



## CITY OF CARMEL-BY-THE-SEA CITY COUNCIL AGENDA

Mayor Dave Potter, Councilmembers Jeff Baron,  
Alissandra Dramov, Karen Ferlito, and Bobby  
Richards  
Contact: 831.620.2000 [www.ci.carmel.ca.us](http://www.ci.carmel.ca.us)

All meetings are held in the City Council Chambers  
East Side of Monte Verde Street  
Between Ocean and 7th Avenues

### REGULAR MEETING Tuesday, October 1, 2024

4:30 PM

#### HYBRID MEETING ATTENDANCE OPTIONS

This meeting will be held in person and via teleconference ("hybrid"). The public is welcome to attend the meeting in person or remotely via Zoom, however, the meeting will proceed as normal even if there are technical difficulties accessing Zoom. The City will do its best to resolve any technical issues as quickly as possible. To view or listen to the meeting from home, you may also watch the live stream on the City's YouTube page at: <https://www.youtube.com/@CityofCarmelbytheSea/streams>. To participate in the meeting via Zoom, copy and paste the link below into your browser.

<https://ci-carmel-ca-us.zoom.us/j/83289524838> Webinar ID: 832 8952 4838 Passcode:  
904814 Dial in: (253) 215-8782

#### HOW TO OFFER PUBLIC COMMENT

The public may give public comment at this meeting in person, or using the Zoom teleconference module, provided that there is access to Zoom during the meeting. Zoom comments will be taken after the in-person comments. The public can also email comments to [cityclerk@ci.carmel.ca.us](mailto:cityclerk@ci.carmel.ca.us). Comments must be received at least 2 hours before the meeting in order to be provided to the legislative body. Comments received after that time and up to the beginning of the meeting will be made part of the record.

### OPEN SESSION 4:30 PM

#### TOUR OF INSPECTION - 4:00 PM

Prior to calling the meeting to order, the Board/Commission will conduct an on-site tour of inspection of the properties listed on the agenda and the public is welcome to join. After the tour is complete, the Board/Commission will begin the meeting in the City Council Chambers no earlier than the time noted on the agenda.

- A. Torres Street 4 northeast of 6th Avenue, Carmel, 93921 (Voris)

#### CALL TO ORDER AND ROLL CALL - 4:30 PM

#### PLEDGE OF ALLEGIANCE

## **EXTRAORDINARY BUSINESS**

- A. Carmel Youth Center Presentation

## **ANNOUNCEMENT REGARDING PUBLIC APPEARANCES**

### **PUBLIC APPEARANCES**

Members of the public are entitled to speak on matters of municipal concern not on the agenda during Public Appearances. Each person's comments shall be limited to 3 minutes, or as otherwise established by the Chair. Persons are not required to provide their names, however, it is helpful for speakers to state their names so they may be identified in the minutes of the meeting. Under the Brown Act, public comment for matters on the agenda must relate to that agenda item and public comments for matters not on the agenda must relate to the subject matter jurisdiction of this legislative body. If a member of the public attending the meeting remotely violates the Brown Act by failing to comply with these requirements of the Brown Act, then that speaker will be muted.

### **ANNOUNCEMENTS**

- A. City Administrator Announcements
- B. City Attorney Announcements
- C. Councilmember Announcements
- D. Ad Hoc Committees - Report Out

### **ORDERS OF BUSINESS**

Orders of Business are agenda items that require City Council, Board or Commission discussion, debate, direction to staff, and/or action.

1. Receive the 2024 Car Week After Action Report and provide staff with feedback and direction
2. Receive a report from the Traffic Safety Committee on a proposed plan regarding the implementation of AB413 and provide direction
3. Resolution 2024-085 authorizing the City Administrator to execute a construction contract with Sharp Engineering & Construction, Inc., in an amount, including a contingency, of \$503,470 for the San Antonio Avenue Pedestrian Pathway Reconstruction Project
4. Receive a follow up presentation by Wave Astound Broadband to address public comments regarding their Fiber Optic Project and authorize issuance of an Encroachment Permit with Special Conditions of Approval.
5. Update on City Council Resolution 2024-062 to develop alternative sites and programs that would allow for an amendment to the City's adopted 6th cycle Housing Element to remove Vista Lobos and Sunset Center from the Housing Sites Inventory List

### **PUBLIC HEARINGS**

6. **PERM EN 240129 (Voris):** Consideration of a Permanent Encroachment Permit application, PERM EN 240129 (Voris), for a stone border around a landscape planter in the public right-of-way, fronting a single-family residence located on Torres Street 4

northeast of 6th Avenue. APN: 010-092-010-000.

## **FUTURE AGENDA ITEMS**

### **ADJOURNMENT**

#### **7. Correspondence Received After Agenda Posting**

This agenda was posted at City Hall, Monte Verde Street between Ocean Avenue and 7th Avenue, Harrison Memorial Library, located on the NE corner of Ocean Avenue and Lincoln Street, the Carmel-by-the-Sea Post Office, 5th Avenue between Dolores Street and San Carlos Street, and the City's webpage <http://www.ci.carmel.ca.us> in accordance with applicable legal requirements.

#### **SUPPLEMENTAL MATERIAL RECEIVED AFTER THE POSTING OF THE AGENDA**

Any supplemental writings or documents distributed to a majority of the City Council regarding any item on this agenda, received after the posting of the agenda will be available for public review at City Hall located on Monte Verde Street between Ocean and Seventh Avenues during regular business hours.

#### **SPECIAL NOTICES TO PUBLIC**

In compliance with the Americans with Disabilities Act, if you need special assistance to participate in this meeting, please contact the City Clerk's Office at 831-620-2000 at least 48 hours prior to the meeting to ensure that reasonable arrangements can be made to provide accessibility to the meeting (28CFR 35.102-35.104 ADA Title II).



**CITY OF CARMEL-BY-THE-SEA  
CITY COUNCIL  
Staff Report**

**October 1, 2024  
EXTRAORDINARY BUSINESS**

<b>TO:</b>	Honorable Mayor and City Council Members
<b>SUBMITTED BY:</b>	Chip Rerig, City Administrator
<b>APPROVED BY:</b>	Chip Rerig, City Administrator
<b>SUBJECT:</b>	Carmel Youth Center Presentation

**RECOMMENDATION:**

Receive a presentation from the Carmel Youth Center.

**BACKGROUND/SUMMARY:**

**FISCAL IMPACT:**

**PRIOR CITY COUNCIL ACTION:**

**ATTACHMENTS:**

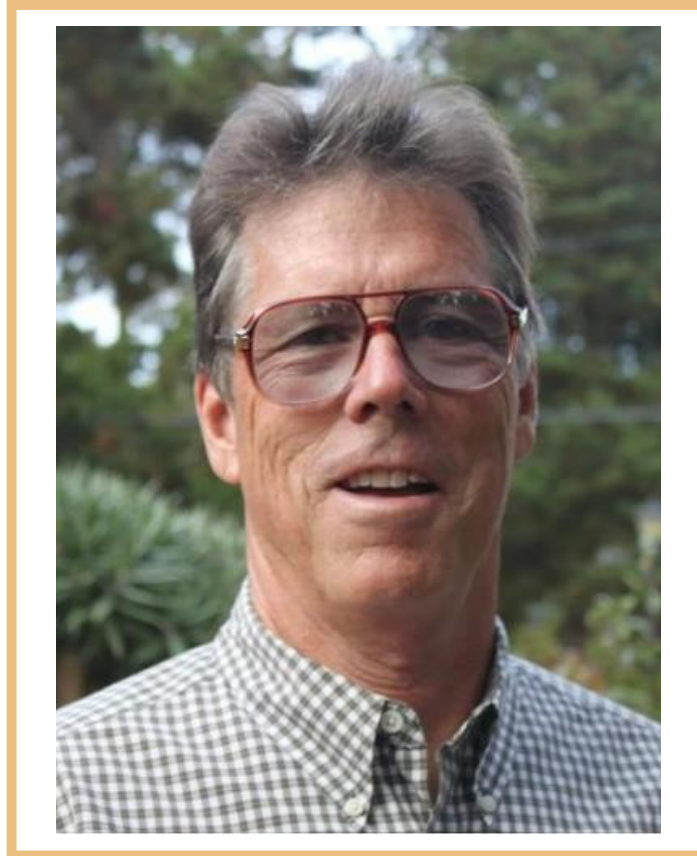
Attachment 1) CYC Presentation



*CVMC*

CAR  
YOU

# Attachment 1 WHO WE ARE & WHY WE CARE



*John Ruskell, President & Alumni*



*Sherilyn Napoli, Executive Director*

## EXECUTIVE COMMITTEE

John Ruskell - President  
Retired Business Owner  
CYC Alumni  
Board member for 7+ years

John Plastini - Vice President  
TSD Carmel Properties, L.P.  
Carmel-by-the-Sea Rotary  
Board member for 7+ years

Bill Kiernan  
Director at Cloudera  
Board member for 6 months

Marci Meaux - Secretary  
Pebble Beach Company  
Carmel Public Library Foundation  
Board member for 3 years

## BOARD MEMBERS

Pam Neiman  
Pebble Beach Company  
Board member for 3 years

Linda Frye, CTC  
Carmel Unified School District  
Carmel Host Lions Club  
Board member for 3 years

Devon Meeker  
Realtor, Monterey Coast Realty  
Children attend CYC  
Board member for 1 year

Cyndy Hodges, CPA  
Retired CPA  
Board member for 9 months

Robin Stelle  
Realtor, Coldwell Banker Realty  
Board member for 9 months

James Emerson  
Retired Lawyer  
Board member for 4 months

Anton Forbes-Roberts  
Co-Founder & COO Soar Media  
Board member for 2 months

# CARMEL YOUTH CENTER

Attachment 1

SINCE 1949



For 75 years, our mission has been to grow future leaders who can change our community and the world for the better. Since then, we have served over 32,000 youth members and recruited 80,000+ volunteers, solidifying our legacy as a staple in the community.

Our vision is to meet young youth where they are. To provide them with the support and opportunities in order to build independence and leadership skills, in turn, transforming their lives.

## A TRUE COMMUNITY CENTER

Youth Camps

Jiu-jitsu

After School Care

Blood Drives

Early Learning

Employer

Facility Rentals

Warming Center

WE HAVE OUR LICENSE !!



... and we have a plan



# WHAT WE'VE ACCOMPLISHED

Attachment 1

- January 2023: Retained a Grant Writer
- July 2023: Master plan for Building approved by City of Carmel by the Sea
- September 2023: Hired Director of Childcare/ Executive Director Sherilyn Napoli, with 25+ years of teaching experience
- September 2023: Submitted application to the California State Department of Social Services, expanding our offerings to include preschool care
- November 2023: Capital improvements around the facility and grounds to ensure safety and code compliance
- December 2023: Conducted site visits with the State to ensure our facilities met compliance and provided ample space regulations per child
- January 2024: Upgraded heating system in the gym to meet State requirements (cost of \$39,000)
- February 7, 2024: Awarded our license from the State to operate as a Child Care Facility!!
- February 2024: Posted job positions on indeed.com for teachers and aides
- June 2024: Opened Summer Camps for Youth. Served 72 families
- August 2024: Opened After School Program.

# CYC 2-YEAR STRATEGIC PLAN

Attachment 1



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## BUSINESS PRIORITIES

- Programs
- Financials
- Facility Management
- Non-Profit Business Management

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## KEY INITIATIVES

- Enhance & Enrich Programming
- Build Financial Resiliency
- Improve our Facility
- Demonstrate 501©3 Business Best Practices

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## OUTCOMES

- Positive Community Impact
- Community Trust and Increased Attractiveness to Donors
- Expansion of Services and Program Offerings
- Sustainable Growth and Impact

# CYC 2-YEAR STRATEGIC PLAN INITIATIVES

Attachment 1

- **Enhance and enrich programming**
  - Ensure success and growth of new pre-school
  - Successfully re-introduce and grow our program offerings
  - Deliver a multi-faceted, skill-based youth leadership program with community partners
  - Deliver a culinary arts hospitality program with community partners
- **Build Financial Resiliency**
  - Add a Fund-raising expert to the organization
  - Plan and execute a 75<sup>th</sup> Anniversary Fundraising Celebration
  - Build our financial reserves
  - Maximize grants and matching funds
- **Improve our Facility with future capital improvements**
  - Permitting and building additional all- gender bathrooms
  - Converting large garage to future preschool. Includes bathrooms, heating , stairs
  - ADA accessibility to all levels of the facility
  - Multi-purpose Learning Kitchen
- **Demonstrate 501©3 business best practices**
  - Build best practices and internal financial controls
  - Build and maintain donor relationships
  - Board development and engagement through committees
  - Build a positive inclusive working environment

# PROGRAM OFFERINGS

Attachment 1

## Summer Camps

June 10<sup>th</sup> – August 2<sup>nd</sup>

CAPACITY: 65 CHILDREN

SERVES: KINDERGARTEN - 8TH GRADE (AGES 5-13)

MONDAY - FRIDAY, 8:30AM - 5:30PM

## Afterschool Enrichment

Starts August 7<sup>th</sup>

CAPACITY: 65 CHILDREN

SERVES: KINDERGARTEN - 8TH GRADE (AGES 5-13)

MONDAY - FRIDAY, 3:00PM - 6:00PM

## Early Learners

Target Start Date November 2024

CAPACITY: 12 CHILDREN

SERVES: POTTY TRAINED, AGES 3 - 5

YEAR ROUND, MONDAY - FRIDAY 7:00AM - 3:00PM

# JOB OFFERINGS

TWO TEACHERS

TWO TEACHER ASSISTANTS

TWO TEACHERS

TWO TEACHER ASSISTANTS

TWO TEACHERS

ONE TEACHER ASSISTANT

# 2024 – SEVEN 1-WEEK SUMMER CAMPS

Attachment 1



# 2024 – <sup>Attachment 1</sup> SUMMER CAMP TESTIMONIAL

Hi, my name is Jason Lande and my 11-year-old son Beck has been participating this summer in the newly re-activated Carmel Youth Center Summer Day Camp. This is his third week of CYC summer camp.

As residents of Carmel and past participants in CYC summer camps and after-school activities, we have been keenly interested in the developments at CYC and have been curious to see how CYC would emerge, newly bolstered with proper certifications and new leadership.

We couldn't be more pleased and excited. Our son Beck has had a wonderfully supportive and confidence-building experience this summer. As a kid who's struggled with self-confidence and bullying at school this past year, Beck started out uncertain and quiet. In his several weeks at CYC, Beck has shown new-found self-assurance and has, with the active and ongoing support of Executive Director Sherilyn Napoli and her staff, stepped up as a mentor and leader with his fellow campers. The nurturing and supportive environment Ms. Napoli has created, imbued with kindness and clear expectations and accountability, is remarkable and appreciated.

I want to call out that Sherilyn Napoli is a fantastic asset to CYC, and I want to make sure that her strong positive impact and influence are recognized and acknowledged. She is kind and welcoming. She also holds all of the campers to high standards and puts up with no nonsense. She expects accountability and kindness from them towards each other, and works consistently to encourage, support, and coach them to the best versions of themselves. Please do everything in your power to reinforce the work that Ms. Napoli is doing. She's a keeper :-).

Sincerely,

Jason Lande

Father of 11 yr. old Beck Lande, CYC Summer Day Camper

650.796.8675

To whomever it may concern,

I am writing on behalf of my children's experience at their first summer camp. From registration, to applying for a scholarship for both of my girls, to arriving on their first day of camp, we have been nothing but happy. Sherilyn and her employees are always greeting us with a smile that welcomes you with warmth. When I pick up my girls at the end of the day they are smiling ear to ear trying to tell me absolutely everything that happened that day, and all I feel is security, happy vibes, and inclusiveness.

Our experience at the CYC is exactly what we needed for our family that is transitioning financially and struggling emotionally. They have truly touched our hearts and I will never stop talking about how wonderful this place is for my 5 year old twin girls, and every child that receives an opportunity to attend. The activities, art, themes, and follow through each day is well thought out and I feel like my girls are learning just as much as they are having fun. I truly feel we were blessed, and I hope my girls can return for many years to come. We love the CYC!

Sincerely,

Marisa, Lena and Lila

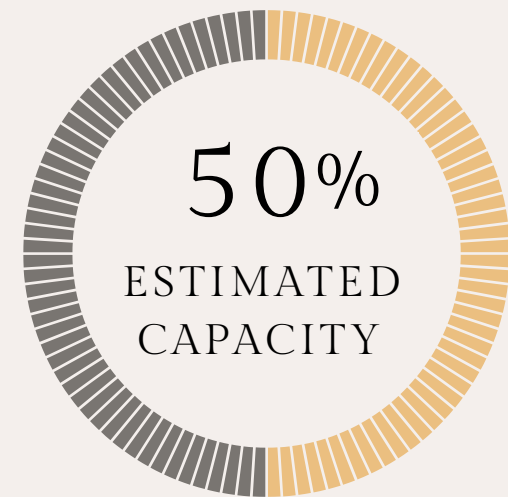
# SERVING THE CARMEL AREA & BEYOND

Attachment 1

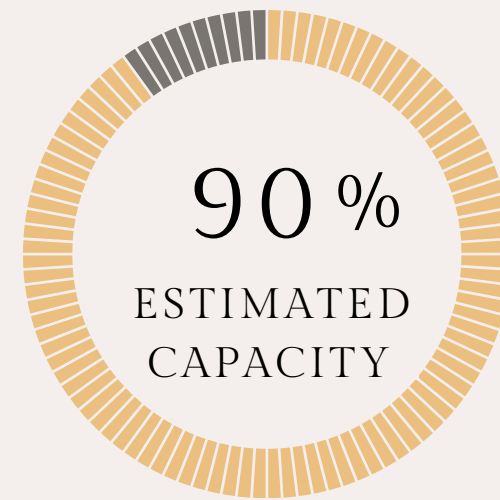
- providing care for residents, neighbors, and the Carmel labor force -



2021



2024



2025



2026

\*ASSUMING  
CAPITAL IMPROVEMENTS



# CITY OF CARMEL-BY-THE-SEA CITY COUNCIL Staff Report

October 1, 2024  
ORDERS OF BUSINESS

<b>TO:</b>	Honorable Mayor and City Council Members
<b>SUBMITTED BY:</b>	Ashlee Wright, Director, Libraries & Community Activities
<b>APPROVED BY:</b>	Chip Rerig, City Administrator
<b>SUBJECT:</b>	Receive the 2024 Car Week After Action Report and provide staff with feedback and direction

## RECOMMENDATION:

Receive the 2024 Car Week After Action Report and provide staff with feedback and direction.

## BACKGROUND/SUMMARY:

Since its inception, “Car Week” has evolved from being just a handful of events during the span of a week, to tens of public and private events held over the span of a week and a half on the peninsula.

This year “Car Week” took place from Friday, August 9 through Sunday, August 18. This After Action Report seeks to discuss traffic and safety impacts to Carmel-by-the-Sea during Car Week, as well as a breakdown of any issues with events held in the Village and to propose mitigation tactics to counter these effects in subsequent years.

## EVENTS HELD IN CARMEL-BY-THE-SEA

For 2024 staff worked with event organizers from the previous year to build on the events that they presented in 2023, understanding that if there are events in Carmel during Car Week that they would like to get back to the look and feel of the pre-pandemic events. With the expansion of Concours for a Cause on Tuesday and Prancing Ponies and the Concorso Carmel on Thursday this year looked and felt more like Car Week pre-pandemic than it has in the past few years. There were four permitted events in Carmel-by-the-Sea this year:

- Tuesday, August 13 Concours for a Cause
- Wednesday, August 14 Astons on the Avenue
- Thursday, August 15 Prancing Ponies



- Thursday, August 15 Ferrari Owners' Club Concours Carmel

### ***Concours for a Cause***

The Concours for a Cause event was held Tuesday, August 13, 2024 in Devendorf Park from 10:00 a.m. to 4:00 p.m. The event was held on Ocean Avenue between Junipero and Dolores Streets, inclusive of the side streets between Sixth and Seventh Avenues. Event set-up began at 12:00 a.m. and event breakdown was completed by 8:00 p.m. This was the second year for this event in Carmel-by-the-Sea and it featured classic cars organized by country, some of which were previous participants and award winners at past Concours on the Avenue events. In addition there were local artisans creating car centric artwork, as well as music, by The Sun Kings, The Money Band, and the Italian All-stars, and seating for a respite after walking the village. In addition the event organizer partnered with local restaurants to feature them within the event. There were no issues with safety or the load-in/load-out of the event.

### ***Astons on the Avenue***

This was the first year for Astons on the Avenue event, which grew out of parking stall rentals in front of the Meuse Gallery in 2023. The event was held on Wednesday, August 14, 2024 from 10:00 a.m. to 4:00 p.m. on Ocean Avenue from Dolores Street down to Monte Verde Street. Load-in started later than anticipated, but all of the cars were in place by late morning. There were no issues with this small event and they plan to return next year.

