, which is inconsistent with the LCP. As currently proposed, the extensive excavation for the basements, garages, and foundations is inconsistent with certified LCP Land Use Plan (LUP) policies that require archaeological resources to be maintained and protected for their scientific and cultural values. Nor do they incorporate sufficient site planning and design features to avoid and substantially minimize impacts to archaeological resources (LUP Policy 2.8.2). The project designs do not reflect the fact that the parcels are located within a known recorded archaeological resource site, do not minimize grading and landform alteration (LUP Policies 2.7.4.1 and 2.2.3.7), and do not emphasize preservation over excavation of the resource (LUP Policies 2.8.3.4 and 2.8.4.6). In short, the extensive excavation for the proposed basements and foundations, and other related excavation, does not avoid or substantially minimize impacts to tribal/archaeological resources as required by the LCP.

Further, staff reached out to the Ohlone/Costanoan-Esselen Nation, or OCEN, a Native American tribe traditionally and culturally affiliated with this area, and a tribe that has been active in projects at Carmel Point in advocating against excessive grading and archaeological disturbance, and which has objected to projects like this with extensive basements and subsurface disturbance because of the impacts to known ancestral lands and the accompanying destruction/desecration of culturally significant items, as well as to their sacred ancestral burial grounds. OCEN strongly objects to the projects as proposed.

The Applicants argue that they have evaluated the potential for archeological and tribal cultural resources to be found at the site, including through extensive on-site archeological investigation and the use of ground penetrating radar (GPR), and have concluded that the excavation and grading in question would not impact any such resources at the site. However, staff reached out to multiple sources, including the manufacturer of the GPR equipment used in the Applicants' analyses, and it is clear that it is not possible to say with 100% certainty what type of archeological and tribal cultural resources may be found in the soils of these sites, including at the significant excavation depths proposed. In other words, there is no way to conclude with certainty that the proposed grading and excavation can avoid such resources. The only way to *ensure* avoidance of these resources as directed by the LCP would be to prohibit excavation and grading. However, full avoidance (i.e., a complete prohibition on any grading and

² For scale, this is the equivalent of some 300 heavy-duty commercial truckloads of materials.

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excavation would require denial of the residential projects, and denial could engender constitutional takings questions. Thus, if residential development is to be accommodated to avoid a taking, then the impacts in question need to be minimized to meet LCP requirements as much as possible.

Fortunately, the sites and the proposed projects lend themselves to impact minimization techniques that can accommodate residential development while appropriately protecting 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 (i.e., beyond standard foundation site preparation measures, home and utility access, minor impervious areas, etc.). With these measures applied, standard above-ground residential development can be accommodated to avoid takings concerns.

Further, prior to construction, the projects' archaeologist will be required to perform a surface level archaeological reconnaissance in the presence of a tribal monitor 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, a tribal monitor 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 projects' archaeological reports that were vetted during the tribal consultation process would also be applied, as would measures further refined during the County's approval process. With these measures, the OCEN tribal chairperson has indicated that OCEN's issues are resolved.

In short, as conditioned to address excavation/grading, and as also conditioned to include other construction BMPs and compliance with the LCP's height limit in this area, the projects can be found consistent with the certified LCP, and staff recommends that the Commission conditionally approve CDPs for the projects. Further, approval of these applications pursuant to the staff recommendation, issuance of the permits, and the Applicants' subsequent compliance with all terms and conditions of these permits, will result in resolution of the above-described violations. The CDP motions are found on pages 6 - 7 below.

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APPENDICES

Appendix A – Substantive File Documents

Appendix B - Staff Contact with Agencies and Groups

EXHIBITS

Exhibit 1: Location Map

Exhibit 2: Project Area Photos

Exhibit 3: Proposed Project Plans

Exhibit 4: Monterey County Archaeological Mitigation Requirements

Exhibit 5: OCEN Letters

Exhibit 6 : Byram Archaeological Consulting Memo

CORRESPONDENCE

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I. MOTIONS AND RESOLUTIONS

Staff recommends that the Commission, after public hearing, **approve the three CDPs**, as conditioned, for the proposed development. The Commission needs to make three motions to act on this recommendation, one for each CDP application. To implement this recommendation, staff recommends a **yes** vote on each of 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 any of the motions will result in denial of those CDPs. The motions pass only by affirmative vote of a majority of the Commissioners present.