### ***Prancing Ponies All Woman Car Show***

The Prancing Ponies event was held Thursday, August 15, 2024 from 10:00 a.m. to 4:00 p.m. This is the 6th year this event was held in the City. Ocean Avenue was closed from Junipero to San Carlos Street. Mission Street was also closed between Red Eagle Lane and Sixth Avenue. Event set-up began at 12:00 a.m. and event breakdown began at 4:00 p.m. There were no major issues with this event.

### ***Ferrari Owners Club Concorso Carmel***

This was the second year of the Concorso held on Thursday, August 16, 2024 from 9:00 a.m. to 4:00 p.m. The event was held on Dolores Street between Ocean and Seventh Avenues. Event set-up began at 1:00 a.m. and breakdown was completed by 7:30 p.m. This judged event featured curated vintage and modern Ferraris and Italian motorcycles, music, interviews with car owners and award ceremony. There were no issues with safety or the load-in/load-out of the event. We will work with the organizers to work towards clearing the event out quicker so we can open up traffic and set up the traffic calming system as close to 6:00pm as possible.

### ***Overall Event Summary***

Overall, each event ran very smoothly and there were no major issues to report. Since Car Week 2022 staff have been receiving feedback that they would like to see a Concours on the Avenue-like event. The village's

patience was rewarded this year with the expansion of Concours for a Cause, the addition of Astons and the Avenue, and the expansion of Prancing Ponies and Concorso Carmel. Staff is looking forward to working with all of the event organizers for 2025.

Further, staff received positive feedback on this year's Czinger event held at the Sunset Center, which had had some issues in 2023 that impacted the neighbors.

## **PARKING STALL PERMITS**

In the early 2000's the City began renting individual parking stalls in the downtown commercial district for non-construction purposes or as part of a special event permit. The purpose of the individual parking stall rentals was intended to allow businesses to set-up valet services during busy times of the year for their patrons or to park prestigious vehicles in front of their businesses to draw visitors to their establishments. Prior to the pandemic parking stall permits were not issued on the Tuesday and Thursday of Car week, due to the all-encompassing size of the events traditionally held on these days - COTA and the Tour. Spaces were rented for the remaining days of the week during Car Week.

Currently, if someone wants to rent a parking stall they must complete a parking stall permit application through the Community Activities Department. If the applicant is requesting the placement of carpet, stanchions, etc. in the parking stall in addition to parking a vehicle they must also submit an Encroachment Permit through the Community Planning and Building Department.

Pricing for the rental of parking stalls is scaled based on the time of year, with higher rental rates during Peak Demand times, including the weeks surrounding the December Holidays, major golf events at Pebble Beach, and during Car Week. The cost for the rental of parking stalls is \$100 per stall/day and \$200 per stall day during Peak Demand Rental time. If the applicant is requesting the placement of carpet, stanchions, etc. in the parking stall in addition to parking a vehicle they must also pay the fee for a Temporary Encroachment. During recent years demand for parking stall permits has been concentrated during and around Car Week, very few if any parking stall permit applications are received around the December Holidays or major golf events.

Last year the Council approved some additional restrictions on parking stall rentals during Car Week that included:

- Vehicles placed in the rented parking stalls remain in that stall for the entire day unless they are actually being used for valet services.
- Businesses who rent the parking stalls understand that they are responsible for whatever happens as a result of that parking stall rental regardless of who owns the vehicle - including providing security to keep onlookers out of the streets.
- No rental of the green zone 30 minute parking stalls at the corners of blocks, as this contributes to congestion around intersections which can be hazardous to onlookers, as well as through traffic.

Staff recommends keeping these restrictions in place for next year. In particular, L'Auberge worked with City staff through multiple meetings to develop a plan for managing crowds and traffic control with private

security with excellent results.

## **TRAFFIC, NOISE, AND SAFETY IMPACTS**

Again, as in past years, Carmel-by-the-Sea was inundated with specialty vehicles known as “exotics”. Exotics are a group of exclusive and expensive high performance vehicles owned or rented by enthusiasts and members of car clubs. “Exotic” cars have a large following and can draw substantial crowds and car enthusiast videographers who produce videos and other content for display on the internet and social media sites. Subgroups of exotics enthusiasts also enjoy demonstrating the engine power and high performance capabilities of exotic cars and similar cars designed for street racing. These enthusiasts or groups have in the past taken over streets and intersections in towns and cities to conduct illegal street races or to engage in reckless driving behavior in events called “Sideshows”. Groups and enthusiasts sometimes use messaging platforms like Twitter, Snapchat, You Tube, and/or Facebook to post videos of reckless driving and illegal car show activities. They also utilize social media to post the intended location of street racing sites with the intent to draw crowds to be spectators to dangerous acts, including speeding and burnouts through intersections. These groups have come to Carmel-by-the-Sea in the past and continue to conduct illegal “Sideshow” events all over the country.

Due to previous illegal “sideshows” in Carmel-by-the-Sea during Car Week, the City and Police Department coordinated plans to implement traffic calming measures on Ocean Avenue in the evenings to deter the take over of intersections on Ocean Avenue. Carmel-by-the-Sea has become known as a location where some of the most expensive and rare exotic cars are on display and drive the streets during car week. The high end exotics were parked on display throughout Car Week and were here in our City the entire week.

Like previous years, the high end exotic cars were parked in and around the downtown area prominently presented and displayed. Due to the multiple county wide events throughout the week it appeared more visitors ascended to our city to view the exotics parked everywhere after hours. By Friday and Saturday, there were large groups of people in town all day to view the cars, and the crowds increased into the evenings as other local events concluded. In response to past activity, the Police Department was able to control and dissipate the crowds using planned staffing of additional personnel, planned traffic calming measures on Ocean Avenue, engineered controls of traffic to alleviate cruising activities, and by utilizing mutual aid from neighboring agencies, including the traffic units from STOPP (Strategic Traffic Observation and Prevention Program) made up of units from Carmel, Monterey, Marina, and Salinas Police Departments.

As in years past, the Police Department took a “No Tolerance” approach to dangerous driving and to that end officers conducted 141 traffic stops for various violations including; Speeding, Exhibition of Speed, Reckless Driving, Registration Violations and Modified Exhaust. The Police Department also made two DUI arrests. The Police Department also issued approximately 447 parking citations for the week.

This year, the City experimented with speed bump traffic calming measures on Ocean Ave which proved successful at slowing down traffic entering and exiting the village. We also utilized our VIP program (Volunteers in Policing) program throughout the week. The VIPs were helpful in the successful outcome of these events by providing direction and guidance to event attendees. They provided a total of 45 hours of service during these events.

## **SURVEY RESULTS**

After Car Week, staff issued a survey to the community seeking feedback on the events held in Carmel and Car Week overall (**Attachment 1**). There were 379 respondents and 151 of those were residents of 93921. Of all respondents 66.7% loved Car Week overall, 17.5% thought it was okay, and 15.9% did not like it at all. Last year 35% of respondents did not like Car Week in Carmel which decreased this year by close to 20%.

The stronger approval rating for 2024 was due in part to the expansion of the Concours for a Cause events which received very positive feedback this year, as well as the expansion of the Ferrari Owners' Club event on Thursday, and the addition of Astons on the Avenue. In terms of number of events, event layout throughout the downtown and overall feeling, this was the closest Car Week has been to the pre-pandemic days of Concours on the Avenue and the Tour d'Elegance.

Events continue to mostly receive positive ratings. The community's largest concerns and complaints around Car Week center around dangerous and reckless driving in Carmel and around the peninsula, disrespectful visitors, and noise. As with last year's survey, traffic and noise impacts were of concern, not only in the village, but peninsula wide, posing challenges for locals getting to appointments, school and work. Staff does participate in interjurisdictional meetings - both for public safety agency communications and planning, and for staff processing special event permits. While these concerns are discussed, at the staff level, it would likely take a larger change in mindset not only between all of the jurisdictions regarding number of and timing of events, but also that of the business and hospitality community who are a driving force championing the economic benefits of Car Week for the entire peninsula.

## **PLANNING FOR 2025**

At the conclusion of Car Week, the Police Department made an evaluation of efforts and will be looking to re-evaluate traffic calming and engineered controls, staffing and planning of events, seek direction on how Car Week may be adjusted next year and in years to come, and evaluate best practices and implement changes to our planning and event management based on the expectations of Council, residents, and the business communities.

Staff recommends the following for next year to try mitigate the some negative effects of Car Week:

- Continuing to refine traffic calming measures in the downtown business district to seriously deter the cruising behavior that draws the exotics or similarly-minded car enthusiasts who come to Carmel to view and film the cars in the evenings.
- Continuing to work with event organizers to ensure security and non-police staffing for their events so that the Police Department can reserve resources for the evenings or other times to ensure Village security and to ensure a timely emergency response.
- Continuing to work with regional and state law enforcement assets to monitor car events and social media for information on illegal car activities.
- Continuing to enforce the "No Tolerance" approach to dangerous or illegal street activity.
- Continuing to work with Peninsula L.E. partners in developing mutual aid responses for partner cities,

including more planned resource sharing in the City.

- Continuing to improve signage and messaging through press, media, and social media to directly educate the public and potential visitors on Carmel-by-the-Sea event events and plans for road closures and police enforcement of traffic and parking rules.

Staff are also looking for Council direction on the following proposed additional mitigation tactics for next year:

- Increasing fines for certain violations of the Municipal Code during Car Week.
- Completely closing Ocean Ave during the evening hours to mitigate the street takeover/block party mentality and create a safe, friendly walking environment.
- Implementing the aforementioned modifications for the rental of parking stalls during Car Week

## **CONCLUSION**

All of the permitted events held in Carmel-by-the-Sea went very smoothly this year and staff are looking forward to working with event organizers to start planning for Car Week 2025.

The traffic calming measures deployed on Ocean Avenue worked well to deter many of the fuel run groups, “side show” events, and street takeovers. City staff will look for ways to continue to improve these types of measures, in addition to exploring the deployment of strategically placed temporary speed bumps and other traffic calming measures at other potential key spots within the City limits.

Through thoughtful planning and coordination within City departments and other outside jurisdictions, staff will continue to strive to improve the safety and success of future Car Week events, and the safety of the village overall, as Car Week continues to grow in size and attendance throughout the peninsula.

## **FISCAL IMPACT:**

There is no fiscal impact associated with receiving this report.

## **PRIOR CITY COUNCIL ACTION:**

The Council receives an after-action report on Car Week each October.

## **ATTACHMENTS:**

Attachment 1) Car Week Survey (Responses) Link

2024 Car Week Survey Results

Timestamp	I am:	How did you feel about Car Week in Carmel-by-the-Sea overall this year?	Why do you feel that way?
8/23/2024 14:55:11	A worker in 93921	It was okay.	Wish there were free snacks and drinks to give out
8/23/2024 17:01:42	A resident of 93921	It was okay.	Concours for a Cause was a hit. The other events were just ok.
8/23/2024 17:37:46	A resident of 93921	It was okay.	It was noisy, but am happy to see people having fun.
8/23/2024 17:45:18	police dept volunteer	Loved it.	It was such an upgraded 3 day event.....the cars, the bands, even the people attending were upgraded'

To view the entire 2024 Car Week Survey Results, go to our website here: [https://ci.carmel.ca.us/sites/main/files/file-attachments/2024\\_car\\_week\\_survey\\_responses\\_for\\_website.pdf](https://ci.carmel.ca.us/sites/main/files/file-attachments/2024_car_week_survey_responses_for_website.pdf)



# CITY OF CARMEL-BY-THE-SEA CITY COUNCIL Staff Report

October 1, 2024  
ORDERS OF BUSINESS

<b>TO:</b>	Honorable Mayor and City Council Members
<b>SUBMITTED BY:</b>	Paul Tomasi, Chief of Police & Public Safety Director
<b>APPROVED BY:</b>	Chip Rerig, City Administrator
<b>SUBJECT:</b>	Receive a report from the Traffic Safety Committee on a proposed plan regarding the implementation of AB413 and provide direction

## RECOMMENDATION:

Receive a report from the Traffic Safety Committee on a proposed plan regarding the implementation of AB413 and provide direction.

## BACKGROUND/SUMMARY:

On October 2023, Governor Gavin Newsom signed assembly Bill 413 (AB413) into law (**Attachment 1**). The bill was authored by assembly member Alex Lee of San Jose and aims to increase visibility at crosswalks across California. The bill went into effect January 1, 2024 and adds a section to the existing California Vehicle Code Section; 22500: Stopping, Standing & Parking.

AB413, more commonly known as the Daylighting Bill went into effect January 1, 2024, with enforcement required to begin on January 1, 2025.

The added language to the California Vehicle Code Section 22500 is as follows: (n)(1)(A) Within 20 feet of the vehicle approach side of any marked or unmarked crosswalk or within 15 feet of any crosswalk where a curb extension is present.

Additional language to Section 22500 includes options for implementation and compliance of the law.

**Option #1:** A local authority may establish a different distance if both of the following requirements are met; (1) The local authority establishes the different distance by ordinance that includes a finding that the different distance is justified by established traffic safety standards; and (2) A local authority has marked the different distance at the intersections using paint or signs.

**Option #2:** A local authority may permit commercial vehicle loading or unloading within 20 feet of the vehicle approach side of any marked or unmarked crosswalk or within 15 feet of any crosswalk where a curb extension is present if both of the following requirements are met. (A) A local authority authorizes the commercial loading and unloading by ordinance and identifies the crosswalk or crosswalks in the ordinance; and (B) A local authority has marked the commercial loading and unloading areas with paint or signage.

**Option #3:** A local authority may permit spaces be used for bicycles or motorized scooters within 20 feet of a crosswalk.

In order to develop a plan for the city, where we meet the requirements of AB413, and increase pedestrian safety, staff took a three step approach to the proposed pan.

**Step 1: Analyze accident data for the village:**

- Over the past six years, analyzing accident data from 2019 to August 2024 there have been a total of 9 pedestrian versus vehicle accidents. Of those 9, only one potentially would have been avoided by the requirements of AB413. In this single accident, a contributing factor was darkness due to the time of night, which impacted the driver’s ability to see the person in the crosswalk. In all other accidents, improving the sight view on the approach side of the intersection would not have made a difference in the outcome of the accident as the visibility being gained by this law would not have changed the outcome.

**Step 2: Identify the intersections that have the highest probability for pedestrian versus vehicle accidents:**

- This study focused on primarily the business district, including streets and intersections from Junipero to Monte Verde, and 5th Avenue to 8th Avenue.
- Intersections with the heaviest traffic and pedestrian traffic were identified.
- Intersections were identified by staff were primarily along Ocean Avenue and the intersections surrounding Devendorf Park.

**Step 3: Determine the number of spaces in the business district.**

Staff initially tallied all of the parking spaces available in the core of the village, consisting of Junipero to Monte Verde and 5th Avenue to 8th Avenue. Spaces counted include 2-hour, Commercial loading, 30/10-minute zones, and Disabled parking. Spaces not included are Hotel Loading Zones and spaces contained within parking lots or curbs that are already painted red.

**Current Parking Stock (Attachment 2):**

810 total spaces:

- 696 Two-hour parking spaces
- 102 Thirty/Ten minute zones
- 8 Commercial Loading Zones
- 4 Disabled Parking

The development of the proposed plan took into consideration the large number of 30-minute parking zones in the village and looked for opportunities to convert a number of these spaces into 20-minute commercial vehicle loading zones. This would still allow short term parking for vehicles.

The following plan, besides being flexible, may also help reduce the number of small vehicles double parking, which is often done for pick-ups and/or deliveries. The double parking creates lane closures which impacts traffic flow and increases an arguably greater risk to pedestrians. This plan does not address full size trucks which legally still can double park for deliveries.

**Staff proposes the following plan (Attachment 3):**



<b>810 Total Spaces</b>	<b>Previously</b>
687 Two-Hour Spaces	(696)
42 Thirty/Ten minute zones (Green)	(102)
39 Commercial Loading Zones (Yellow)	(8)
8 Bicycle/Motorized Scooter Spaces (White)	(0)
4 Disabled Spaces (Blue)	(4)
30 Red No Parking Spaces (Red)	(0)

Staff completed a study of the remainder of the city where spaces would be impacted by AB413. The following intersections were identified, and staff has made recommendations for these intersections.

- Junipero & 4<sup>th</sup> - Center Median - Red
- Mission & 4<sup>th</sup> - NE Corner - Loading
- Mission & 4<sup>th</sup> - NW Corner - Loading
- San Carlos & 4<sup>th</sup> - SE Corner - Loading
- San Carlos & 4<sup>th</sup> - NE Corner - Loading
- San Carlos & 12<sup>th</sup> - SE Corner - Red
- San Carlos & 9<sup>th</sup> - SE Corner - Loading
- San Carlos & 9<sup>th</sup> - SW Corner - Loading
- Dolores & 9<sup>th</sup> - SW Corner - Loading
- Casanova & 8<sup>th</sup> - NE Corner - Red
- Camino Real & 8<sup>th</sup> - NE Corner - Loading
- Camino Real & 8<sup>th</sup> - SW Corner - Loading
- Carmelo & 8<sup>th</sup> - NE Corner - Loading
- Carmelo & 8<sup>th</sup> - SE Corner - Loading
- San Antonio & 8<sup>th</sup> - NE Corner - Red
- Camino Real & 7<sup>th</sup> - NE Corner - Red

A total of:

- Five (5) Red Zones
- Eleven (11) Commercial Loading Zones

This plan was presented to the Traffic Safety Committee on August 28, 2024. The Traffic Safety Committee received the report with a proposal to bring the final plan to City Council for approval and recommendations.

This plan gets us compliant with AB413 and allows for flexibility based on future needs of the city while limiting the impact on our existing available parking. Future changes to the plan would be made by the Traffic Safety Committee, unless required to be made through the City Council. If approved by Council, staff will return in November for the first reading of an ordinance identifying the parking spaces being converted to Commercial Loading Zones and begin implementation of the proposed plan.

### **FISCAL IMPACT:**

There is virtually no additional fiscal impact as the proposed plan involves the application of paint by Public

Works, which is already a function fully budgeted by the Department.

**PRIOR CITY COUNCIL ACTION:**

None

**ATTACHMENTS:**

Attachment 1) AB 413 Vehicle Code Amendment

Attachment 2) Existing Parking Map

Attachment 3) Proposed Parking Map

**Assembly Bill No. 413**

CHAPTER 652

An act to amend Section 22500 of the Vehicle Code, relating to vehicles.

[ Approved by Governor October 10, 2023. Filed with Secretary of State October 10, 2023. ]

**LEGISLATIVE COUNSEL'S DIGEST**

AB 413, Lee. Vehicles: stopping, standing, and parking.

Existing law prohibits the stopping, standing, or parking of a vehicle in certain places and under certain conditions, including within an intersection, on a sidewalk or crosswalk, or in front of a fire station. Existing law additionally authorizes local jurisdictions to, by ordinance, restrict parking in certain areas, at certain times, and for certain reasons, and to establish metered parking.

This bill would prohibit the stopping, standing, or parking of a vehicle within 20 feet of the vehicle approach side of any unmarked or marked crosswalk or 15 feet of any crosswalk where a curb extension is present, as specified. The bill would, prior to January 1, 2025, authorize jurisdictions to only issue a warning for a violation, and would prohibit them from issuing a citation for a violation, unless the violation occurs in an area marked using paint or a sign.

By restricting parking in certain areas, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

**Digest Key**

Vote: MAJORITY Appropriation: NO Fiscal Committee: YES Local Program: YES

**Bill Text**

**The people of the State of California do enact as follows:**

**SECTION 1.**

Section 22500 of the Vehicle Code is amended to read:

**22500.**

A person shall not stop, park, or leave standing any vehicle whether attended or unattended, except when necessary to avoid conflict with other traffic or in compliance with the directions of a peace officer or official traffic control device, in any of the following places:

- (a) Within an intersection, except adjacent to curbs as may be permitted by local ordinance.
- (b) On a crosswalk, except that a bus engaged as a common carrier or a taxicab may stop in an unmarked crosswalk to load or unload passengers when authorized by the legislative body of a city pursuant to an ordinance.
- (c) Between a safety zone and the adjacent right-hand curb or within the area between the zone and the curb as may be indicated by a sign or red paint on the curb, which sign or paint was erected or placed by local authorities pursuant to an ordinance.
- (d) Within 15 feet of the driveway entrance to a fire station. This subdivision does not apply to any vehicle owned or operated by a fire department and clearly marked as a fire department vehicle.
- (e) (1) In front of a public or private driveway, except that a bus engaged as a common carrier, schoolbus, or a taxicab may stop to load or unload passengers when authorized by local authorities pursuant to an ordinance.  
  