A. CDP Application A-3-MCO-19-0039

CDP Approval Motion: 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.

B. CDP Application A-3-MCO-19-0041

CDP Approval Motion: 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.

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C. CDP Application A-3-MCO-19-0042

CDP Approval Motion: 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 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 permit is granted subject to the following special conditions:

- 1. Revised Plans.** PRIOR TO ISSUANCE OF THE CDPs, the Permittees shall submit two full-sized sets of revised plans for each approved single-family residence and related developed (i.e., at 26307 Isabella Avenue, 26338 Valley View Avenue, and

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26346 Valley View Avenue, respectively) to the Executive Director for review and written 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 sited and designed to minimize grading and ground disturbance. Site preparation shall be limited to the minimum necessary for a standard perimeter foundation, thickened mat, or other foundation that minimizes grading and ground disturbance. Foundation plans shall be provided along with an analysis from the consulting engineers demonstrating that site preparation has been minimized.
 - 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 shall be 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 each building's 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 Permittees 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

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adjustments: (1) are deemed reasonable and necessary; and (2) do not adversely impact coastal resources.

2. **Construction Plan.** PRIOR TO ISSUANCE OF THE CDPs, the Permittees shall submit two copies of a Construction Plan for each approved project to the Executive Director for review and written approval. Each Construction Plan shall, at a minimum, include the following:
 - a. **Construction Areas.** Each 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.** Each 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. Each 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 Best Management Practices (BMPs).** Each 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 workday.
 2. **Equipment.** Equipment washing, refueling, and/or servicing shall take place at an appropriate location to prevent leaks and spills of hazardous materials

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and preferably on an existing hard surface area (e.g., a road or driveway) and 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.** Each 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.** Each 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 CDPs.
- h. Notification.** The Permittees 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.

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All requirements above and all requirements of each approved Construction Plan shall be enforceable components of each CDP. The Permittees 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., Archaeological Mitigation Measures 1 – 4, see **Exhibit 4**), 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 as well. 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 Permittees shall employ a qualified archeologist to perform additional surficial reconnaissance, in the presence of a tribal monitor. The tribal monitor shall be defined as either a monitor approved by the appropriate tribe traditionally and culturally affiliated with the vicinity of the subject parcels and who has consulted with Monterey County on the three projects and designated one lead contact person in accordance with AB52 requirements, or another appropriately Native American Heritage Commission (NAHC) recognized representative. The surficial reconnaissance shall be comprised of at least six additional test units within the boundaries of each proposed building foundation to determine whether significant cultural materials are present. The supplementary archeological reconnaissance results, along with the archeologist's recommendation as to whether any discovered materials should be considered significant, and the comments of the designated tribal monitor, 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.

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- 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 archaeologist in consultation with the tribal monitor. The Plan 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 the most likely descendent as identified by the NAHC, 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 Permittees are 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 Monterey County 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 THE CDPs, the Permittees shall submit to the Executive Director for review and approval documentation demonstrating that the Permittees have executed and recorded, against each property governed by the respective CDPs, 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

A. PROJECT LOCATION AND BACKGROUND

The proposed residential developments would be constructed on 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 undeveloped 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 project sites also fall within the boundaries of a known recorded cultural resource area (i.e., CA-MNT-17, 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. The tribal group followed a general hunting and gathering subsistence pattern and occupied sites most often near streams and other watercourses. 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 Applicants propose three separate CDPs to authorize the construction of a residence and related development on each of three vacant lots owned by the Applicants. Each lot is designated by the LCP for medium density residential (MDR) development. The projects are more specifically described as follows:

26307 Isabella Avenue (A-3-MCO-19-0039): Construction of a split-level 3,397-square-foot single-family dwelling with a 437-square-foot attached garage and a

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1,366-square-foot basement, altogether totaling 5,200 square feet, grading of approximately 620 cubic yards, and related improvements.

26338 Valley View Avenue (A-3-MCO-19-0041): 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 (A-3-MCO-19-0042): 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 proposed projects each include 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),³ along with additional grading for general site preparation and to address foundation issues in the sandy soil substrate. The proposed projects further include mitigations intended to protect and maintain archaeological resources, and also include landscape plans, water quality and erosion control plans, biological resource protections, and lighting plans.

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

C. COASTAL DEVELOPMENT PERMIT DETERMINATIONS

The standard of review for these CDP determinations is the Monterey County certified LCP, including the Carmel Area LUP.

1. Archeological Resources

Applicable LCP Provisions

The Carmel Area LUP, as well as its implementing measures and the broader LCP that

³ The proposed 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 the LCP uses average natural grade to calculate height measurements (which 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).

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regulates development within the entire County coastal zone, protects and maintains cultural resources in the following manner:

LUP Policy 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.

LUP Policy 2.8.3 (General Policies - in relevant part): 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.

LUP Policy 2.8.3 (Specific Policies - in relevant part): ... 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.

LUP Policy 2.7.4 (Specific Policies - Hazards): 1. All development shall be sited and designed to conform to site topography and to minimize grading and other site preparation activities. ...

In addition, the Carmel Area LUP describes the area around the proposed development

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as follows:⁴

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.

Another relevant policy from the Carmel Area LUP includes:

LUP Policy 2.2.3 (General Policies - Visual Resources (in relevant part)): 7. 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.

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 developments/uses are required to incorporate *all* site planning and design features necessary *to minimize and avoid* impacts to archaeological resources (LUP Key Policy 2.8.2). Site surveys are required for 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 individuals (LUP Policy 2.8.3.5). When development is proposed for parcels where archaeological resources are located, project design shall be required that avoids or substantially minimizes impacts to such sites, with the primary emphasis on preserving the entire site rather than excavation of the resource (LUP Policy 2.8.3.4). Extensive landform alteration is not permitted (LUP Policies 2.2.3.7 and 2.7.4.1). In sum, these policies clearly evince an LCP requirement to protect archaeological resources as much as possible, with the primary emphasis on limiting ground disturbance, grading, and landform alteration so as to avoid potential impacts.

As described above, the project area falls within the boundaries of a known previously recorded cultural resource area previously occupied by the Costanoan (Ohlone) group, and is within one block of the boundaries of two additional documented and recorded

⁴ See Carmel Area LUP page 49.

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cultural sites.⁵ In accordance with LUP requirements, the Applicants have undertaken extensive archaeological analysis via surveys and reports for each respective parcel.⁶ The Applicants' first report (prepared by Albion Environmental) noted that the field surveys produced pieces of lithic debitage,⁷ low density fragmented marine shell, one piece of bone, and modern items. However, that report indicated that 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 Applicants' second 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, this report acknowledged the possibility of buried cultural resources being discovered during deep excavations (although the report did not define what depth would constitute a "deep" excavation). Results from the Applicants' third report (prepared by Susan Morley) similarly concluded that the surface fragments found were not archaeologically significant and the findings were deemed negative for the presence of archaeological resources.

All three of the Applicants' archaeologists' reports concluded that there was no reason to delay the projects further, and all three recommended archaeological monitoring to be applied to the projects during construction to avoid or minimize impacts to resources should they be found at depth. Yet, despite the findings of the reports, all three archaeologists also 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.

To better understand potential buried resources and basement impacts, the Applicants also commissioned a fourth archaeologic review of the project parcels. The additional Phase II subsurface testing involved the use of ground penetrating radar (GPR) and targeted geo-probe borings. The borings were implemented at locations where the GPR surveys identified anomalies in the soil strata to determine the presence/absence of cultural resources. GPR surveys with soil borings can be effective in favorable conditions (uniform sandy soils) and unlike excavation, GPR can aid in locating

⁵ In total there are nine previously recorded prehistoric sites located within about one kilometer of the proposed residential project sites.

⁶ See Appendix A: List of Substantive File Documents.

⁷ Debitage is all the material produced during the process of lithic reduction (i.e. the process of fashioning stones or rocks from their natural state into tools or weapons by removing some parts of the stones/rocks). Debitage includes, but is not limited to, different kinds of lithic flakes and lithic blades, shatter and production debris, and production rejects.