(2) In unincorporated territory, where the entrance of a private road or driveway is not delineated by an opening in a curb or by other curb construction, so much of the surface of the ground as is paved, surfaced, or otherwise plainly marked by vehicle use as a private road or driveway entrance, shall constitute a driveway.
- (f) On a portion of a sidewalk, or with the body of the vehicle extending over a portion of a sidewalk, except electric carts when authorized by local ordinance, as specified in Section 21114.5. Lights, mirrors, or devices that are required to be mounted upon a vehicle under this code may extend from the body of the vehicle over the sidewalk to a distance of not more than 10 inches.
- (g) Alongside or opposite a street or highway excavation or obstruction when stopping, standing, or parking would obstruct traffic.
- (h) On the roadway side of a vehicle stopped, parked, or standing at the curb or edge of a highway, except for a schoolbus when stopped to load or unload pupils in a business or residence district where the speed limit is 25 miles per hour or less.
- (i) Except as provided under Section 22500.5, alongside curb space authorized for the loading and unloading of passengers of a bus engaged as a common carrier in local transportation when indicated by a sign or red paint on the curb erected or painted by local authorities pursuant to an ordinance.

(j) In a tube or tunnel, except vehicles of the authorities in charge, being used in the repair, maintenance, or inspection of the facility.

(k) Upon a bridge, except vehicles of the authorities in charge, being used in the repair, maintenance, or inspection of the facility, and except that buses engaged as a common carrier in local transportation may stop to load or unload passengers upon a bridge where sidewalks are provided, when authorized by local authorities pursuant to an ordinance, and except that local authorities pursuant to an ordinance or the Department of Transportation pursuant to an order, within their respective jurisdictions, may permit parking on bridges having sidewalks and shoulders of sufficient width to permit parking without interfering with the normal movement of traffic on the roadway. Local authorities, by ordinance or resolution, may permit parking on these bridges on state highways in their respective jurisdictions if the ordinance or resolution is first approved in writing by the Department of Transportation. Parking shall not be permitted unless there are signs in place, as may be necessary, to indicate the provisions of local ordinances or the order of the Department of Transportation.

(l) In front of or upon that portion of a curb that has been cut down, lowered, or constructed to provide wheelchair accessibility to the sidewalk.

(m) In a portion of a highway that has been designated for the exclusive use of public transit buses.

(n) (1) (A) Within 20 feet of the vehicle approach side of any marked or unmarked crosswalk or within 15 feet of any crosswalk where a curb extension is present.

(B) Notwithstanding subparagraph (A), a local authority may establish a different distance if both of the following requirements are met:

(i) A local authority establishes the different distance by ordinance that includes a finding that the different distance is justified by established traffic safety standards.

(ii) A local authority has marked the different distance at the intersection using paint or a sign.

(2) Notwithstanding paragraph (1), a local authority may permit commercial vehicle loading or unloading within 20 feet of the vehicle approach side of any marked or unmarked crosswalk or within 15 feet of any crosswalk where a curb extension is present if both of the following requirements are met:

(A) A local authority authorizes the commercial vehicle loading and unloading by ordinance and identifies the crosswalk or crosswalks in the ordinance.

(B) A local authority has marked the commercial loading and unloading areas with paint or signage.

(3) Notwithstanding paragraph (1), a local authority may permit parking for bicycles or motorized scooters within 20 feet of a crosswalk.

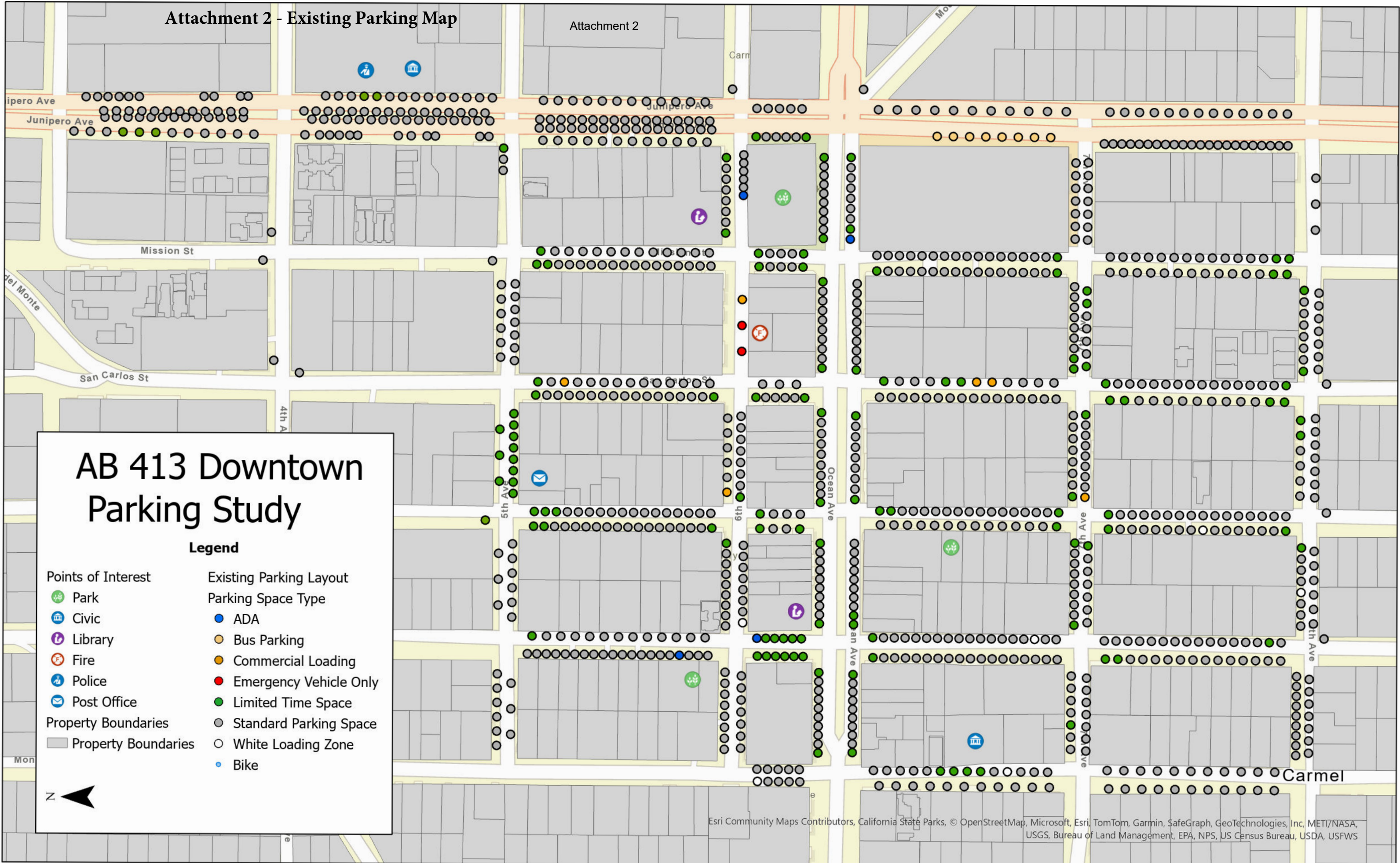
(4) Prior to January 1, 2025, jurisdictions may only issue a warning, and shall not issue a citation, for a violation unless the violation occurs in an area marked using paint or a sign.

## **SEC. 2.**

If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

# Attachment 2 - Existing Parking Map

Attachment 2



## AB 413 Downtown Parking Study

### Legend

#### Points of Interest

- Park
- Civic
- Library
- Fire
- Police
- Post Office

#### Property Boundaries

- Property Boundaries

#### Existing Parking Layout

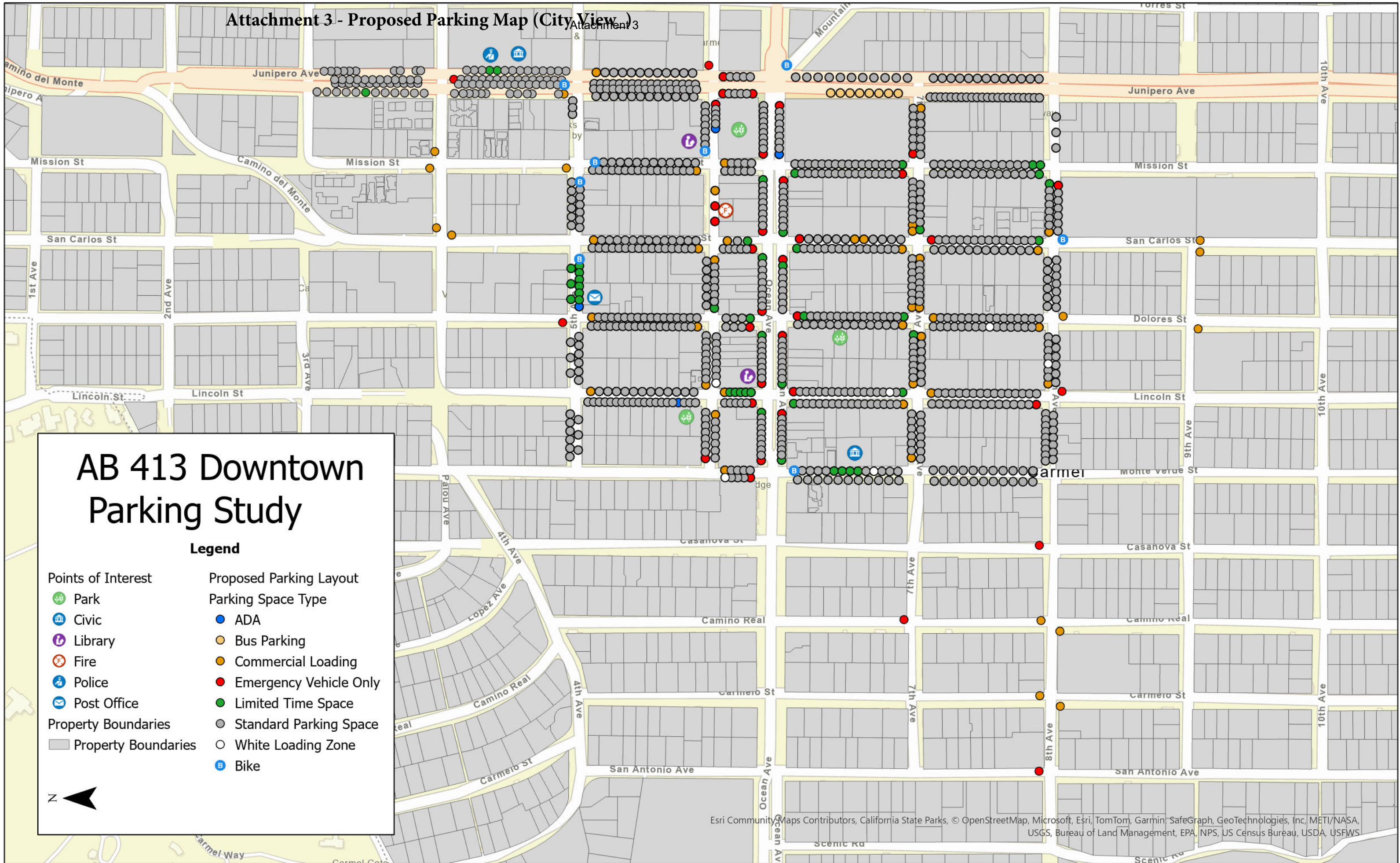
##### Parking Space Type

- ADA
- Bus Parking
- Commercial Loading
- Emergency Vehicle Only
- Limited Time Space
- Standard Parking Space
- White Loading Zone
- Bike



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# Attachment 3 - Proposed Parking Map (City View)



## AB 413 Downtown Parking Study

### Legend

#### Points of Interest

- Park
- Civic
- Library
- Fire
- Police
- Post Office

#### Property Boundaries

- Property Boundaries

#### Proposed Parking Layout

##### Parking Space Type

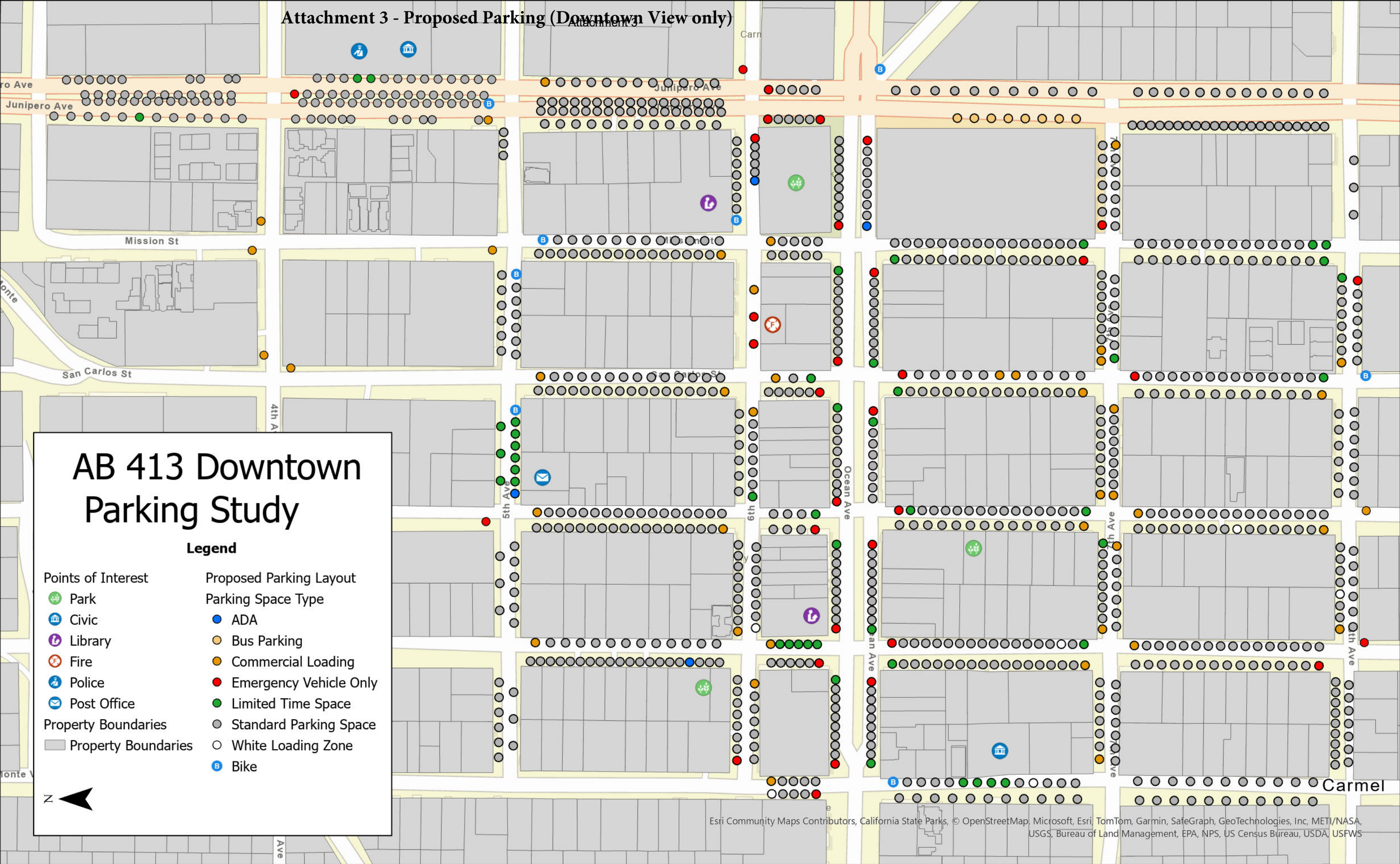
- ADA
- Bus Parking
- Commercial Loading
- Emergency Vehicle Only
- Limited Time Space
- Standard Parking Space
- White Loading Zone
- Bike



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Attachment 3 - Proposed Parking (Downtown View only)



# AB 413 Downtown Parking Study

## Legend

### Points of Interest

- Park
- Civic
- Library
- Fire
- Police
- Post Office

### Property Boundaries

- Property Boundaries

### Proposed Parking Layout

#### Parking Space Type

- ADA
- Bus Parking
- Commercial Loading
- Emergency Vehicle Only
- Limited Time Space
- Standard Parking Space
- White Loading Zone
- Bike



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# CITY OF CARMEL-BY-THE-SEA CITY COUNCIL Staff Report

October 1, 2024  
ORDERS OF BUSINESS

<b>TO:</b>	Honorable Mayor and City Council Members
<b>SUBMITTED BY:</b>	Robert Harary, P.E, Director of Public Works
<b>APPROVED BY:</b>	Chip Rerig, City Administrator
<b>SUBJECT:</b>	Resolution 2024-085 authorizing the City Administrator to execute a construction contract with Sharp Engineering & Construction, Inc., in an amount, including a contingency, of \$503,470 for the San Antonio Avenue Pedestrian Pathway Reconstruction Project

## RECOMMENDATION:

Adopt Resolution 2024-085 authorizing the City Administrator to execute a construction contract with Sharp Engineering & Construction, Inc., in an amount, including a contingency, of \$503,470 for the San Antonio Avenue Pedestrian Pathway Reconstruction Project.

## BACKGROUND/SUMMARY:

The San Antonio Avenue Pedestrian Pathway, located on the west side between Second and Fourth Avenues, was damaged by winter storms in early 2023. FEMA funding was promptly sought for reconstruction costs. While over \$100,000 of FEMA reimbursement is anticipated for storm damage, debris removal, and beach access, funding for these pathway repairs was not successful.

In January 2024, the City Administrator executed a Professional Services Agreement with ZFA Engineering, a local structural engineering firm, for design plans, structural calculations, technical specifications, and construction support for repairs needed to restore both this San Antonio Pathway and for approximately eight damaged walls surrounding the Sunset Center complex, for a combined not-to-exceed fee of \$55,500. The fee to design the San Antonio Pathway of \$19,500 was funded out of the Public Works/Streets and Forestry operating budgets in Fiscal Year (FY) 2023/24 and was substantially completed by the end of last FY. The plans and supporting documents were reviewed by the Building Department for a Building Permit readiness review. The design process revealed that the original construction was deficient in that while the original buried concrete piers were fine, the wooden lagging and posts supporting the grape stake fencing was not properly connected to the piers. Consequently, stormwater traveled along the west edge of the pathway, rotting the wooden lagging and bases of the wooden posts, resulting in the fence falling down.

In June 2024, Council adopted the Capital Improvement Program (CIP) Budget for FY 2024/2025 which included \$550,000 for the San Antonio Avenue Pedestrian Pathway Reconstruction Project, and a CIP

Contingency Fund of \$400,000 to cover any cost overruns that may occur during this current FY.

In July, the City's Project Management consultants at Ausonio, Inc. completed the plan reviews, compiled bidding and construction contract documents, and provided support during the bidding phase. Bid advertisement notices were published in the Carmel Pine Cone, Central Coast Builders Association, and posted on the City's and other public purchasing websites. In addition, courtesy calls and emails were sent to 30 contractors, including to the six contractors who attended the pre-bid meeting and site tour which took place on August 6th.

Three responsive, responsible bid proposals were received and opened at a Public Bid Opening held on August 29, 2024, with the following results:

<b>Bidder</b>	<b>Bid Amount</b>
Sharp Engineering & Construction, Inc.	\$437,800
Tyman Construction	490,000
The Don Chapin Company	739,000

Sharp Engineering & Construction's bid of \$437,800 is 3% below the Project Team's cost estimate of \$450,000.

Located in the Carmel Crossroads and established in 2009, Sharp Engineering & Construction possesses both Class A - General Engineering and B - General Building Contractor's licenses. They had favorable references, and in the past few years have completed several projects of a similar type and scope, including Public Works projects for the Carmel Area Wastewater District, City of Pacific Grove, California State Parks, and Sunnyslope Water District in Hollister.

The repair involves excavating around 44 concrete piers, constructing steel-reinforced concrete pier caps to support new steel column posts, replacing the wood lagging, installing grape stake fencing to match the appearance of the original fence, and restoring the pathway. Because much of the project involves underground construction on top of existing retaining walls in a narrow work zone, a 15% construction contingency of \$65,670 is recommended.

Work will take approximately three months to complete from the Notice to Proceed, weather permitting. Construction work will require the removal and pruning of a significant number of shrubs in the public right-of-way under the direction of the City Forester. Depending on the Contractor's proposed equipment and construction operations, up to three, non-significant City trees may also need to be removed and/or pruned. City crews will provide replanting following construction.