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underground features without any risk of damaging them. In this case, GPR surveys were conducted on behalf of PaleoWest Archaeology by Byram Archaeological Consulting. GPR grids were surveyed at high resolution over the design footprints for the house excavation areas on all three residential lots. The surveys detected several anomalies in profiles of the soil strata. Geo-probe soil borings were performed into the area of the anomalies to assess whether the irregularities in the soil strata depicted in the survey represented the presence of any cultural or archaeological resources. The results of the geo-probe borings were negative, meaning no cultural material and no evidence of anthropogenic soils or sediments were encountered. PaleoWest recommended that the mitigation measures described in the three above-mentioned archaeology reports for the projects be followed.

Notwithstanding the findings of the GPR and soil borings and the recommendation of the final archaeological report, it should be noted that although the use of GPR technology to uncover pipes, utilities, and other solid buried structures is fairly common (though its efficacy can be greatly affected by subsurface environmental conditions), its application in the field of archeology is less widespread though it is emerging. GPR is most effective in the hands of an experienced archeologist who has been trained in the use of the technology. It provides a non-invasive means of “looking” at soil layers and detecting areas that may have been disturbed in the past. It is not a panacea for the lack of knowledge of important variables (such as tribal and cultural history, known range of tribe, customs, burial methods, etc.). Similarly, an experienced archeologist without proper training in the use of GPR survey methods is unlikely to obtain accurate results from GPR field surveys. To this point, the Applicants have provided a memo from the consulting archeologist (i.e., Byram Archaeological Consulting) attesting to his experience and past success in identifying archaeological resources, and specifically human burials, through the use of GPR.⁸

It should be understood, however, that GPR surveys cannot detect bones. Detection of burials is affected by properties of the gravesite, which includes among other things, the electromagnetic gradient that exists between the buried feature and the soil, and the state of preservation, size, shape and depth of burial. Unlike more modern burials, California coastal Native American burials did not include disturbed soil around them or an enclosure (e.g., a coffin) around the remains. Because of their relatively small size, the lack of an enclosure, and the lack of physical contrast between the remains and surrounding soils, coastal Native American burial sites are difficult to detect. Additionally, the longer they are in the ground, decomposition and settling of soil materials renders corpse and burial materials less detectable by GPR. As a result of decomposition and the settling of soil materials, burials become less noticeable on radar with the passage of time.⁹ Thus, while GPR may be effective in identifying soil disturbances associated with modern burial sites and materials, it cannot identify bones. As such, GPR use is not 100 percent failsafe in the detection of prehistoric burials such

⁸ See April 19, 2020 memo from Scott Byram, Byram Archaeological Consulting in Exhibit 6.

⁹ Doolittle, J.A., Bellantoni, N.F., The search for graves with ground-penetrating radar in Connecticut, *Journal of Archaeological Science* (2009).

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as those associated with the native peoples of Carmel Point.

With regard to survey methods, the survey grids were initially limited to the design footprints for the house excavations but were extended during subsequent surveying to include an area outside the perimeter of the residences. The surveys did not extend across the entirety of the lots even though it is common for site preparation activities to extend well beyond the house and to include grading over the entire site (i.e., into areas not surveyed with GPR), thus introducing greater risk of disturbing or destroying cultural resources. While the prospect of the use of GPR to uncover the mysteries beneath the surface of the ground is appealing, it is limited in its practical application for discovering prehistoric Native American remains and does not allow one to conclusively rule out the presence of subsurface cultural or archaeological resources at the sites of the proposed residential developments.

And it is important to note that cultural remains were discovered upon excavation in other projects in the Carmel Point area that had negative archaeological reports, underscoring the difficulty in conclusively showing that no cultural resources are present at depth. Specifically, Native American bones were unearthed in the summer of 2019 just one block from the proposed projects. The remains in that case were located within the boundaries of the same known recorded cultural resource area (i.e., CA-MNT-17) where the proposed residences would be located.

Such disturbance and the desecration of human remains and cultural artifacts is avoidable, especially with respect to the construction of basements, which typically involve extensive amounts of excavation and landform alteration. The County has acted in the past to deny a residential project with a proposed underground basement.¹⁰ In that case, the basis for denial of the basement was to avoid direct impacts to known pre-historic cultural resources. The County's staff report noted that the deletion of the proposed improvements (i.e., the proposed basement) "*better achieves the goals and objectives of the Carmel Area LUP in that it results in the preservation of cultural resources.*" Indeed, to take a precautionary approach to ensure consistency with LCP archaeological resource impact avoidance requirements, Monterey County has also denied basements in projects otherwise approved. In fact, for the proposed projects here, the County's CEQA documents initially recommended prohibiting basements to avoid potential archaeological impacts. Ultimately, however, the County chose not to impose this mitigation measure.¹¹

As discussed above, the Monterey Bay region has several legally-recognized Native American tribes including 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 the requirements of Assembly Bill 52

¹⁰ Monterey County Planning Commission meeting report dated February 12, 2014; CDP application PLN 120519, Bearman.

¹¹ In response to comments received by the Applicants and at the direction of the Planning Commission, revised/amplified mitigation measures were substituted in place of elimination of the basements.

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(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 ancestors' human remains located within its ancestral burial and village sites be protected and undisturbed. Therefore, OCEN objects to the basement components of the proposed projects due to the extent of excavation required to construct the basements, which would lead to the disturbance of any culturally significant items that may be present at greater soil depths. OCEN objects 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 native 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 (at 3,834 square feet, 2,735 square feet, and 3,468 square feet, respectively, including above-grade residential development and garages). The proposed below grade basement elements 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, totaling 2,705 cubic yards of excavation on the three sites combined.¹² The proposed garages require excavation to roughly five feet of depth (covering some 1,500 square feet of the sites and representing nearly 300 cubic yards (or 30 additional truckloads) of excavation). In short, as opposed to *avoiding* sensitive areas and *limiting* landform alternation and grading, it appears that the proposed projects will *maximize* landform alteration and excavation on these sites, which is inconsistent with LCP Policies 2.8.2, 2.8.3.4, 2.7.4.1, and 2.2.3.7. As currently proposed, the extensive excavation for the basements and their foundations is not consistent with certified LCP policies that require archaeological resources to be maintained and protected for their scientific and cultural values (LUP Policy 2.8.2), and require that projects incorporate site planning and design features to avoid and substantially minimize impacts to archaeological resources (LUP Policies 2.8.2 and 2.8.3.4). The projects' design does not reflect the fact that the parcels are

¹² For scale, 2,705 cubic yards is the equivalent of some 300 heavy-duty commercial truckloads of materials.

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located within a known recorded archaeological resource site, does not minimize grading and landform alteration (as required by LUP Policies 2.7.4.1 and 2.2.3.7), and does not emphasize preservation over excavation of the resource (LUP Policies 2.8.3.4 and 2.8.4.6). The extensive excavation for the basements and their foundations, and related excavation does not avoid or substantially minimize impacts as required by the LCP. OCEN strongly objects to the projects as proposed.

The Applicants argue that they have evaluated the potential for archeological and tribal cultural resources to be found at the site, including through extensive on-site archeological investigation and the use of GPR, and have concluded that the excavation and grading in question would not impact any such resources at the site. However, Commission staff reached out to multiple sources, including the manufacturer of the GPR equipment used in the Applicants' analyses, and it is clear that it is not possible to say with 100% certainty what type of archeological and tribal cultural resources may be found in the soils of these sites, including at the significant excavation depths proposed. In other words, there is no way to conclude with certainty that the proposed grading and excavation can avoid such resources. The only way to *ensure* avoidance of these resources as directed by the LCP would be to prohibit excavation and grading. However, full avoidance (i.e., a complete prohibition on any grading and excavation) would require denial of the residential projects, and denial could engender constitutional takings questions. Thus, if residential development is to be accommodated to avoid a taking, then the impacts in question need to be minimized to meet LCP requirements as much as possible.

Specifically, 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 (LUP Policies 2.8.2, 2.8.3.2, and 2.8.3.6). If residential development is to be accommodated to avoid a potential takings, then the impacts to potential archeological resources need to be minimized. Fortunately, the sites and the proposed projects lend themselves to impact minimization techniques that can accommodate residential development while appropriately protecting potential archeological resources. Specifically, the substantial basements and other subsurface development proposed can be eliminated from the projects, as must all other unnecessary grading and other landform alterations (i.e., beyond that necessary to support the residential structures on a standard foundation, home and utility access, minor impervious areas, etc.). The Commission's Senior Coastal Engineer, Dr. Lesley Ewing, reviewed the geotechnical reports prepared for the project sites and concurs with the Applicants' geotechnical engineers that site preparation activities are necessary to support the residential structures in the sandy substrate to ensure stability over the life of the developments.¹³

The existing foundation zone soils are comprised of loose sands not capable of supporting residential structures in their current condition. One option involves the re-densification of the top five feet of the soil strata whereby conventional foundations, such as perimeter foundations or other shallow foundation designs, can be utilized.