Construction will require the southbound lane of San Antonio Avenue, between Second and Fourth Avenues, to be shut down for construction staging and operations; however, all private driveways will remain accessible. The north-bound lane of San Antonio Avenue going into Pebble Beach will remain open. Southbound traffic from Pebble Beach into Carmel will need to detour east onto Second Avenue and then south on Camino Real to the end of the detour on Fourth Avenue. The Police Department agrees that this is the preferred detour plan during construction. As the City's construction managers, Ausonio will coordinate with the contractor to provide notifications to all affected residents and communicate regular updates as construction progresses.

Please note that a majority of the work will be completed along San Antonio Avenue in the southerly one third of the project site and the northerly one third of the site. The middle portion of the fence, approximately mid-way between Second and Fourth Avenues, did not encounter damage and does not warrant

reconstruction.

### FISCAL IMPACT:

In June 2024, Council adopted the CIP Budget for FY 2024/2025 which included \$550,000 for this Project in CIP Account Number 301-311-00-43008. Council also approved a separate CIP Contingency Fund of \$400,000 for any CIP project that may need additional funds to proceed into construction.

The total estimated cost for this Project in the current FY, including the cost for the proposed construction contract with contingency of \$503,470, as well as required special building code inspections and geotechnical testing, are listed below.

No.	Company	Services	Cost
1	Ausonio, Inc.	Construction Management	\$45,000
2	ZFA Structural Engineers	Design Support during Construction	7,200
4	Sharp Engineering & Construction, Inc.	Construction – Base Bid	437,800
5	Sharp Engineering & Construction, Inc.	15% Contingency for Unforeseen Conditions	65,670
6	Moore Twinning & Assoc	Special Welding and Anchor Inspections (on-call)	15,000
7	Haro, Kashunich & Assoc	Geotechnical and Concrete Testing (on-call)	7,410
	<b>Total Cost</b>		<b>\$578,080</b>

The total estimated Project cost of \$578,080 would deplete the \$550,000 CIP Budget appropriated for this Project. The balance needed to award the construction contract of \$28,080 is available from the \$400,000 CIP Contingency Fund and would leave \$371,920 (93%) available in the Contingency Fund for any future needs.

### PRIOR CITY COUNCIL ACTION:

In June 2024, Council adopted Resolution 2024-047 adopting the FY 2024/25 CIP Budget which appropriated \$550,000 for the San Antonio Pedestrian Pathway Reconstruction Project plus \$400,000 for a separate CIP Contingency Fund.

In July 2024, Council adopted Resolution 2024-052 approving Amendment No. 2 to the Professional Services Agreement with Ausonio, Inc. to continue to manage the design and construction of five CIP projects, including this Project, during FY 2024/25 for a total not-to-exceed fee of \$125,000.

### ATTACHMENTS:

Attachment 1) Resolution 2024-085

**CITY OF CARMEL-BY-THE-SEA  
CITY COUNCIL**

**RESOLUTION NO. 2024-085**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF CARMEL-BY-THE-SEA AUTHORIZING THE CITY ADMINISTRATOR TO EXECUTE A CONSTRUCTION CONTRACT WITH SHARP ENGINEERING & CONSTRUCTION, INC., IN AN AMOUNT, INCLUDING A CONTINGENCY, OF \$503,470, FOR THE SAN ANTONIO AVENUE PEDESTRIAN PATHWAY RECONSTRUCTION PROJECT**

WHEREAS, the San Antonio Avenue Pathway fencing, located on the west side between Second and Fourth Avenues, was damaged by winter storms in early 2023; and

WHEREAS, in January 2024, the City Administrator executed a Professional Services Agreement with ZFA Engineering to prepare structural design plans, calculations, and specifications for repairs needed to restore the Pathway; and

WHEREAS, in June 2024, Council adopted Resolution 2024-047 approving the Fiscal Year (FY) 2024/25 Capital Improvement Program (CIP) Budget which appropriated \$550,000 to fund this Project and established a separate CIP Contingency Fund in the amount of \$400,000 for any CIP project that may need additional funds to proceed into construction; and

WHEREAS, in July 2024, Council approved Amendment No. 2 to the Professional Services Agreement with Ausonio, Inc. to continue to provide Project and Construction Management services to oversee five CIP projects, including this Project; and

WHEREAS, three responsive construction bids were received at the Public Bid Opening held on August 29, 2024; and

WHEREAS, Sharp Engineering & Construction, Inc., of Carmel, submitted the lowest base bid of \$437,800 which was 3% below the Project Team's cost estimate; and

WHEREAS, due to risks associated with underground construction on top of existing retaining walls within a narrow work zone, a 15% contingency of \$65,670 is recommended, resulting in a total contract amount of \$503,470; and

WHEREAS, the total estimated Project cost for FY 2024/25, including the cost for construction with contingency, plus fees for construction management, engineering design support, special materials inspections, and geotechnical and concrete testing during construction, is \$578,080 which exceeds the \$550,000 CIP funding appropriated for this Project; and

WHEREAS, the balance needed of \$28,080 is available in the CIP Contingency Fund for FY 2024/25, leaving 93% of the Contingency Fund remaining for any CIP project that may need additional funds to proceed into construction; and

WHEREAS, a temporary detour will be required during construction limiting one-way travel along San Antonio Avenue, between Second and Fourth Avenues, with a detour via Second Avenue, Camino Real, and onto Fourth Avenue.

**NOW, THEREFORE, BE IT RESOLVED THAT THE CITY COUNCIL OF THE CITY OF CARMEL-BY-THE-SEA DOES HEREBY:**

Authorize the City Administrator to execute a Construction Contract with Sharp Engineering & Construction, Inc., in an amount, including a 15% contingency, of \$503,470 for the San Antonio Avenue Pedestrian Pathway Reconstruction Project.

**PASSED AND ADOPTED BY THE CITY COUNCIL OF THE CITY OF CARMEL-BY-THE-SEA this 1st day of October, 2024, by the following vote:**

AYES:

NOES:

ABSENT:

ABSTAIN:

APPROVED:

ATTEST:

---

Dave Potter  
Mayor

---

Nova Romero, MMC  
City Clerk



# CITY OF CARMEL-BY-THE-SEA CITY COUNCIL Staff Report

October 1, 2024  
ORDERS OF BUSINESS

<b>TO:</b>	Honorable Mayor and City Council Members
<b>SUBMITTED BY:</b>	Robert Harary, P.E, Director of Public Works
<b>APPROVED BY:</b>	Chip Rerig, City Administrator
<b>SUBJECT:</b>	Receive a follow up presentation by Wave Astound Broadband to address public comments regarding their Fiber Optic Project and authorize issuance of an Encroachment Permit with Special Conditions of Approval.

## RECOMMENDATION:

Receive a follow up presentation by Wave Astound Broadband to address public comments regarding their Fiber Optic Project and authorize issuance of an Encroachment Permit with Special Conditions of Approval.

## BACKGROUND/SUMMARY:

At the October 3, 2023 City Council meeting, Public Works staff and a representative of Wave Astound Broadband (Wave) presented a proposed Fiber Optic Project that has been in review in some form with the City since 2017. The bulk of the Project consists of installing a continuous fiber optic cable attached to existing PG&E power poles in the northern and central portions of the City, and installing a segment of fiber optic conduit below San Carlos Street between Ocean and Seventh Avenues. The Staff Report, which includes the Project Location Map, is included in **Attachment 1**.

The Public Works and Community Planning and Building Departments have performed extensive reviews of the proposed Project alignment, plans, and potential impacts. Thirty Nine (39) Special Conditions of Approval to a proposed Encroachment Permit were prepared to minimize public disruption during and after installation, and all conditions were accepted by Wave. Included in the permit application process was an Arborist Report documenting all trees in the easterly half of the Project. Although aerial cables are to be installed through existing tree crowns, no trees will be removed, and utility pruning, which is expected to be minimal, will be performed by a Certified Arborist with utility line clearance certification under the direction of the City Forester.

Once started, construction is anticipated to last approximately three months, pending weather conditions. Wave will provide construction management over their contractors, and Public Works will lead the oversight during construction and help resolve problems as they arise. The Directors of Public Works and Public Safety have the authority to immediately shut down the Project if serious problems or safety issues arise.

## October 2023 Council and Public Comments and Responses

At the October meeting, Councilmembers and the public voiced various questions and concerns regarding the proposed Project. Council directed staff to work with Wave to address these comments and return to Council with responses.

Below are the questions and comments received at that meeting and our collective responses. At the next Council meeting, Wave will expand on certain responses, such as how the existing poles are checked to ensure their stability when the additional cable is added, size and weight of the cable, pros and cons for undergrounding at this time, customer service ratings, and potential benefits for upgrading the fiber optic network.

**1. Question: Can the public see Wave's Application?**

Response: The Permit Application is included in **Attachment 2**. The construction plans, traffic control plans, technical reports, and other information are available for review at the Public Works Office upon appointment. Staff does not recommend attaching all of the detailed plans and technical documents to the Staff Report.

**2. Question: Was the weight of the cable evaluated with the structural integrity of the power poles they are being placed on?**

Response: Yes. Up to eight support anchors or guy wires are required to reinforce the poles. See also Question 15 and a letter from Wave shown in **Attachment 5**.

**3. Question: Can Wave ensure the Project will be constructed in its entirety and to the satisfaction of the City? Can they post a Performance Bond?**

Response: In response to this comment, a Special Condition of Approval was added to require Wave to post a Performance Bond in the amount of \$100,000. See **Attachment 3**, Condition #4.

**4. Comment: This Project is not minor and is not Exempt under the California Environmental Quality Act (CEQA).**

Response: Staff confirmed that this Project is exempt from CEQA in accordance with Section 15303 (Class 3) of the CEQA Statutes.

**5. Question: Will the cable be attached to any trees?**

Response: No.

**6. Question: Will more fiber optic lines be installed in the City?**

Response: Possibly from Wave and/or other utility providers in the future. This would require a separate Encroachment Permit(s) and project-specific Conditions of Approval based on the scope of the proposed future projects.

**7. Question: Is Wave entitled to install the new Fiber Optic as a matter of right? \_**

Response: The company has a state franchise to use the public right-of-way for their new fiber optic facilities, but it is subject to the City's authority to reasonably determine whether the proposed installations will incommode the public use of the streets. This can include a consideration of aesthetics. The City cannot charge a fee for using the public right-of-way, but can charge for permits.



**8. Question: What discretion does the City have regarding this item in terms of either denying the encroachment permit or imposing conditions?**

Response: Under state law, denial is allowed if the installation would incommode the public use. The City established the criteria for exercising its authority over utility encroachments in Carmel Municipal Code (CMC) Chapter 12.08, (see 12.08.050 and 12.08.060 among others), for the standards, process, and some conditions. The City would have to approve the application if the applicant meets the code standards. Conditions of approval are common. They must be reasonable and proportionate. Also refer to Special Legal Counsel analysis in **Attachment 6**.

**9. Question: Is the City entitled to collect a Franchise fee for this project?**

Response: The City will not receive any Franchise Fees for the proposed fiber cable for the following reasons. Under state law, local governments have no authority to grant or refuse to grant franchises to communications companies to allow them to use local public rights of way. Franchises are granted pursuant to state law. Telephone companies have a statutory state franchise under Public Utility Code 7901 to use all public rights of way within the state, and in most cases are also required to obtain a Certificate of Public Convenience and Necessity (CPCN) from the California Public Utilities Commission (CPUC). Cable TV/video service providers are required to obtain a state video franchise from the CPUC under Public Utility Code 5840.

Telephone companies and cable TV/video service providers do not need any additional franchise or authorization to provide internet services. Under state law, the City may collect very limited franchise fees. Cable TV/video service providers must pay a franchise fee to the City in the amount of 5% of gross revenues derived solely from the provision of cable TV/video services to residents and businesses within the City; they do not pay franchise fees on other revenues such as internet. No franchise fees may be collected from telephone companies.

Astound LLC is authorized by the state both as a telephone company with a CPCN, and as a video/cable TV services provider. Astound intends to use its fiber network to offer business and enterprise class broadband internet and telephone. The current footprint of Astound's video/cable TV authorization does not include Carmel-by-the-Sea so it cannot offer cable TV/video services to residents/businesses at this time. If in future, the company decides to offer video services within the City, then it would have to obtain an amendment to its state authorization from the CPUC, and Astound would then have to pay franchise fees to the City on those cable TV/video services revenues.

**10. Comment: The Project appears to be inconsistent with the General Plan.**

Response: The General Plan does not include a specific policy requiring undergrounding of new electrical/fiber utilities. In the General Plan Public Facilities and Services Element, Graph 6.1, "Priorities for Improving/Maintaining City Facilities," notes that based on a 1982 community survey, 59% of respondents stated that undergrounding utilities was "most important."

**11. Comment: The Project appears to be inconsistent with Carmel Municipal Code Section 13.32, Cable System Regulations.**

Response: Staff's review of CMC Section 13.32 did not reveal any inconsistencies with the proposed Project.

**12. Question: What customer service ratings does Wave have?**

Response: Wave will provide this information in their presentation at the Council meeting.

**13. Question: Why can't Wave install the fiber optic cable underground by micro-trenching? Can Wave assure the City that they will relocate their aerial cable to underground when PG&E and other utilities are converting to underground, at no cost to the City?**

Response: See Wave's letter in Attachment 5. The pros and cons of installing the fiber optic cable underground will also be explained by Wave during their presentation at the Council meeting.

**14. Question: What types of benefits will this Project bring to Carmel-by-the-Sea?**

Response: Wave will provide this information in their presentation.

### **February 2024 Additional Public Comments and Responses**

**Attachment 4** provides additional, written public comments that were received prior to the cancellation of the February 6, 2024 Council meeting. These additional comments and questions, and staff responses, are listed below.

**15. Question: The (February 6th) staff report did not address the public and council's questions from the 10/3/23 meeting concerning safety and responsibility. Here are some links verifying that the California Public Utilities Commission cannot ensure our safety from electrical risk of overloading our telephone poles with joint utilities. There is a history of electrical fire death and destruction due to overloading telephone poles with joint utilities. (See Attachment 4.)**

Response: Wave is required by the CPUC General Order 95 to evaluate every pole and confirm that they meet or exceed a factor of safety of 2.67. Generally, all poles have a safety factor of 3 or greater. Based on the evaluation of every pole, Wave will need to install 8 anchors with each requiring a down guy to the utility pole. Also see Wave's letter in **Attachment 5**.

**16. Question: Please find enclosed an article from The Fiber Optic Association.**

FTTA - Fiber to the Antenna

Today's users of mobile devices depend on wireless connections for their voice, data and even video communications. Even homes and businesses may depend on wireless, especially those who are not in urban or suburban areas served by FTTH (fiber to the home) or FTTC (fiber to the curb.) Some of us in the business now use the term FTTW for fiber to wireless, since wireless depends on fiber for the communications backbone and increasingly the connection to the wireless antennas, no matter what kinds of wireless we use.

Wireless is not entirely wireless. The easiest way to understand wireless is to think of it as a link that replaces the cable that connects your cellular or wireless phone to the phone system or the patch cord that connects your computer or other portable Internet device to the network. To understand wireless, it is necessary to look at several different and unique types of wireless systems, including cellular wireless phones, wireless in premises cabling, municipal or private wireless links and even some of the short distance links used for computer peripheral connections.

This FOA page focuses on fiber to the antenna, primarily looking at cell towers, but also antennas mounted on rooftops, small cells and distributed antenna systems (DAS.) Because of its variety, DAS will be covered in a separate page in more detail.

**It became apparent to me after reading this article that the proposed Wave/Astound fiber optic installation is for Verizon. I also learned that Astound is a subcontractor for Verizon. Verizon's fiber network is the backbone for their wireless network so the project map makes it apparent to me that the route chosen was to hook up the fiber to Verizon's tower on the Dowd Arcade & also to hook up the fiber to Verizon's antennas on the Sunset Center roof. Why wasn't this explained in the Staff Reports? Because fiber is the backbone of Verizon's wireless network, this fiber optic project must start over & follow the protocol in our wireless ordinance. Wave/Astound has to begin again with the CBTS' Planning & Building & then present to the Planning Commission.**

Response: Astound's cables here are not subject to the City's Wireless Ordinance. Astound is a public utility with the right to construct lines and serve the Village in its own right. That Verizon Wireless may be an Astound customer and contract with Astound to use fiber in these cables to connect its wireless facilities in the Village to the public switched telephone network, does not make the cables themselves a wireless facility. Astound is likely going to have other customers as well, and even if it didn't, that would not change its legal right to install the cables and provide its service to Verizon's site (like any other commercial customer). The Wireless Ordinance would also not apply for the reasons discussed below.

The Wireless Ordinance has some language about communications cables, but that language wasn't intended to capture cables connecting a wireless facility site to the public switched telephone network (the fiber/cables referred to by industry as "**backhaul**" – Mr. McWalters calls it the "backbone"). Astound's cables may be providing the backhaul for Verizon. But the Wireless Ordinance applies to the wireless facility at the fixed site, so it would capture only those cables between the antennas and other equipment at the site. The only situation where it might capture cables in the public right-of-way, is where multiple wireless facilities operate together as a system. That system would be the wireless facility (the Ordinance gives examples of Distributed Antenna System or small-cell network). That facility or system of facilities is then connected by backhaul to the public switched telephone network.

The Ordinance's definitions of wireless facility, base station, personal wireless service facility, and structure (among others) are also relevant to understand the overall distinctions. Also refer to Special Legal Counsel Legal Analysis in **Attachment 6**.

**17. Question: Why isn't there an explanation for not putting all of the fiber optic cable underground?**

Response: See Question 13 and letter from Wave in **Attachment 5**. The pros and cons of installing the fiber optic cable underground will also be explained by Wave during their presentation at the Council meeting.

**18. Question: Why do the telephone poles need guy wires? How do you stress test the telephone poles to know which ones need guy wires or do they all need guy wires? From the 10/3/23 Staff Report under "Background Summary", 5th paragraph, is the following sentence: "Additionally, Wave will install up to 9 support anchors & guy wires to reinforce certain existing power poles." Why?**

Response: See Questions 2, 16, and Wave's letter in **Attachment 5**. Wave will further explain how the power poles were checked and the need for support anchors and guy wires during their presentation at the Council meeting.

**19. Question: Why did Wave/Astound pay \$19,306 towards an “Encroachment Permit” before the Permit was issued?**

Response: City permits are not issued until applicable fees are paid to the City. Anticipating issuance of an encroachment permit approximately two years ago, Wave posted the Encroachment Permit fees that were applicable at that time, although that may have been premature. The project evolved over the past two years, and the applicable fees have also increased. Wave is required to pay the balance of the fees prior to issuance of the Encroachment Permit.

**20. Question: Under “Prior City Council Action” from 10/3/23 Staff Report is the following: “In September 2018, Council received a project presentation & authorized issuance of an Encroachment Permit with Special Conditions of Approval for a PG&E gas pipeline project installed across the northern portion of the city.” Why are you mentioning “a gas pipeline project” in a fiber optic staff report?**

Response: The last time that the City Council approved an Encroachment Permit with Special Conditions of Approval for a significant utility project was in September 2018. That project consisted of installation of approximately one mile of new gas pipeline across the northern portion of the City. There are no other correlations between the two projects.

**21. Question: In the 2/6/24 Staff Report under “Background” is the following sentence: “At the 10/3/23 City Council meeting, Public Works staff & a representative of Wave Astound Broadband (Wave) presented a proposed Fiber Optic Project that has been in review in some form with the City since 2017.” Is this supposed to reassure us that Wave/Astound has been properly vetted? It doesn’t reassure me.**

Response: Wave submitted their original project plans to the City in 2017. Different configurations and alignments, as well as personnel changes, occurred since that time. The currently-proposed alignment, plans, and reports have been checked and are now acceptable to Public Works and the Community Planning and Building Departments. To minimize impacts to the public for this unique project, Special Conditions of Approval were developed as part of the Encroachment Permit. Staff is recommending that the Project proceed into the installation phase pending Council approval of the Encroachment Permit with these Special Conditions.

### **March 2024 Additional Public Comments and Responses**

Verbal testimony was received from Mr. Twomey and Ms. Witt under Public Appearances at the March 5, 2024 Council meeting. Key additional (unique) comments and questions, and staff responses, are listed below.

**22. Are the businesses along San Carlos, between Ocean and Seventh Avenues, and 100 feet towards Eighth Avenue aware of this underground boring?**

Response: The underground portion of the project, along San Carlos Street, from south of Eighth Avenue to Ocean Avenue, will not be constructed by the open cut trench method. Rather, there will only be several boring pits excavated, and conduits will be jacked underneath the roadway between the pits. This will minimize disruption to the adjacent businesses. In addition, public notification requirements in Conditions of Approval #14 - #19 are also intended to notify all businesses that may be very temporarily affected along the alignment.