¹³ See Haro, Kasunich and Associates, Inc., Foundation Zone Soil Condition Mitigation Measures for Proper Foundation Support, (October 30, 2018).

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Another option is a thickened mat (slab) foundation. With a mat foundation, soil would be excavated to install the mat foundations and some subgrade scarification would be part of the projects' design. A mat foundation might require a shallower excavation than a conventional foundation, perhaps only 3.5 feet deep. The site preparation process obviously does not completely avoid disturbance of the near-surface soils, but it does minimize the amount of earthwork necessary to sufficiently support the residential structures (without basements) and to prevent differential settlement of the improvements over time. With these measures applied, standard above-ground residential development can still be accommodated to avoid a potential taking, while still providing for three relatively large residences (including garages) of 3,834, 2,735, and 3,468 square feet. Given that substantial homes could be built, even without basements, denial of the proposed basements (which would avoid the significant grading that would be required to construct such basements) would not result in an unconstitutional taking of private property. The Applicants would have a reasonable economically beneficial use through approval of the single-family residences without basements, consistent with the protection of cultural resources and avoidance of major landform alterations as required per the LCP.

Accordingly, **Special Condition 1** requires the submittal of final plans demonstrating that the basements and other substantial subsurface elements have been eliminated from each of the projects. Specifically (with the exception of site preparation for the 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, is prohibited. The only allowable ground disturbing and/or subsurface elements are: (1) construction of conventional perimeter foundations with standard pier and beam interior supports or thickened mat (slab) foundations; (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 in a manner that are sited and designed to minimize grading and ground disturbance, including limiting any trenching depth as much as possible; (4) other impervious surfaces that are 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.

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

Further, the County required archeological mitigation measures (see **Exhibit 4**), which were recommended in the archaeological reports and vetted during the tribal consultation process, through its CEQA determinations and its local permit conditions. 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

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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 and are incorporated into this CDP through **Special Condition 3**.

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 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 a representative tribal monitor and the projects' archaeologist 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 the tribal monitor, proposed mitigation measures to protect any significant materials, including returning such materials to the most likely descendent, in-situ preservation, recovery and/or relocation/reburial elsewhere on the project site, or project redesign. With these archaeological conditions (including the elimination of basements required in **Special Condition 1**), OCEN has indicated it supports approval of the proposed projects.

Other conditions are necessary to include in this CDP approval. First, 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 these CDPs, the terms and conditions of these CDPs shall prevail.

Further, the terms and conditions of this approval are meant to be perpetual. **Special Condition 6** therefore requires the Permittees to notify any prospective purchasers of the properties about these permit requirements, thus ensuring that future owners are put on notice 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 have 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

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resources will be protected and maintained into the future, and can be found LCP-consistent on these points in a takings approval scenario.

2. Other Issues – Visual Resources and Water Quality

Applicable LCP Provisions

The LCP also protects public views and community character, including in terms of allowable size and scale of development, and also protects water quality. Applicable LCP provisions (in relevant part) 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): 7. 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.

2.4.3 General Policies (Water and Marine Resources): 2. New development including access roads shall be sited, designed and constructed to minimize runoff, erosion, and resulting sedimentation. ... Runoff volumes and rates should be maintained at pre-development levels, unless provisions to implement this result in greater environmental damage.

2.4.3 General Policies (Water and Marine Resources): 3. Point and non-point sources of pollution of Point Lobos and Carmel Bay ASBS's, coastal streams and the Carmel River Lagoon and Marsh shall be controlled and minimized.

Monterey County Zoning Section 20.12.060 (Medium Density Residential, Site Development Standards): The three parcels are zoned MDR/2-D(18)(CZ), which limits the density to two units per acre and includes a maximum 18-foot height limit above average natural grade.

Visual Resources

Some members of the public have voiced concerns about the visual compatibility of the proposed new residences in the neighborhood. Unchecked development could lead to visual impacts that impair the natural and scenic character of the neighborhood. 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). In addition, structures are required to be located and designed to minimize tree removal and grading of the building site. All residences in the MDR/2-D(18)(CZ) are also limited in height to a maximum of 18 feet. To ensure consistency with the LCP's visual resource policies (including LCP Key Policy 2.2.2, and Sections 2.2.3.7, and 2.4.3.3,) and the medium-density residential zoning height

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standard for these sites (Zoning Code 20.12.060), **Special Condition 1(b)** limits the overall residence height to 18 feet from average natural grade.

Water Quality

The site of the proposed developments is approximately one block from Carmel River State Beach and the Carmel Bay Area of Special Biological Significance. The developments will require site preparation activities including grading and landform alteration that could result in significant adverse impacts to these protected coastal waters. LCP Policies 2.4.3.2 and 2.4.3.3 require new development to be designed and constructed to minimize runoff, erosion, and resulting sedimentation, and to control and to minimize point and non-point sources of runoff. To ensure consistency with LCP water quality requirements when grading/landform alteration is undertaken, **Special Condition 2** requires implementation of best management practices during construction to prevent unnecessary disturbance, erosion, sedimentation, and the discharge of pollutants onto the beach and into Carmel Bay.

3. Violation

Violations of the Monterey County LCP exist on the two Valley View Avenue properties.¹⁴ Specifically, after the County Planning Commission approved the CDPs for the projects, and after the actions of the Planning Commission were appealed on January 14, 2019 to the County Board of Supervisors, the Applicants began site preparation activities, trenching for utilities, and oak tree relocation, all without the necessary CDPs and all without archaeological and/or tribal monitoring during these activities. 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 these CDPs, and compliance with all of the terms and conditions of them, will result in resolution of the aforementioned violations of the LCP on the subject properties going forward. Specifically, the spoils resulting from the trenching previously undertaken without proper archaeological controls will now be required to be examined by the projects' archaeological monitor and appropriately handled should any artifacts of significance be uncovered, all pursuant to the terms and conditions of these CDPs. Any further trenching and/or ground disturbing activities will only occur under the supervision of both an approved archaeological monitor and tribal monitor in accordance with the conditions of the approved CDPs. 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 was successfully replanted. As such, approval of the CDPs, as conditioned, will appropriately address these violations.

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

¹⁴ Consistent with advice from both the State Attorney General and the Coastal Commission Chief Counsel (see memos dated June 20, 2014, and August 1, 2014, respectfully), Commissioners should not engage in any ex parte communications related to these violations.

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constitute an implied statement of the Commission's position regarding the legality of development, other than the development addressed herein, undertaken on the subject sites without the necessary CDPs. In fact, approval of these permits is possible only because of the terms and conditions included herein and failure to comply with these terms and conditions would also constitute a violation of these CDPs and of the LCP and/or Coastal Act. Accordingly, the Applicants remain subject to enforcement action, just as they were prior to these permit approvals, for engaging in unpermitted development activities prior to the effective date of these CDPs.

Further, failure to comply with the terms and conditions of these CDPs may result in the institution of enforcement action under the provisions of Chapter 9 of the Coastal Act. Only as conditioned are the proposed developments consistent with the Monterey County LCP.

D. 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 CDP Determination 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 DOCUMENTS¹⁵

- *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.
- *Additional Phase II Archaeological Presence/Absence Testing for Three Undeveloped Parcels in Carmel, Monterey County, (APNs 009-463-003, 009-463-017, & 009-463-012)*, Paleo West Archaeology, October 31, 2019.
- *Report Addendum on Additional Phase II Archaeological Presence/Absence Testing for Three Undeveloped Parcels in Carmel, Monterey County*, Paleo West Archaeology, February 25, 2020.
- *Memo from Scott Byram*, Byram Archaeological Consulting, April 19, 2020;
- *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.
- *Foundation Zone Soil Condition Mitigation Measures for Proper Foundation Support*, Haro, Kasunich and Associates, Inc., October 30, 2018.
- *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.

¹⁵ These documents are available for review through the Commission's Central Coast District office.

APPENDIX B – STAFF CONTACT WITH AGENCIES AND GROUPS

- Monterey County Resource Management Agency
- Ohlone/Costanoan-Esselen Nation (OCEN)
- Geophysical Survey Systems
- Esselen Tribe of Monterey County