**23. Comment: This project rises to the level of public concern, and we really owe it to the impacted residents and business community to have the Planning Commission provide oversight and insight to guide this significant project.**

Response: The City Attorney's office has confirmed that there is no legal basis for the Planning Commission to review this Encroachment Permit. Refer to the Legal Analysis in **Attachment 6**.

**24. How will the fiber optic connect from the public right-of-way to people's homes? I do not want overhead wires coming onto my home.**

Response: The proposed fiber optic cable will not be directly attached to any private home. The only connections are at the terminus points at the Dowd Arcade and Sunset Center facilities. The proposed project will also not change any utility services to private properties.

**25. Is Astound providing new services, or does this provide services that are already available to our residences?**

Response: Wave is proposing to upgrade the existing service by replacing copper wire cables with state-of-the-art fiber optic cables.

**26. What is the full geographic buildout of their fiber network (in the City)?**

Response: The Project Map included in **Attachment 1** shows the entirety of this project within the City limits for this Encroachment Permit application. If Wave, or any other utility, requests to extent the fiber network beyond this project's limits in the future, that proposed project would be subject to a separate Encroachment Permit with special conditions of approval specific to that future project.

## **Environmental Review**

The City finds that this Project is exempt from CEQA in accordance with Section 15303 (Class 3) of the CEQA Statutes for new construction and conversion of small structures. A Notice of Exemption will be filed by the City upon Project approval by the City Council.

## **FISCAL IMPACT:**

Based on the combined length of the aerial cables and underground conduit, this Encroachment Permit fee is \$25,155, of which Wave previously paid \$19,306.

## **PRIOR CITY COUNCIL ACTION:**

In October 2023, Council received a presentation from Wave Astound Broadband regarding installation of their proposed Fiber Optic Project and requesting authorization for issuance of an Encroachment Permit with Special Conditions of Approval. Council directed staff to work with Wave to address public comments and return to Council with responses.

This item was posted on the February 6, 2024 meeting agenda; however, the meeting was cancelled due to storms.

## **ATTACHMENTS:**

Attachment 1) October 3, 2023 Staff Report and Project Map

Attachment 2) Encroachment Permit Application

Attachment 3) Updated Special Conditions of Approval, January 2024

Attachment 4) Additional Comments received prior to the February 6, 2024 meeting

Attachment 5) Wave Letter April 18, 2024

Attachment 6) Legal Analysis from City Attorney Office



CITY OF CARMEL-BY-THE-SEA
CITY COUNCIL
Staff Report

October 3, 2023
ORDERS OF BUSINESS

Table with 2 columns: Field (TO, SUBMITTED BY, APPROVED BY, SUBJECT) and Value (Honorable Mayor and City Council Members, Robert Harary, P.E., Director of Public Works, Chip Rerig, City Administrator, Receive a Presentation by Wave Astound Broadband to introduce a new Fiber Optic Project and authorize issuance of an Encroachment Permit with Special Conditions of Approval)

RECOMMENDATION:

Receive a Presentation by Wave Astound Broadband to introduce a new Fiber Optic Project and authorize issuance of an Encroachment Permit with Special Conditions of Approval.

BACKGROUND/SUMMARY:

Public Works and Community Planning & Building have been meeting with representatives of Wave Astound Broadband (Wave) off and on since 2017 to review Wave's proposed fiber optic project (Project). This Project has gone through multiple iterations over the years, and Wave and staff have recently reached consensus on the preferred alignment and measures to minimize impacts to the public during installation of this unique Project. Staff has also approved the construction plans, traffic control plans, and arborist report.

The bulk of the Project consists of installing continuous fiber optic cables attached to existing PG&E power poles in the northern and central portions of the City, and installing a segment of fiber optic conduit below San Carlos Street as detailed below.

As shown in the Project Location Map in Attachment 1, the overhead route begins in the County off of the Highway 1 Carpenter Street exit, and heads south along Carpenter Street into the City limits to the intersection with Ocean Avenue. The alignment turns west along Ocean Avenue to the intersection with Torres Street, and then turns south along Torres Street to the intersection of Eighth Avenue. At this point, the Project extends west along Eighth Avenue to the intersection with Cassanova Street. Finally, the alignment turns north along Cassanova Street until it veers northwest along Palou Avenue to a terminus pole near Second Avenue.

In conjunction with the overhead cables, a 2-inch conduit will be installed via boring, extending along San Carlos Street from Ocean Avenue to approximately 100-feet south of Seventh Avenue.

Additionally, Wave will install up to nine support anchors and guy wires to reinforce certain existing power poles. Each guy wire location has been found acceptable to Community Planning and Public Works staff.

Wave also submitted an Arborist Report documenting all trees in the easterly half of the Project. While the aerial fiber cables will be installed through existing tree crowns, no trees will be removed, and utility pruning, which is expected to be minimal, will only be performed by a Certified Arborist with utility line clearance certification, paid for by Wave, and under the direction of the City Forester. Based on the Arborist Report, the minimal impacts to existing trees, and required, continuous oversight by an Arborist, a report for the westerly portion of the project was excused.

As part of the Encroachment Permit process, staff developed 38 Special Conditions of Approval, as shown in Attachment 2. These Special Conditions were tailored to minimize disruption to residents along the alignment, protect or restore City and other facilities that may inadvertently be damaged, and provide a safe environment during construction.

Per the Special Conditions of Approval for the Encroachment Permit, Wave shall:

- Execute a Hold Harmless Agreement
Provide increased general liability insurance limits
Display a 24/7 hotline phone number for public concerns
Provide ongoing coordination with Police, Fire, MST, GreenWaste, etc.
Conform to approved traffic control plans
Place parking notices 72-hours in advance
Provide updated construction schedules on a weekly basis

- Coordinate and shutdown, if necessary, during City special events
- Provide a Certified Arborist with line clearance certification during all aerial fiber installations, and consult with City Forester for utility pruning
- Provide an archaeological monitor for underground work in archaeologically-sensitive zones
- For the San Carlos Street underground boring, protect City storm drains, CAWD sewer facilities, and Cal Am water lines, provide an independent testing laboratory for backfill, and restore the concrete street
- Reconstruct any damaged streets, sidewalk, sign, pavement markings, etc. to the City's satisfaction
- Reconstruct any damage to private property

Attachment 1

At this time, construction is anticipated to begin by the end of the year and be completed within three months, pending weather conditions. Wave will provide construction management over their contractors, and Public Works will lead the oversight during construction and help resolve problems as they arise. The Directors of Public Works and Public Safety have the authority to immediately shut down the Project if serious problems or safety issues arise.

At the October 3, 2023 Council meeting, staff will introduce Mr. John Mosher, Senior Construction Manager at Wave, who will provide the presentation. The presentation will briefly describe the purpose of the Project, anticipated construction impacts, and mitigation measures.

Wave and City staff welcome comments from the public and City Council regarding this Project. Based on comments received, staff will finalize the Special Conditions of Approval for the Encroachment Permit to further minimize adverse impacts. Council is also requested to authorize the issuance of the Encroachment Permit.

## ENVIRONMENTAL REVIEW

The City finds that this Project is exempt from CEQA in accordance with Section 15303 (Class 3) of the CEQA Statutes for new construction and conversion of small structures. A Notice of Exemption will be filed by the City upon Project approval by the City Council.

## FISCAL IMPACT:

Based on the combined length of the aerial cables and underground conduit, this Encroachment Permit fee is \$25,155, of which Wave has previously paid \$19,306.

## PRIOR CITY COUNCIL ACTION:

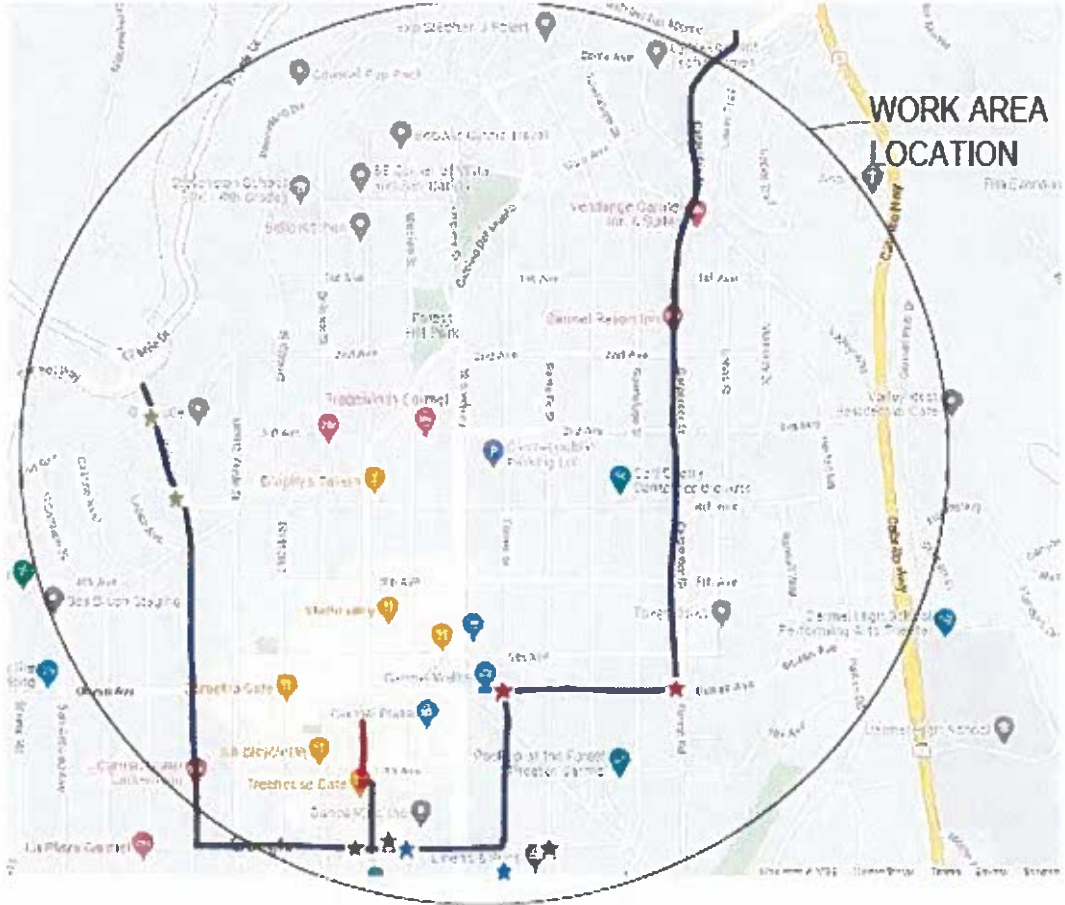
In September 2018, Council received a project presentation and authorized issuance of an Encroachment Permit with Special Conditions of Approval for a PG&E gas pipeline project installed across the northern portion of the City.

## ATTACHMENTS:

[Attachment 1\) Project Location Map](#)

[Attachment 2\) Special Conditions of Approval for Encroachment Permit](#)





**LOCATION MAP  
CARMEL BY THE BEACH, CA  
N.T.S.**



**PERMANENT ENCROACHMENT**  
**PERMIT APPLICATION**

City of Carmel-by-the-Sea  
Department of Community Planning & Building  
P.O. Box CC, Carmel, CA 93921  
(831) 620-2010 OFFICE

EN Attachment 2  
FEE PD \_\_\_\_\_  
REC # \_\_\_\_\_  
Copy Given to: \_\_\_\_\_  
Date: \_\_\_\_\_

1. Property Owner: Astound Broadband, LLC Date: 03/24/2023

2. Project Location: See Attached Supplemental Page

Block: \_\_\_\_\_ Lot(s): \_\_\_\_\_ Parcel #: \_\_\_\_\_

Mailing Address: 215 Mason Circle City: Concord State: CA Zip: 94520

3. Contractor/Contact Person (Circle One): Albert Borbon

Mailing Address: 215 Mason Circle City: Concord State: CA Zip: 94520

Telephone # (925) 532-5670 E-Mail: albert.borbon@astound.com

Contractor State Lic #: See Supplemental Page Contractor City Lic #: See Supplemental Page  
Type: \_\_\_\_\_

4. Date Work is Scheduled to Begin: 05/01/2023 Projected Completion Date: 06/02/2023

\*PLEASE ATTACH SITE PLAN AND PHOTOS DETAILING PROPOSED\*

FULLY DESCRIBE ALL WORK PROPOSED: All work operations are detailed on attached plans and supplemental page for this project.

→PLEASE NOTIFY **USA DIG** (Call 811) **48 HOURS PRIOR** TO DIGGING

→PLEASE NOTIFY **PUBLIC WORKS DEPT.** (831-620-2074) **48 HOURS PRIOR** TO START OF WORK

→CONTROL OF DRAINAGE DURING **AND** AFTER CONSTRUCTION IS **REQUIRED.**

**Applicant Acknowledgement**

I understand and agree to comply with all pertinent conditions, standards and requirements as specified by the Carmel Municipal Code, State, County and Federal regulations pertaining to this permit application. I agree to properly maintain the subject work at no expense to the City and to indemnify the City from any liability arising from the permit issued. Acceptance by the City of the work described hereon is not a waiver of my obligations as stated herein.

Applicant Name (Print Clearly): Cory L Pacheco on behalf of Astound Broadband, LLC

Signature: Cory L Pacheco Date: 03/24/2023

Digitally signed by Cory L Pacheco  
Reason: I attest to the accuracy and integrity of this document  
Location: Gilroy, CA  
Date: 2023.03.24 10:48:58  
Public Key Infrastructure Version: 3.1.5

**CITY USE ONLY BELOW**

Lead Department:  Planning & Building

Public Works

Public Works: Approve/Disapprove

Forestry/Beach: Approve/Disapprove

By: \_\_\_\_\_ Date: \_\_\_\_\_

By: \_\_\_\_\_ Date: \_\_\_\_\_

Planning Department: Approve/Disapprove  
(Optional)

Police Department: Approve/Disapprove  
(Optional)

By: \_\_\_\_\_ Date: \_\_\_\_\_

By: \_\_\_\_\_ Date: \_\_\_\_\_

Additional Insurance: Approve/Disapprove  
(Optional)

By: \_\_\_\_\_ Date: \_\_\_\_\_

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**Please protect all trees during construction:**

**→HAND DIG WITHIN 10 FEET OF TREES.**

**→NOTIFY FORESTER OF ROOTS 2” OR MORE THAT NEED TO BE CUT.**

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**FINAL INSPECTION FROM PUBLIC WORKS: \_\_\_\_\_**

**DATE: \_\_\_\_\_**

Attachment 2

**INSTRUCTIONS TO THE APPLICANT  
PERMIT FOR ENCROACHMENT IN THE PUBLIC RIGHT-OF-WAY  
CITY OF CARMEL-BY-THE-SEA**

An application for an encroachment in the public right-of-way includes all of the following steps.

1. Encroachment Permit Application

This is the first step in the process of requesting the City’s approval for an encroachment in the public right-of-way. The application and the form entitled “Information Regarding Improvements in the ROW” are to be completed and returned, along with the encroachment application fee, as determined by the master fee schedule, to the Department of Community Planning & Building. A site plan sketch on an 8.5” x 11” sheet is also typically required (refer to the Site Plan Requirements handout, included with this application packet).

2. Hold Harmless Encroachment Agreement

Upon preliminary staff approval of the Encroachment Permit Application forms, submittal of the Hold Harmless Encroachment Agreement is required. This document must be executed by the legal owner(s) of the property adjacent to the public right-of-way upon which the encroachment is planned to be installed. The names must be written and signed as they appear in the official records of the City, i.e., “William L. and Elizabeth W. Jones” – not “Bill and Liz Jones.” The applicant(s)’ signature(s) must be notarized.

Special attention should be paid to paragraph 3 of this Agreement and the insurance requirements set forth therein. If the application is approved, **WORK MAY NOT BEGIN** until the Certificate of Insurance is on file with the City Clerk’s Office.

**IMPORTANT NOTICE**

TO THE AGENT PROVIDING INSURANCE COVERAGE ON THE ADDITIONAL INSURED POLICY FORM

When required to supply Liability Insurance, either in the amount of **\$2,000,000** in combined single limit insurance for personal injury and/or property damage per occurrence and **\$4,000,000** in aggregate caused by or due to the present of the encroachment in the CC, SC, RC and R-4 districts OR **\$500,000** in the R-1 district it is imperative that the additional insurance coverage be in the form of an “endorsement” using the following language:

3. Notice Pursuant to Municipal Code § 12.08.110

**“The City of Carmel-by-the-Sea, its elected officials, officers, agents and employees are additionally insured under the policy.”**

INFORMATION REGARDING IMPROVEMENTS IN THE PUBLIC

RIGHT-OF-WAY

NAME: Astound Broadband, LLC

MAILING ADDRESS: 215 Mason Circle, Concord, CA 94520

TELEPHONE: (Business): (925) 459-1038 (Home or Cell): (925) 532-5670  
(E-Mail Address): albert.borbon@astound.com

**EXACT** LOCATION OF PROPOSED ENCROACHMENT(S): See Supplemental Page

BLOCK: \_\_\_\_\_ Lot(s): \_\_\_\_\_ APN: \_\_\_\_\_

TYPE OF ENCROACHMENT(S): If there is more than one required (e.g. fence and steps), please list each separately. Attach additional sheet(s) if necessary.

1. O'lash 11,607' +/- of Existing Strand/Cable w/ (1) FOC
2. Place 11 New Anchors
3. Open Trench/Directional Bore 378' from Existing Utility Pole to New Vault

DIMENSION(S) OF ENCROACHMENT(S): (Attach an 8 1/2" x 11" site plan showing all existing and proposed improvements in the right-of-way.)

1. AER Layout | Sheets 12-23
2. Anchor Details | Sheets 24-27
3. UG Layout | Sheet 4

TYPE OF MATERIAL TO BE USED FOR EACH ENCROACHMENT REQUESTED:

1. Fiber Optical Cable (FOC) to be used for Overlash on Existing OSP
2. Concrete Anchors to be used for Guying
3. 2" HDPE Conduit to be used for Open Trench and Directional Bore
4. Reinforced Concrete Box to be used for Proposed New Vaults

WHEN RECORDED, MAIL TO:

CITY OF CARMEL-BY-THE-SEA  
ATTN: ENCROACHMENTS  
PO BOX CC  
CARMEL-BY-THE-SEA, CA 93921

THIS SPACE FOR RECORDER'S USE ONLY

---

**HOLD HARMLESS ENCROACHMENT AGREEMENT**

AGREEMENT made this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, between the CITY OF CARMEL-BY-THE-SEA, hereinafter called CITY, and \_\_\_\_\_, hereinafter called OWNER, with reference to the following facts:

OWNER is in possession of and owns certain real property in CITY known as Block \_\_\_\_\_, Lot(s) \_\_\_\_\_, Assessor's Parcel No. \_\_\_\_\_ Zoning District \_\_\_\_\_, street location \_\_\_\_\_.

OWNER has requested from CITY permission to construct and maintain a structural encroachment on CITY street or sidewalk area adjacent to or near the property, described as follows:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.

NOW, THEREFORE, the parties, in consideration of the mutual covenants contained herein, agree as follows:

1. CITY grants permission to OWNER to construct and maintain a structural encroachment on CITY street or sidewalk area adjacent to or near OWNER'S property, as described above. Said permission is subject to the following conditions:

- a. Execution of the Hold Harmless Agreement and compliance with the provisions of paragraph 3 below.
- b. \_\_\_\_\_  
\_\_\_\_\_

2. OWNER, his successors and assigns, agrees to name CITY an additional insured and to hold CITY harmless from any and all claims, actions and demands of third parties of any kind, character and description arising out of or due to any accident or mishap in, on , or about said structural encroachment so constructed or so maintained or any error or omission resulting in personal injury or property damage.

3. OWNER, agrees to provide CITY and maintain a certificate of insurance from an insurance carrier acceptable to CITY certifying that OWNER has public liability and property damage insurance with limits of not less than \$500,000 combined single limit for personal injury and/or property damage for property located in the R-1 zoning district and limits of not less than \$4,000,000 for property located in all other zoning districts. The certificate must indicate this insurance is primary over any other valid or collectible insurance CITY may have, insures owner’s performance of this Hold Harmless Agreement and that the Carrier will notify CITY in the event of any material change in the policy, including the nonrenewal thereof. Said Certificate of Insurance must name CITY, its elected officials, officers, agents and employees as additional insured insofar as the insurance pertains to this encroachment. Owner further agrees to maintain said insurance as long as said encroachment remains on CITY property.

In the event of cancellation or nonrenewal, the insurance company will give thirty (30) days’ written notice to CITY. The Certificate must be signed by an authorized employee of the insurance carrier and mailed to: City Clerk, Carmel-by-the-Sea, P.O. Box CC, Carmel-by-the-Sea, CA 93921.

4. CITY may terminate and revoke this Agreement at any time that it is determined by the City Council to be in the best interests of City and necessary to promote the public health, safety or welfare. Any expenses caused to OWNER, his successors or assigns, by termination of this Agreement shall be borne by OWNER, his successors or assigns.

5. The parties agree that this contract is for the direct benefit of the land in that it makes the property more usable and increases its value, as such, agree that the covenants herein shall run with the land, and the parties agree that the covenants shall bind the successors and assigns of OWNER.

CITY OF CARMEL-BY-THE-SEA:

OWNER(S):

\_\_\_\_\_  
By: Chip Rerig, City Administrator or Designee

\_\_\_\_\_  
\_\_\_\_\_  
Print Name

ATTEST:

\_\_\_\_\_  
Britt Avrit, City Clerk

\_\_\_\_\_  
\_\_\_\_\_  
Print Name

## ACKNOWLEDGMENT

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document, to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California  
County of \_\_\_\_\_

On \_\_\_\_\_ before me, \_\_\_\_\_  
Insert Name and Title of the Officer

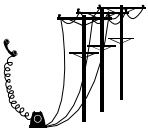
personally appeared \_\_\_\_\_  
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) , or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraphs is true and correct.

WITNESS my hand and official seal.

Signature \_\_\_\_\_ (Seal)





**Structure Leasing & Engineering, Inc.**

8833 Monterey Road, Suite B  
Gilroy, CA 92020  
<http://www.slegroup.net>

**TO:** City of Carmel-by-the-Sea  
Department of Community Planning & Building  
PO Box CC, Carmel, CA 93921  
(831) 620-2010 Office

March 24, 2023

**RE:** Submittal of Supplemental Application Page – Aerial and UG – Carmel-by-the-Sea

To Whom It May Concern:

Enclosed is the Permanent Encroachment Permit Application we are submitting on behalf of Astound Broadband, LLC. This is a supplemental page to identify the Contractors and their Work Operations for this Project.

**UG Contractor:**

J. Moraga Construction  
385 Grogan Avenue  
Merced, CA 95341  
P: (209) 388-9200  
Cont. St. Lic#: 882920, Type A  
Cont. City Lic#: 2764

**Proposed UG Work:**

Place (1) 2" HDPE Conduit by Open Trench and Directional Bore at a Minimum Depth of 48", 378' from Existing Utility Pole to Proposed New Vault along and crossing San Carlos Street through the 7<sup>th</sup> Avenue Intersection.

**Aerial Contractor:**

EDT TEC, Inc.  
4398 Contractors Common  
Livermore, CA 94551  
P: (925) 245-9533  
Cont. St. Lic#: 830873, Type A, B, C-7  
Cont. City Lic#: On File

**Proposed Aerial Work:**

O'lash 11,607' +/- of Existing Strand with (1) FOC Aerially on Existing Utility Poles along Palou Avenue, N Casanova Street, 8<sup>th</sup> Avenue, Ocean Avenue, Carpenter Street, Torres Street and San Carlos Street.

Please advise if there are any issues, corrections or redlines.

Sincerely,

**Cory L Pacheco / Site Acquisition/CFO**

(408) 767-8119 [cpacheco@sleinc.net](mailto:cpacheco@sleinc.net)

ENCROACHMENT PERMIT # \_\_\_\_\_

WAVE ASTOUND BROADBAND FIBER INSTALLATION PROJECTSPECIAL CONDITIONS OF APPROVALJanuary 22, 2024

The following Conditions of Approval of the Encroachment Permit were developed by the City, and reviewed and accepted by WAVE Astound Broadband (WAVE), to minimize impacts and inconvenience to the public while accommodating construction. All Conditions of Approval are subject to modification by the City to ensure the safety and welfare of the public, construction workers, and public and private property. References to the City mean the Director of Public Works Robert Harary, P.E., or his designee.

Administrative

1. **Revocability:** This permit shall be revocable by the City at any time. Encroachment permit actions may be appealed to the City Council by filing an appeal with the City Clerk within fifteen (15) days of the date of notification.
2. **Hold Harmless Agreement:** Prior to issuance of and encroachment permit a Hold Harmless Agreement will need to be completed and recorded.
3. **Liability Insurance:** WAVE will provide evidence of general liability insurance to the City with a minimum limit of \$3 million per incident and \$5 million in aggregate.
4. **Performance Bond:** WAVE will provide a performance bond to the City in the amount \$100,000.
5. **City Business License:** Prior to conducting any work in the City right-of-way, all contractors, subcontractors, and consultants must obtain a City Business License.
6. **Encroachment Permit:** City acknowledges receipt of \$19,306.75 deposit for this permit. WAVE to submit the balance due of \$5,848.16 for the Permit plus \$50.00 to reimburse the City's CEQA filing fee.
7. **Fiscal Impact:** In the event that staff becomes increasingly involved with oversight and inspection of this Project during construction, an agreement with WAVE will be deployed so that WAVE reimburses the City for any actual City labor costs and expenses incurred.

## Environmental

8. **CEQA Documentation:** The City finds that this Project is exempt from CEQA in accordance with Section 15303 (Class 3) of the CEQA Statutes for new construction and conversion of small structures. A Notice of Exemption will be filed by the City upon Project approval by the City Council.
9. **Environmental Mitigation:** The following measures are of particular concern to the City:
  - Enclose or cover exposed stockpiles daily.
  - Designate worker parking areas that minimize parking displacement along the Alignment in the downtown area
  - Sweep all paved access roads no less than weekly or as requested by the City
10. **BMP's:** All construction activities require adequate protection for any catch basin, drain inlet, or drainage swale to prevent spills, sediment, or construction debris from entering the drainage system. Provide sediment filter bags at catch basins, place 2-bag high gravel berms for silt protection, and provide stockpile covers with sediment barrier. Provide secondary containment tray with sanitary facility.
11. **Arborist Report:** Report provided to the City is sufficient for the work being conducted. This project does not have to be presented to the Forest and Beach Commission. However, it is the responsibility of Astound to provide a City approved, Certified Arborist with line clearance certification for the duration of the Project.
12. **Street Trees:** No trees are to be removed under this Permit. A Certified Arborist shall be on site for the aerial cable installation and utility pruning. Minimal impact utility pruning shall meet ISA BMP's and Standards. *"No pruning will come remotely close to excessive pruning."* Arborist will consult with City Forester prior to pruning and to address treatment requirements, if any, See also Condition #39, Tree Protection Requirements.
13. **Archeologist Monitoring:** WAVE acknowledges that archeologically-sensitive zones exist in the vicinity of San Carlos Street and Eighth Avenue, and near the Casanova Street and Palou Avenue. WAVE will provide a qualified archeological monitor for any below groundwork in these areas. Monitoring shall be done by a City-approved consultant. If any archaeological finds are encountered, all excavating is to cease immediately and the City shall be so notified.

## Public Notifications

14. **City Council:** This project would need to be presented to City Council at an upcoming meeting, date to be determined, plan on a 5 to 10-minute presentation.
15. **Public Relations:** Implement the following outreach program as a minimum during

construction:

- Provide a 24/7 WAVE Public Hotline Number
- Provide door hangers and notices to each property/business prior to working along the next street segment
- Place barricades at each road or lane closures identifying the Project name and including the WAVE hotline number

WAVE to keep the City's Project Manager informed as to these public relations activities. City will support such efforts in good faith.

16. **Emergency Access:** Maintain access for emergency vehicles at all times.
17. **Emergency Response Notifications:** Contractor shall notify Police and Fire (831) 646-3914, and ambulance service providers at least 48 hours in advance as to proposed road or lane closures, and detours. Also, provide schedule updates.
18. **Road/Lane Closure Notifications:** Notify postal carrier, MST, Green Waste, and affected residences and businesses at least 48 hours in advance as to proposed road/lane closures. Also, provide schedule updates.
19. **Ingress, Egress, and Parking Impacts:** Notify, coordinate, and resolve access, ingress, egress, special needs (disabilities), and parking Issues with all private property owners/tenants and businesses along the alignment.

#### Utilities and Private Improvements

20. **Potholing for Utilities:** Call Underground Service Alert, at 811, before you dig.
21. **Damage to Existing Facilities:** Promptly make repairs to the public right-of-way or underground utilities that are damaged by the work authorized by this Permit. Damage to City streets outside of the alignment caused by construction operations shall also be repaired to pre-construction conditions. These repairs shall be to the satisfaction of the City. Damage to third party utilities shall be repaired as required by the applicable utility.
22. **Private Improvements:** Restore, repair, or replace private property improvements damaged by construction operations to pre-construction conditions as commercially practical and to the private property owner's satisfaction. In the event the private property owner is not satisfied with the restoration or repair of damaged improvements, WAVE's Project Manager, and/or other such representative, shall meet with the property owner to resolve the issue. The City may be asked to assist in the resolution of private improvement repair matters, but the City shall not be responsible for such repairs.

#### General Construction Requirements

23. **Traffic Control Plans:** Traffic Control Plans for the Project have been submitted by WAVE and approved by the City. Additional or modifications to approved Traffic Control Plans must also be approved by the City prior to implementation along the affected street segment. Provide safe provisions for pedestrians and bicycles around construction zones.
24. **Preconstruction Video:** Prior to boring along San Carlos Street, provide City with an indexed, preconstruction video of existing surface Improvements shown from both directions of travel, of acceptable clarity and quality to the City.
25. **Project Schedule:** Provide City with a Master Project Schedule prior to construction, and updated Master Project Schedule(s) weekly or upon request by the City.
26. **Staging Areas:** Provide to the City legal evidence of the use of any staging areas located within City limits.
27. **Parking Notices:** Provide a minimum of 72-hour advance notices for no-parking zones every 25 feet in each direction affected. Parking notices will indicate the start date and anticipated duration of work within the affected area. Please do not be overly conservative as to the duration/completion of work on the signs.
28. **Construction Work Hours:** All work is to be completed between the hours of 8:00 AM – 5:00 PM, Monday through Friday. If after hours, weekend, or holiday work is requested, prior authorization must be granted by the City.
29. **Construction Inspection:** Day-to-day oversight of construction operations, including subcontractors, shall be performed by WAVE’s Construction Manager. City’s inspections are intended for Quality Assurance purposes.
30. **Security:** Permittee shall be exclusively responsible for the security of its property and any use thereof.
31. **Cutting Street Surfaces:** All pavement, concrete, and asphalt sidewalks, curbs, gutters, medians, and berms will be saw cut with smooth straight edges. The City shall field verify saw cut limits prior to saw cutting.
32. **Clean-up of Right-of-Way:** Upon completion of work along a street segment, all materials, equipment, traffic control devices, BMPs, and debris shall be entirely removed, and the right-of-way shall be left in a clean condition satisfactory to the City.
33. **Concrete Washout Locations:** Washout locations must be pre-approved by the City.

34. **Final Inspection:** Prior to release of the Permit, all surface improvement work must be completed and approved by the City.
35. **Guy Wire Special Conditions:**
- Detail A (8th and San Carlos) - Add Queen's Post to allow the anchor to be shifted south near perpendicular to the parking tee, this will allow sufficient clearance for doors and trunk access.
  - Detail E (Ocean and Forest) – Guy Wire is not permitted in location shown on plans. Three acceptable options are listed below in order of preference. Contractor to provide revised alternative to City prior to construction.
    - Use pole to pole tension mounting extending east two poles
    - Move location of guy wire to pole west of intersection of Ocean and Forest
    - Move location of guy wire two poles east of current designated location.

#### Technical Requirements

36. **Striping & Signage:** Existing signs, striping, pavement legends, markings, markers, crosswalk striping, painted curbs, and parking tees damaged by the Project will be restored to City standards and as directed by the City.
37. **Restoration of Pits Submittals and Testing Lab:** Provide shop drawings and submittals for boring pit layouts, backfill, aggregate base, and concrete surface material along San Carlos Street. Bedding, trench backfill, and Class 2 Aggregate Base shall be compacted to 95% minimum relative compaction. WAVE shall retain an independent testing laboratory to field-verify proper compaction. For the boring operations, City requests copies of inspection reports and material testing results performed by the independent laboratory.
38. **Pavement Restoration:**
- a. **Incomplete Street Openings (Barriers and Steel Plates):** Where boring openings cannot be backfilled during the day of opening, suitable barriers shall be placed around the excavation pit to prevent accidents, and lighted barricades shall be continuously maintained at the opening site. Alternatively, steel plates may be placed over the trench with temporary cold mix ramps along each edge.
  - b. **Final Surface Restoration:** Iron/valve cans, vaults, and manhole lids shall be raised to finish grade within five (5) business days of concrete surfacing.
39. **Tree Protection Requirements:** Per Carmel-by-the-Sea Municipal Code Section 12.28.340, for safeguarding of trees during construction, the following conditions shall apply to all trees:

- a. Prior to the commencement of construction, all significant trees located within 15 feet of the alignment shall be inventoried by WAVE's arborist as to size, species, and location, and the inventory shall be submitted to the City. - COMPLETED
- b. Damage to any tree during construction shall be immediately reported by a person causing the damage, or the responsible subcontractor to the Director of Public Works, and the Contractor shall treat the tree for damage in the manner specified by the City Forester.
- c. Oil, gasoline, chemicals and other construction materials shall not be stored within the drip line of any tree.
- d. Wires, signs and other similar items shall not be attached to trees.
- f. Cutting and filling around the base of trees shall be done only after consultation with the City Forester.
- g. No paint thinner, paint, plaster or other liquid or solid excess or waste construction materials or wastewater shall be dumped on the ground or into any grate between the dripline and the base of the tree, or uphill from any tree where such substance might reach the roots through a leaching process.
- h. The Contractor shall be required to erect protective barricades around all trees along the building site. These barricades must be in place prior to the start of any construction activities.
- i. Wherever cuts are made in the ground near the roots of trees, appropriate measures shall be taken to prevent exposed soil from drying out and causing damage to tree roots.
- j. Trimming cuts shall conform to arboricultural standards and shall be made along the branch bark ridge.
- k. Earth surfaces within the drip line of any tree shall not be changed or compacted. All equipment, material, and soil storage shall be kept beyond the drip line of trees.
- l. Hand digging (and/or hydro vacuum) is required within ten (10) feet of trees.
- m. Failure to protect or maintain trees on construction sites is a violation of the Municipal Code and grounds for suspension of the permit. (Ord. 91-4 §§ 1 – 7, 1991; Ord. 84-6 § 1, 1984; Ord. 83-25 § 1(G), 1983; Ord. 81-4 § 12, 1981; Code 1975 § 1237).



Robert Harary &lt;rharary@ci.carmel.ca.us&gt;

## Fwd: Astound-Safety Dangers

6 messages

**Nova Romero** <nromero@ci.carmel.ca.us> Fri, Feb 2, 2024 at 3:39 PM  
 To: Chip Rerig <crerig@ci.carmel.ca.us>, Brandon Swanson <bswanson@ci.carmel.ca.us>, Brian Pierik <bpierik@ci.carmel.ca.us>, Robert Harary <rharary@ci.carmel.ca.us>, Javier Hernandez <jhernandez@ci.carmel.ca.us>

See correspondence below regarding the Astoud Broadband item on Tuesday's agenda. Tasha sent her comment directly to Council.



**Nova Romero, MMC**  
**City Clerk**  
 City of Carmel-by-the-Sea  
 P.O. Box CC  
 Carmel-by-the-Sea, CA 93921  
 (831) 620-2016  
[nromero@cbts.us](mailto:nromero@cbts.us)

----- Forwarded message -----

From: "Tasha Witt" via cityclerk <cityclerk@ci.carmel.ca.us>  
 Date: Fri, Feb 2, 2024 at 3:33 PM  
 Subject: Astound-Safety Dangers  
 To: <adramov@ci.carmel.ca.us>, Bobby Richards <brichards@ci.carmel.ca.us>, Dave Potter <dpotter@ci.carmel.ca.us>, Karen Ferlito <kferlito@ci.carmel.ca.us>, Jeff Baron <jbaron@ci.carmel.ca.us>, City Clerk <cityclerk@ci.carmel.ca.us>

City Clerk please add this public comment to the Astound city council agenda for 2/6.  
 Thank you

City Council Members,

The Astound proposal is on the 2/6 City Council agenda #8. The staff report did not address the public and council's questions from the 10/3 meeting concerning safety and responsibility.

Here are some links verifying that the California Public Utilities Commission cannot ensure our safety from electrical risk of overloading our telephone poles with joint utilities. There is a history of electrical fire death and destruction due to overloading telephone poles with joint utilities.

"The general allegation for the cause of the recent fire in 2023 Lahaina, Maui against the telecommunications company is that it overloaded shared utility poles with equipment. The overloaded and destabilized some of the poles. The lawyers said the cables were attached in a way that put too much tension on the poles, causing them to lean and break in the winds on Aug. 8 when flames burned down much of Lahaina, killing at least 115 people and destroying more than 2,000 structures."

<https://www.civilbeat.org/2023/11/spectrum-seeks-to-move-lahaina-fire-case-to-honolulu-court/>

Overloaded joint utility poles spark 2007 Malibu fire causing death and destruction:



2/14/24, 11:22 AM

Carmel-by-the-Sea Mail - Fwd: Astound-Safety Dangers

<https://www.latimes.com/local/la-xpm-2011-oct-23-la-me-utility-pole-fines-20111023-story.html>

"Poorly maintained utility poles and attachments have caused substantial property damage and repeated loss of life in the state. These safety issues have increased at the same time that advanced telecommunications technologies have driven demand for access to utility poles and conduit to unprecedented levels. Further, there is not a shared data repository to track where the utility poles are located and information about the condition of the poles."

<https://www.latimes.com/local/la-xpm-2011-oct-23-la-me-utility-pole-fines-20111023-story.html>

"California has the strictest utility pole safety rules in the country, yet has continually faced disastrous and deadly conditions."

"My CPUC colleagues and I ordered many of these conditions to be fixed, strengthened utility pole safety rules, and increased the authority of the CPUC's Safety and Enforcement Division to hold electric, telecommunications, and Internet companies accountable for CPUC rule violations. Despite these efforts, the CPUC's enforcement process remains hampered by antiquated information systems, spotty reporting of rule violations, limited enforcement resources, aging infrastructure designs and resources, and a system that tolerates rule violations that persist for years."

<https://www.scu.edu/ethics/all-about-ethics/principles-for-utility-regulation-in-the-face-of-increasing-wildfire-risk/>

Tasha Witt

---

Robert Harary <rharary@ci.carmel.ca.us>

Fri, Feb 2, 2024 at 4:37 PM

To: Javier Hernandez <jhernandez@ci.carmel.ca.us>, Timothy Melgaard <timothy.melgaard@astound.com>

2/14/24, 11:21 AM

Carmel-by-the-Sea Mail - The FOA Reference For Fiber Optics - Fiber To The Antenna for Wireless



Robert Harary &lt;rharary@ci.carmel.ca.us&gt;

## The FOA Reference For Fiber Optics - Fiber To The Antenna for Wireless

7 messages

**Mike McWalters** <michaelmcwalters@gmail.com>

Mon, Feb 5, 2024 at 7:40 PM

To: dpotter@ci.carmel.ca.us, brichards@ci.carmel.ca.us, Karen Ferlito <kferlito@ci.carmel.ca.us>, jbaron@ci.carmel.ca.us, adramov@ci.carmel.ca.us, Chip Rerig <crerig@ci.carmel.ca.us>, Robert Harary <rharary@ci.carmel.ca.us>, Brandon Swanson <bswanson@ci.carmel.ca.us>

Cc: Nova Romero <cityclerk@ci.carmel.ca.us>

Hi Nova, Please include this in "Public Correspondence" for the 2/6/24 City Council meeting or if that's cancelled, then the City Council meeting when it's on the agenda. Thank you

<https://www.thefoa.org/tech/ref/appln/FTTA.html>

Dear Mayor Potter, Mayor ProTem Richards, Councilmembers Ferlito, Baron, Dramov, City Administrator Rerig, Director Harary & Director Swanson,

Please find enclosed an article from The Fiber Optic Association.

Please scroll to the 4th paragraph titled "Fiber to the Antenna".

It became apparent to me after reading this article that the proposed Wave/Astound fiber optic installation is for Verizon. I also learned that Astound is a subcontractor for Verizon.

Verizon's fiber network is the backbone for their wireless network so the project map makes it apparent to me that the route chosen was to hook up the fiber to Verizon's tower on the Dowd Arcade & also to hook up the fiber to Verizon's antennas on the Sunset Center roof.

Why wasn't this explained in the Staff Reports?

Because fiber is the backbone of Verizon's wireless network, this fiber optic project must start over & follow the protocol in our wireless ordinance.

Wave/Astound has to begin again with the CBTS' Planning & Building & then present to the Planning Commission.

There are big gaps in the report besides the Verizon omission.

For example, why isn't there an explanation for not putting all of the fiber optic cable underground?

Why do the telephone poles need guy wires?

How do you stress test the telephone poles to know which ones need guy wires or do they all need guy wires?

From the 10/3/23 Staff Report under "Background Summary", 5th paragraph, is the following sentence:

"Additionally, Wave will install up to 9 support anchors & guy wires to reinforce certain existing power poles." Why?

Why did Wave/Astound pay \$19,306 towards an "Encroachment Permit" before the Permit was issued?

Under "Prior City Council Action" from 10/3/23 Staff Report is the following: "In September 2018, Council received a project presentation & authorized issuance of an Encroachment Permit with Special Conditions of Approval for a PG&E gas pipeline project installed across the northern portion of the city."

Why are you mentioning "a gas pipeline project" in a fiber optic staff report?

In the 2/6/24 Staff Report under "Background" is the following sentence: "At the 10/3/23 City Council meeting, Public Works staff & a representative of Wave Astound Broadband (Wave) presented a proposed Fiber Optic Project that has been in review in some form with the City since 2017." Is this supposed to reassure us that Wave/Astound has been properly vetted? It doesn't reassure me.

When Wave/Astound has answered all of our questions & been thoroughly transparent, then our vetting process of them will be complete.

Michael McWalters, Scenic Road 2N of 11th

PS. Has Verizon's lawsuit against us concluded?

Sent from my iPhone

**Robert Harary** <rharary@ci.carmel.ca.us>

Tue, Feb 6, 2024 at 8:02 AM



Powered by  wave

April 18, 2024

To whom it may concern,

In an effort to proactively address city and resident concerns see below responses to questions that have been raised related to the proposed Astound Broadband fiber project;

- Has undergrounding been considered as an alternative? Yes, Astound has evaluated undergrounding as an alternative to aerial construction and determined that aerial construction on utility poles where they already exist within the right of way is much less disruptive to the community and roadways, and provides symmetry with the existing overhead dry utility construction methods (you do not have all of the other dry utilities overhead and one dry utility underground). Undergrounding of the overhead dry utilities if undertaken by the city in the future is much more efficient if all of the dry utilities are undergrounded at the same time. This allows for a more cohesive and efficient design and construction incorporating all dry utility conversions at one time. Lastly underground construction is significantly more expensive than aerial construction 5x+ which puts an undue burden on Astound versus its competitors who are allowed to utilize the aerial network and are not held to the same requirement.
- Have the poles been tested to insure they can withstand the load of the added cables? Yes, Astound is required to meet CPUC General Order 95 guidelines for aerial construction, which includes evaluating every pole's strength and ensuring that they meets the required CPUC guidelines this information is compiled and sent to the pole owner for review and approval. Every utility pole is also confirmed to be structurally sound by ensuring that intrusive testing of the utility poles has been completed within the past 5 years for poles that are older than 15 years and that the testing indicates that the poles meets guidelines for structural soundness. Intrusive testing generally utilizes a resistograph to measure cracks, voids, cavities and decay inside a utility pole.
- Can you provide a more defined illustration of the wires that are to be installed? Below is a chart showing approximate cable sizes and weights of the proposed Astound fiber cable and existing CATV and Phone cables;



<b>Provider</b>	<b>Cable diameter (approx.)</b>	<b>Cable weight/ft (approx.)</b>
Astound	0.71"	0.14 lb/ft
CATV	1.24"	0.28 lb/ft
Phone	1.6"	1.6 lb/ft

We hope this information helps provide some additional clarity related to the proposed Astound network and project.

Sincerely,

Tim Melgaard  
Senior Director - Construction Project Management - SF Region

**Astound Business Solutions**  
powered by Wave

215 Mason Circle  
Concord, CA 94596

**P** Office Phone # 925.459.1038  
**C** Mobile Phone # 650.619.1456  
**E** [timothy.melgaard@astound.com](mailto:timothy.melgaard@astound.com)

## Legal Analysis of City Municipal Code

Gail A. Karish of Best, Best & Krieger (special legal counsel for the City) has provided this analysis in regard to the applicable provisions of the City Municipal Code (CMC).

### **1. CMC Chapter 12.08 applies to Astound's fiber project.**

CMC Chapter 12.08 (Encroachments) applies to Astound's project, and not Chapter 17.46 (Telecommunications and Wireless Facilities).

Astound is a public utility and a telephone company with a statutory franchise right granted by state law to use the City's streets to install its telephone lines (which include fiber optic cable facilities) to provide communications services.<sup>1</sup> Astound is proposing to install fiber optic cables.

The City's authority over Astound's fiber project is limited to:

(1) regulating the placement of the facilities to ensure that they do not "incommode" the public use, which can include a consideration of aesthetics and the discretion to approve or deny permits on reasonable aesthetic grounds;<sup>2</sup>

(2) regulating "matters affecting the health, convenience, and safety of the general public, including matters such as the use and repair of public streets by any public utility, the location of the poles, wires, mains, or conduits of any public utility, on, under, or above any public streets"<sup>3</sup> to the extent those matters are *not* regulated by the California Public Utilities Commission (CPUC);<sup>4</sup> and

(3) exercising "nondiscriminatory" and "reasonable control as to the time, place, and manner in which roads...are accessed."<sup>5</sup>

The City exercises this regulatory authority pursuant to Chapter 12.08 which expresses the criteria which Astound must meet to obtain an encroachment permit to install its fiber project.

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<sup>1</sup> Pub. Util. Code 7901.

<sup>2</sup> *T-Mobile West LLC v. City and County of San Francisco*, 3 Cal. App.5th 334, 355-56 (2016) ("In our view, 'incommode the public use' means 'to unreasonably subject the public use to inconvenience or discomfort; to unreasonably trouble, annoy, molest, embarrass, inconvenience; to unreasonably hinder, impede, or obstruct the public use.'" (citing with approval, *Sprint PCS Assets v. City of Palos Verdes Estates*, 583 F.3d 716 (9th Cir. 2009)). The Court of Appeal's decision was upheld by the California Supreme Court in *T-Mobile West LLC v. City and County of San Francisco*, 438 P.3d 239 (2019). ("*T-Mobile West*").

<sup>3</sup> Pub. Util. Code 2902.

<sup>4</sup> The installation of the fiber optic cable must be done in a manner that complies with the CPUC's extensive regulations on the design, construction and maintenance of all overhead and underground electric and communications facilities. CPUC General Order 95 sets forth the rules for overhead facilities and requires applicants to ensure that their proposed use of utility poles meets wind loading, pole loading and pole overturning calculations, among others. The City may not regulate matters over which the CPUC has been granted regulatory power. For those matters, the CPUC's authority is exclusive. See *S. Cal. Gas v. City of Vernon*, 41 Cal.App.4th 209 (1995).

<sup>5</sup> Pub. Util. Code 7901.1. See also 47 USC Section 253(c) preserving local right of way management.

Chapter 17.46 does not apply to Astound's fiber project. Chapter 17.46 regulates wireless facilities. A wireless facility is defined in Chapter 17.46 as: "the transmitters, antenna structures and other types of installations used for the provision of wireless services at a fixed location, including, without limitation, any associated tower(s), structure(s), and base station(s)."

There are some references to "communications cables" in some of the defined terms in Chapter 17.46, but that is acknowledging the fact that every wireless facility will have cables connecting the antennas and equipment at the fixed location to each other.<sup>6</sup> Separate from those cables that are part of the wireless facility, each wireless facility at a fixed location will also need to be connected to other telephone networks (known as the public switched telephone network). That connection is typically provided by a copper or fiber telephone line and Astound may intend to provide this service to Verizon Wireless as one of its commercial customers, but that does not make Astound's fiber optic project a wireless facility subject to Chapter 17.46.

## **2. Requirements of Chapter 12.08 for issuance of an encroachment permit to Astound.**

CMC Section 12.08.060 lists the encroachment application review standards that apply to Astound's project. Staff has reviewed the project in depth and concluded that the standards have been met.

In considering whether Astound's application meets the standards, the City must bear in mind the limits on its authority discussed above. For example, regarding safety, CPUC General Order 95 provides detailed construction, maintenance and safety requirements that apply to all overhead electrical supply and communication facilities that come within the jurisdiction of the CPUC, and are located outside of buildings, including facilities that belong to non-electric utilities.<sup>7</sup> The rules are intended to protect utility works and the public. General Order 95 was initially adopted in 1941 and has been updated many times, most recently in 2020 to strengthen the requirements for utility pole safety.<sup>8</sup>

General Order 95, Rule 44.2 imposes a mandatory obligation on any entity planning a new attachment to ensure that the utility pole will not be overloaded, regardless of the amount of increase in load. The pole loading calculations must include the results of intrusive inspections of the poles if the poles are over 15 years old. In other words, Astound must ensure the poles being used meet current standards or take steps to ensure that they meet those standards. The addition of guy wires proposed would be a common technique used to strengthen the poles to ensure they meet current General Order 95 standards.

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<sup>6</sup> Sometimes the components of a wireless facility are spread among several fixed locations but operate together as one local network, such as a Distributed Antenna System or small-cell network. In those instances, the fiber in the street that is connecting the components of the local network could be part of the wireless facilities reviewed under Ch. 17.46. However, the fiber connecting the local network to the public switched telephone network still would not be.

<sup>7</sup> See General Order 95, Rule 12- Applicability of Rules. The entire 602 page GO 95 can be viewed at this link: <https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M338/K730/338730245.pdf>

<sup>8</sup> See CPUC Decision No. 20-01-010 (as corrected by D.20-05-029).

As another example, regarding aesthetics, the CMC's standard for visual impacts in public rights-of-way is in Section 12.08.060(E)(1) which provides: "The proposed encroachment shall not diminish public use or enjoyment, either visual or physical, of the City property or public right-of-way to be encroached upon." Aesthetic regulation of communications facilities is on its face lawful according to the *T-Mobile West* cases discussed above. However, how the City applies the CMC's standard for visual impacts to individual applications can be subject to challenge. The Court of Appeal in *T-Mobile West*, while denying a facial challenge to San Francisco's ordinance regulating the aesthetics of communications facilities, explained that whether any particular installation might "aesthetically 'incommode' the public use of the right-of-way" would turn on the existing aesthetics of the proposed location.<sup>9</sup>

Astound's proposal is to (1) "overlash" one fiber optic cable with a diameter of 0.71 inches onto existing strand/cable strung along existing utility pole lines for approximately 2.2 miles, (2) to add up to a *total* of 8 support anchors or guy wires at various points for structural support, and (3) to place additional fiber optic cable underground. In other words, the poles that will be used already have cables and power lines on them, and by overlashing, the applicant will physically tie its new cable to an existing communications cable/strand that is already strung on the existing utility pole. The installation will not add any new lines below or above the existing lines. Instead, an existing line of cable/strand on the poles will become slightly thicker with the addition of the applicant's fiber optic cable. There will be a small number of guy wires added along the route. The remainder of the fiber project is underground.

Considering the project scope and location, denial of the permit on the basis that the visual public use or enjoyment of the public right-of-way would be diminished is highly likely to be subject to a successful legal challenge. In *T-Mobile West*, the Court of Appeal stated, should a permit be denied "in an area already cluttered with other electrical and telecommunications equipment, we again have no doubt [the applicant] may pursue an as-applied challenge."<sup>10</sup> In *Pacific Bell Telephone Co. vs. City of Livermore*, Court of Appeal, 1st District, Division 3, (filed Dec. 28, 2017)(unpublished, 2017 WL 8232408), the city denied an application for aboveground fiber optic cable on existing poles and required the applicant to place its facilities underground. The court overturned the city's decision, finding that adding more wires to existing cluttered utility poles cannot reasonably be considered to be incommoding the public use due to aesthetics. That project was similar to the current project in that the fiber optic cable was proposed to be overlashed onto existing lines.

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<sup>9</sup> T-Mobile at 355 (Court of Appeal contrasting the level of potential aesthetic "incommodation" of the same facility proposed "very close to Coit Tower or the oft photographed 'Painted Lady'" compared to "other parts of the urban landscape.").

<sup>10</sup> *Id.* at 356.



# CITY OF CARMEL-BY-THE-SEA CITY COUNCIL Staff Report

October 1, 2024  
ORDERS OF BUSINESS

<b>TO:</b>	Honorable Mayor and City Council Members
<b>SUBMITTED BY:</b>	Marnie R. Waffle, AICP, Principal Planner
<b>APPROVED BY:</b>	Chip Rerig, City Administrator
<b>SUBJECT:</b>	Update on City Council Resolution 2024-062 to develop alternative sites and programs that would allow for an amendment to the City's adopted 6th cycle Housing Element to remove Vista Lobos and Sunset Center from the Housing Sites Inventory List

## RECOMMENDATION:

Receive the report and provide feedback as appropriate.

## BACKGROUND/SUMMARY:

On April 8, 2024, the City Council adopted the 6th Cycle Housing Element, which covers 2023-2031. The City is responsible to plan for 349 new housing units by 2031.

On April 25, 2024, the State Department of Housing and Community Development (HCD) certified the City's Housing Element. Two city-owned sites, Vista Lobos and Sunset Center, were included as potential affordable housing sites to achieve certification (Housing Element Program 1.1.B: City-Owned Sites).

On July 9, 2024, in response to concerns regarding the redevelopment of the city-owned sites, the City Council passed Resolution 2024-062 directing staff to begin work immediately exploring and developing alternative affordable housing sites and programs to submit a formal general plan housing element amendment that provides alternative affordable housing opportunities and removes the need for housing units at Vista Lobos and Sunset Center. Additionally, staff was directed to return to the City Council in September and October with updates on progress.

On September 10, 2024, the City Council was provided with an update on the joint efforts of the Affordable Housing Alternatives (AHA) community group and City staff exploring four strategies to provide lower-income housing in lieu of developing city-owned sites (**Attachment 1**).

## *October Update*

City Council Resolution 2024-062 directed staff to return at the October 2024 meeting with a rough draft of an amendment that would ultimately be submitted to the State Department of Housing and Community



Development (HCD) (**Attachment 2**). Three months was not a sufficient amount of time to prepare a draft amendment that contains the level of detail required for consideration by HCD. To present alternative sites that can satisfy lower-income housing requirements, additional research and analysis is needed. City staff and the AHA community group will meet with the consultant, Veronica Tam, on Thursday, September 26th, to review the work completed and determine the next steps in preparing the amendment. Staff will update the City Council on the outcome of that meeting in our presentation on October 1st.

***What is our goal?***

The goal of pursuing an amendment to the adopted Housing Element is to identify alternative sites (i.e. private property) to accommodate the very-low, low, and moderate income units currently planned for Vista Lobos and the north and south parking lots of Sunset Center. Below is a breakdown of units by income category for each site.

**Table 1. City-Owned Sites**

	Very Low Income	Low Income	Moderate Income	Market Rate	Total
Vista Lobos	28	11	17	0	56
Sunset Center North	20	10	3	0	33
Sunset Center South	30	25	5	0	60
Total	78	46	25	0	149

The four strategies that are currently being pursued are:

1. Accessory Dwelling Units & Junior Accessory Dwelling Units (Housing Element Program 1.3.C).
  - a. The adopted Housing Element projects a total of 34 new ADUs/JADUs by 2031.
  - b. Based on the number of ADUs constructed and the number currently under construction, the City is projected to meet this target.
  - c. The proposed amendment to the Housing Element seeks to establish a higher projected number based on current trends producing new units.
  - d. Potential changes to this program may include more robust incentives for the development of new ADUs.
  - e. The proposed amendment also includes an analysis of the ADUs produced and whether smaller units could be deemed “affordable by design” satisfying a portion of the lower income housing need without the requirement for deed restrictions.

- f. The ADU sub committee of the AHA community group has delved into the details of ADUs to gain a more holistic understanding of the process to plan, permit, and construct an ADU. A draft resource guide has been prepared to provide homeowners with all the information they need to know, in one place, when exploring adding an ADU or JADU to their property. A draft of the guide is being shared with the Council and the community for feedback.

City staff has continued collecting and updating data on Accessory Dwelling Units that are going through the city's permitting process. The preliminary results of the data show the average size of an ADU is 468 square feet. A summary of the data is provided below.

- In the 6th cycle Housing Element, the city estimated an average of four ADUs per year for the eight-year cycle (2023-2031) for a total of 34 new ADUs.
- In 2023, the city exceeded estimates, issuing **six** certificates of occupancy for new ADUs.
- As of September 2024, the city has issued **five** certificates of occupancy for new ADUs.
- To date, the City has produced **11** of the **34** projected new ADUs. An additional 22 ADUs are currently under construction and are expected to be complete by 2031.
- An additional **four** ADUs are currently in planning review.
- If no additional ADUs were constructed for the remainder of the 6th cycle, the City would exceed the ADU projection by three units.
- Approximately 58% of ADUs constructed or currently under construction are conversions of existing square footage (living space, garages, guesthouses, or studios).

City staff will be surveying property owners of completed ADUs to determine how they are currently being used. Smaller ADUs can be "affordable by design" due to their size. The survey results will inform a revised projection for ADUs in the various income categories (very low income, low income, moderate income, and above-moderate/market rate).

## 2. Hotel-to-Residential Conversions (Housing Element Program 1.3.B).

- a. The adopted Housing Element sets a goal of converting 33 hotel rooms to permanent housing and transferring the development rights for 33 hotel rooms to another site within the commercial district.
- b. A number of smaller, older, lower-performing hotels are being evaluated as potential sites for conversion to residential. In some cases, these sites were apartments before being converted to hotel rooms and may still retain kitchens.
- c. The proposed amendment seeks to create a more robust program for the conversion of hotel

rooms with the goal of absorbing a portion of the lower-income housing requirement that is currently assigned to the city-owned sites.

- d. The Hotel subcommittee of the AHA community group has drafted a white paper and revised program language that is currently being reviewed by the consultant, Veronica Tam.
- e. The hotel subcommittee continues its work to identify potential hotel-to-residential conversions. An inventory of existing hotel properties and the number of hotel rooms per property has been compiled and provided to the consultant for further analysis.

### 3. Housing on Church Sites (Housing Element Program 1.1.D).

- a. The adopted Housing Element sets a goal of providing nine (9) new housing units on church sites (six affordable units and three market-rate units).
- b. The proposed amendment seeks to create a more robust program to increase the number of potential housing units on church sites with the goal of absorbing a portion of the lower-income housing requirement that is currently assigned to the city-owned sites.
- c. City staff and the Church subcommittee of the AHA community group are reaching out to local religious institutions to gauge interest in the development of housing and better understand the church's needs and constraints to make housing a reality.

### 4. Downtown Housing Opportunities (various Housing Element programs).

- a. The adopted Housing Element includes a variety of programs to encourage the creation of new housing units throughout the downtown area.
- b. The proposed amendment seeks to identify specific sites (privately owned) that can absorb a portion of the lower-income housing requirements currently assigned to the city-owned sites.
- c. The Downtown subcommittee of the AHA community group has started surveying properties in the commercial district to identify potential housing opportunities.
- d. The AHA community group has prepared maps that divide the downtown area into different sectors so teams of volunteers can focus on specific areas (**Attachment 3**).
- e. Two sectors of the downtown area have been canvassed, and existing and potential housing opportunities are being collected. The results will be shared with the consultant, Veronica Tam, who will utilize the information when analyzing alternative downtown housing sites.

Since the September 10, 2024, meeting, City staff and the AHA community group have continued to meet weekly.

The City has also entered into a Professional Services Agreement with Veronica Tam & Associates to provide technical assistance.

### **FISCAL IMPACT:**

The City Administrator entered into a Professional Services Agreement with Veronica Tam & Associates to provide technical assistance to develop alternative sites and programs that would allow for an amendment to the City's adopted 6th cycle Housing Element to remove Vista Lobos and Sunset Center from the Housing Sites Inventory List. The contract is for a not-to-exceed amount of \$59,999.

### **PRIOR CITY COUNCIL ACTION:**

On April 8, 2024, the City Council adopted Resolution 2024-029, approving a General Plan Amendment and adopting the 2023-2031 6th cycle Housing Element update.

On July 9, 2024, the City Council adopted Resolution 2024-062 directing staff to begin work immediately exploring and developing alternative affordable housing sites and programs in order to submit a formal general plan housing element amendment which provides alternative affordable housing opportunities and removes the need for housing units at the Sunset Center and Vista Lobos properties as part of the city's 6th cycle housing element.

### **ATTACHMENTS:**

Attachment 1) September 10, 2024, City Council Staff Report

Attachment 2) Resolution 2024-062

Attachment 3) Downtown Sector Maps



## CITY OF CARMEL-BY-THE-SEA CITY COUNCIL Staff Report

**September 10, 2024  
ORDERS OF BUSINESS**

<b>TO:</b>	Honorable Mayor and City Council Members
<b>SUBMITTED BY:</b>	Marnie R. Waffle, AICP, Principal Planner
<b>APPROVED BY:</b>	Chip Rerig, City Administrator
<b>SUBJECT:</b>	Update on City Council Resolution 2024-062 to develop alternative sites and programs that would allow for an amendment to the City's adopted 6 <sup>th</sup> cycle Housing Element to remove Vista Lobos and Sunset Center from the Housing Sites Inventory List.

### RECOMMENDATION:

Receive the report and provide feedback as appropriate.

### BACKGROUND/SUMMARY:

On April 8, 2024, the City Council adopted the 6th Cycle Housing Element, which covers 2023-2031. The City is responsible to plan for 349 new housing units by 2031.

On April 25, 2024, the State Department of Housing and Community Development (HCD) certified the City's Housing Element. Two city-owned sites, Vista Lobos and Sunset Center, were included as potential affordable housing sites to achieve certification (Housing Element Program 1.1.B: City-Owned Sites).

On July 9, 2024, in response to concerns regarding the redevelopment of the city-owned sites, the City Council passed Resolution 2024-062 directing staff to begin work immediately exploring and developing alternative affordable housing sites and programs to submit a formal general plan housing element amendment that provides alternative affordable housing opportunities and removes the need for housing units at Vista Lobos and Sunset Center. Additionally, staff was directed to return to the City Council in September and October with updates on progress.

### **September Update**

City staff has been participating in the weekly meetings of the Affordable Housing Alternatives (AHA) community group since July 16<sup>th</sup>. AHA has formed subcommittees of its members to focus on specific housing strategies. Four housing strategies in particular: accessory dwelling units, hotel-to-residential conversions, church sites, and downtown sites are being further explored. These strategies are discussed below in the August 21<sup>st</sup> community meeting recap.

It is important to note that these strategies already exist as programs in the certified Housing Element. The

main focus of the AHA and City collaboration has been to “supercharge” these programs to produce enough potential affordable housing units that the City sites can be removed from the Sites Inventory List altogether.

Each subcommittee is developing a “one-pager” that includes a) proposals and mechanics, b) challenges and mitigating factors, and c) questions.

Additionally, AHA contacted consulting firms with experience preparing housing elements and arranged meetings to discuss strategies to facilitate the proposed housing element amendment. Three introductory calls were conducted jointly by AHA and City staff to get early feedback on strategies that could successfully amend the City’s certified housing element.

On August 16<sup>th</sup>, city staff released a request for statements of qualifications for technical assistance with preparing an amendment to the housing element. The city received two responses to the request and is in the process of making a final selection. AHA, city staff, and the selected consultant will collaborate throughout September to refine strategies and alternatives to Vista Lobos and Sunset Center for affordable housing.

On August 21<sup>st</sup>, AHA and the City jointly sponsored a community meeting at Sunset Center, Carpenter Hall, from 6:00 to 8:00 p.m. The meeting was advertised in the Carmel Pine Cone and via Constant Contact. The Carmel Residents Association also promoted the meeting through its channels of communication. Approximately 50 attendees (in person and via Zoom) participated. Feedback was collected both orally and in writing. Another community meeting is tentatively scheduled for early October. The meeting will focus on accessory dwelling units and junior accessory dwelling units.

The four strategies discussed at the August 21st community meeting include:

1. Accessory Dwelling Units & Junior Accessory Dwelling Units (Housing Element Program 1.3.C). This program incentivizes the development of accessory dwelling units.
  - a. The AHA subcommittee on ADUs is developing an educational brochure.
  - b. City staff is developing a property owner interest form to better understand needs and constraints.
  - c. City staff has been collecting data on ADU/JADU approvals and production to demonstrate to HCD a track record of creating new housing units.
  - d. City staff is working with HCD to determine how reporting of ADUs constructed can satisfy lower-income housing requirements.
2. Hotel-to-Residential Conversions (Housing Element Program 1.3.B). This program encourages the conversion of older hotels to permanent multi-family rental housing. In exchange for providing 15 percent lower-income units, the hotel units can be transferred to another site within one of the commercial districts.
  - a. The AHA subcommittee on hotel conversions is developing an enhanced program to incentivize conversions.
  - b. The AHA subcommittee has reached out to industry leaders for input.
  - c. The AHA subcommittee is exploring the program's financial feasibility, including what incentives may be necessary to generate more interest.
3. Housing on Church Sites (Housing Element Program 1.1.D). This program implements State law, which allows religious institutions to construct housing on their property, irrespective of local zoning.

- a. Interest from the faith community was expressed following the August 21<sup>st</sup> community meeting.
  - b. The AHA subcommittee on churches is following up with local churches to understand needs and constraints.
4. Downtown Housing Opportunities (various Housing Element programs).
- a. The AHA subcommittee is exploring lot consolidations to create a potential project site(s) that is/are financially feasible for affordable housing development.

City staff will return at the October 1, 2024, Council meeting with another update on the efforts to identify affordable housing alternatives to Vista Lobos and Sunset Center.

**FISCAL IMPACT:**

There will be costs associated with securing a consultant to provide technical assistance. The cost will be billed on a time-and-materials basis not to exceed \$59,999.

**PRIOR CITY COUNCIL ACTION:**

None.

**ATTACHMENTS:**

**CITY OF CARMEL-BY-THE-SEA  
CITY COUNCIL**

**RESOLUTION NO. 2024-062**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF CARMEL-BY-THE-SEA DIRECTING STAFF TO BEGIN WORK IMMEDIATELY, UPON ADOPTION OF THIS RESOLUTION, EXPLORING AND DEVELOPING ALTERNATIVE AFFORDABLE HOUSING SITES AND PROGRAMS, IN ORDER TO SUBMIT A FORMAL GENERAL PLAN HOUSING ELEMENT AMENDMENT WHICH PROVIDES ALTERNATIVE AFFORDABLE HOUSING OPPORTUNITIES AND REMOVES THE NEED FOR HOUSING UNITS AT THE SUNSET CENTER AND VISTA LOBOS PROPERTIES AS PART OF THE CITY'S 6<sup>TH</sup> CYCLE HOUSING ELEMENT. STAFF IS FURTHER DIRECTED TO RETURN TO COUNCIL NO LATER THAN THE REGULAR SEPTEMBER 2024 COUNCIL MEETING WITH AN UPDATE ON PROGRESS AND RETURN NO LATER THAN THE REGULAR OCTOBER, 2024 CITY COUNCIL MEETING WITH A ROUGH DRAFT OF AN AMENDMENT THAT WOULD ULTIMATELY BE SUBMITTED TO THE STATE DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT (HCD)**

WHEREAS, the City of Carmel-by-the-Sea (City) currently has an adopted General Plan Housing Element (Housing Element) which is certified by the California Department of Housing and Community Development (HCD) for the State's 6<sup>th</sup> Housing Cycle spanning the years 2023-2031 (6<sup>th</sup> Cycle) which plans for the potential development of market rate and affordable housing totaling 349 new units; and

WHEREAS, the City wishes to maintain certification of the Housing Element throughout the entire 6<sup>th</sup> Cycle; and

WHEREAS, the City has, and continues to support the development of new affordable housing units within the city limits while protecting and honoring its design character; and

WHEREAS, the Sunset Center and Vista Lobos parking lots (City Owned Sites) are currently included on the certified Housing Element 'Sites Inventory' as sites that could collectively be developed with a total of 149 affordable housing units; and

WHEREAS, the City Owned Sites, in conjunction with others on the 'Sites Inventory', make up the total number of 231 affordable units required to be planned for development as part of the City's 6<sup>th</sup> Cycle Regional Housing Needs Allocation (RHNA); and

WHEREAS, the City wishes to find viable alternative sites and further develop programs (Alternatives) that would better spread affordable housing units around the City and remove the need to utilize the City Owned Sites; and

WHEREAS, the City wishes to move quickly and efficiently, with public input, to develop Alternatives and submit a Housing Element Amendment for certification by HCD which removes the City Owned Sites from the 'Sites Inventory', but does not reduce the total number of 231 new affordable units planned for development as part of the currently certified 6<sup>th</sup> Cycle Housing Element.



**NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Carmel-By-The-Sea does hereby** direct staff to begin work immediately, upon adoption of this resolution, exploring and developing alternative affordable housing sites and programs, in order to submit a formal General Plan Housing Element Amendment which provides alternative affordable housing opportunities and removes the need for housing units at The Sunset Center and Vista Lobos properties as part of the City's 6<sup>th</sup> Cycle Housing Element. Staff is further directed to return to Council no later than the regular September, 2024 Council meeting with an update on progress and return no later than the regular October, 2024 City Council meeting with a rough draft of an amendment that would ultimately be submitted to the State Department of Housing and Community Development (HCD).

**PASSED AND ADOPTED BY THE CITY COUNCIL OF THE CITY OF CARMEL-BY-THE-SEA this 9<sup>th</sup> day of July 2024, by the following vote:**

AYES: Councilmembers Baron, Dramov, Ferlito, Richards, and Mayor Potter

NOES: None

ABSENT: None

ABSTAIN: None

APPROVED:



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Dave Potter, Mayor

ATTEST:



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Nova Romero, MMC, City Clerk

# N3

Attachment 3 - Downtown Sector Maps



N3

Attachment 3 - Downtown Sector Maps



# N2

Attachment 3 - Downtown Sector Maps



N2

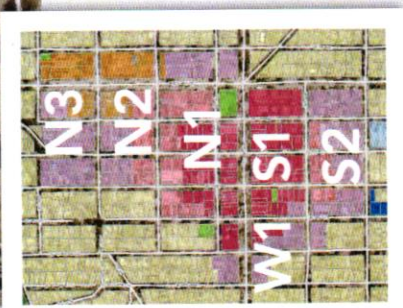
Attachment 3 - Downtown Sector Maps



Attachment 3 - Downtown Sector Maps



N1





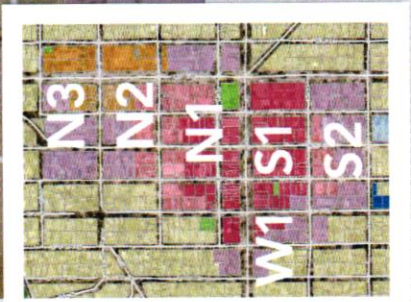
Attachment 3 - Downtown Sector Maps



Attachment 3 - Downtown Sector Maps



S1





Attachment 3 - Downtown Sector Maps



Attachment 3 - Downtown Sector Maps



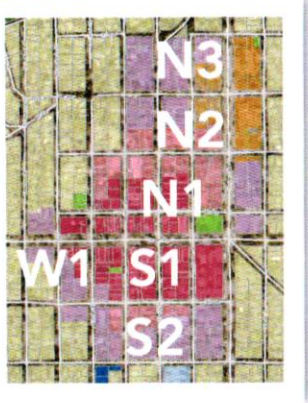
S2



Attachment 3 - Downtown Sector Maps



Attachment 3 - Downtown Sector Maps



W1

Attachment 3 - Downtown Sector Maps



W1



# CITY OF CARMEL-BY-THE-SEA CITY COUNCIL Staff Report

October 1, 2024  
PUBLIC HEARINGS

<b>TO:</b>	Honorable Mayor and City Council Members
<b>SUBMITTED BY:</b>	Marnie R. Waffle, AICP, Principal Planner
<b>APPROVED BY:</b>	Chip Rerig, City Administrator
<b>SUBJECT:</b>	<b>PERM EN 240129 (Voris):</b> Consideration of a Permanent Encroachment Permit application, PERM EN 240129 (Voris), for a stone border around a landscape planter in the public right-of-way, fronting a single-family residence located on Torres Street 4 northeast of 6th Avenue. APN: 010-092-010-000.

## RECOMMENDATION:

Consider a Permanent Encroachment application (PERM EN 240129, Voris) for existing encroachments in the public right-of-way adjacent to the historic Hansel & Gretel cottages located on Torres Street 4 northeast of 6th Avenue (APN 010-092-010-000).

## BACKGROUND/SUMMARY:

On March 13, 2024, the Planning Commission adopted Resolution 2024-019-PC approving the construction of a 250-square-foot detached garage in the front yard setback of the historic Hansel and Gretel Cottages (**Attachment 1**). The Planning Commission recommended the removal of existing encroachments in the public right-of-way and adopted Condition of Approval No. 21, requiring the encroachments to be removed prior to the final inspection of the detached garage (**Attachment 2**). The standard condition would have typically included "...or apply for an encroachment permit." This verbiage was inadvertently left out of the condition of approval. The encroachment permit review standards were not discussed in detail with the Planning Commission, only the treatment of the right-of-way as described in the Residential Design Guidelines. On behalf of the owners, the Applicant is requesting City Council consideration of the encroachments (**Attachment 3**). As of the writing of this report, nine (9) public comment letters supporting the encroachments have been received (**Attachment 4**).

### ***Project Description:***

The Applicant is seeking approval for existing stone borders around landscaped areas in the public right-of-way in front of the historic Hansel & Gretel cottages (**Attachment 5**). The stone border resembles Carmel stone and compliments the stone patio and pathways on the property, as well as the stone foundation and chimney on Hansel. Secondary encroachments include the Carmel stone walkway at the front entry gate and excess asphalt across the property frontage. Previously installed landscape lights have been removed from the right-of-way.

### ***Applicable Regulations:***

General Plan Policy P1-43 states,

*Maintain and enhance the informal, vegetated, open space character of the City's rights-of-way. Trees in the rights-of-way shall not be removed to provide parking. With the exception of driveways, installation of new paving in the rights-of-way by private property owners is prohibited. (LUP)*

CMC Section 17.34.070.B (Public Right-of-Way in the R-1 District) states that pathways paved only with decomposed granite or other soil materials are permitted and above-ground encroachments are prohibited (except paving for driveways). The full text of the section is provided below.

*1. Landscaping in public rights-of-way in the R-1 district is limited to drought-tolerant plants that are native and are consistent with the character of the Monterey Peninsula environment.*

*2. Plants should be natural in character and informally arranged to reflect the surrounding forest atmosphere. Landscaping shall not include bedding plants, highly colorful flowering plants and "formal plant arrangements."*

*3. Landscaping should consist of leafy ground covers, low shrubs and/or trees of the urbanized forest. Natural dirt rights-of-way with pine needles is also permitted. Parking spaces may be defined in the unpaved right-of-way with landscaping.*

*4. Paving, gravel, boulders, logs, timbers, planters or other above-ground encroachments are prohibited, except paving for driveways. Pathways paved only with decomposed granite or other soil materials made of soil materials are permitted.*

Residential Design Guideline 1.5 states,

Maintain and enhance the informal, vegetated, open space character of the right-of-way.

- Use simple planting plans when right-of-way landscaping is proposed.
- Emphasize native plants.
- Do not add paving or boulders to the right-of-way.

Residential Design Guideline 1.7 states,

Where a parking area in the right-of-way is to be defined, use a design that will reinforce the forest image.

- Natural soil, shredded bark and wood chips are preferred surface materials. Gravel is prohibited.
- Separate an existing parking space in the right-of-way from any driveway with plantings.
- Only the city is authorized to add paving or boulders in the public right-of-way, except in the cases of driveways and authorized encroachments.

Residential Design Guideline 2.2 states,

Maintain existing patterns of street edge design and street paving.

- Avoid adding new pavement at the edge that would widen the street or create a parking space.
- Maintain an informal unpaved and/ or landscaped edge where it exists.

Residential Design Guideline 10.3 states,

Planting in areas visible from the street or other public places should continue the forest character. Locate plants in relaxed, informal arrangements that are consistent with the urban forest character.

- Avoid formal, unnatural arrangements of plants and paving except in areas out of public view.
- Reserve the use of bedding plants and exotic flowering plants to small accents at walkways, entries or near special site features. Lawns visible from the street are inappropriate to the forest setting and should be avoided.

Residential Design Guideline 10.4 states,

Plants in the public right-of-way should be predominantly green foliage plants, in keeping with the design traditions of Carmel.

- Leaving the right-of-way natural is encouraged.
- Naturalized landscaping consistent with the City's forest character may be added to the right-of-way and be designed to blend into landscaping on site to enhance the sense of open space.
- If planted, the use of native trees, ground covers and low shrubs is preferred.
- Avoid the use of bedding plants and exotic species in the public right-of-way.

Note: No new paving for parking may be created in the right-of-way and when development occurs on a site any existing paving in the right-of-way must be removed unless specifically authorized through an encroachment permit.

Carmel Municipal Code Chapter 12.08 (Encroachments) states that it is the policy of the City to discourage encroachments onto public lands. When approving an encroachment, they shall be kept to a minimum and permitted only when a) consistent with the General Plan, b) preserve the public health, safety, or welfare, c) contribute to the general planning and zoning objectives of the City, and d) are characteristic with the appearance of the neighborhood and City.

A permit is required to place or maintain any encroachment in the public right-of-way. "Encroachment" is defined as, *any excavation, structure or object, temporary or permanent, upon, over, or under any City property or public right-of-way, except driveways...* A permanent encroachment is any encroachment that remains in the public right-of-way for more than 90 days.

Applications for encroachments are submitted to the Director of Community Planning & Building for coordination of reviews by appropriate City departments. The City Administrator is authorized to approve encroachments that conform to the standards in CMC 12.08.060. If the proposed encroachment does not conform to these standards, or it is the opinion of the City Administrator that the nature of the encroachment is contrary to the public interest or should be referred to the City Council for determination, then the application shall be scheduled for action by the City Council. Due to the nature of the encroachment, the City Administrator is referring the application to the City Council for action. Each standard is listed below, followed by the applicant's response to the standard and the staff's response. The City Council has the authority to exercise discretion in determining conformance with applicable review standards.

## **ANALYSIS:**

### ***Encroachment Application Review Standards***

There are nine (9) review standards A through I. Standard I applies only to wireless communication facilities and does not apply to this application.

**A. Need.** The applicant shall be determined to have a justifiable need for the encroachment, and the encroachment shall not be contrary to the public interest.

Applicant's Response: The request is to retain a previously installed stone border around planting areas. The border is needed to (a) retain water and soil in the planting area; (b) prevent auto traffic from driving into



the planting area; and (c) identify planting area from paved area for pedestrians and vehicles by contrasting color of the border.

Staff's Response: The applicant has provided justification for the stone border. The stone border establishes a perimeter around the landscaping to prevent vehicular and foot traffic from damaging the plant material. It also defines the public viewing areas of the historic cottages directing people to the driveway and front entry gate.

The Carmel stone path defines the front entry and is compatible with other stone features on the property. It provides a stable surface where the public can view the historic cottages.

The asphalt also provides a stable, solid surface for the many visitors to the cottage and an area for vehicles to pull out of the travel lane on Torres Street to take photographs. The encroachments benefit the public due to the volume of visitors that Hansel & Gretel attracts.

**B. Safety.** The granting of an encroachment permit shall not create a hazard to public health or safety.

Applicant's Response: The 6" high stone border is similar to a curb, separating planting from paved areas. The light stone color contrasts with pavement and planting, identifying the demarcation and directing cars and pedestrians to remain on paved areas. Unlike boulders, etc., the curb is familiar to persons as a change in grade.

Staff Response: The stone border is intended to function like a curb protecting the landscaping from vehicular and pedestrian traffic. However, the stone border may also pose a tripping hazard. Hansel & Gretel are arguably the most visited Comstock cottages. This increases the probability of the public tripping over the stone curb. The high contrast between the stone curb and the asphalt makes the border more visible, but the amount of asphalt also detracts from the forested edge character of the residential district. The property owner is required to maintain liability insurance in the event of an accident.

The stone border has been in place for two years, and staff is unaware of any accidents. The Planning Commission recommends that the stone border be removed. While the plants may fall victim to trampling by pedestrians or vehicles, protecting public safety is paramount. The Council may consider whether the stone curb is no more of a hazard than a typical rolled asphalt berm.

The Carmel stone entry path creates a stable surface on which the public can gather to take photographs of the historic cottages. The path is not hazardous to the public health or safety.

The asphalt area allows vehicles to pull out of the travel lane on Torres Street when taking photographs from their vehicles which may improve safety. The width of Torres Street is narrow, and the historic cottages are across the street from a commercial driveway that provides access to the Carmel Bay View Inn. The asphalt extends the improved portion of the roadway and is not a hazard to public safety.

**C. Drainage.** The proposed encroachment shall not adversely affect the normal drainage of surface water, unless an acceptable mitigation is included that will be advantageous to the general public and meet the standards herein.

Applicant's Response: The border retains the normal drainage of surface water within the planting area, whereas if the border is eliminated, water will run off into the street and into the storm drain system.

Staff Response: The stone border will mitigate erosion from the landscaped areas. It will also act as a barrier, redirecting surface water away from the landscaping, where it might have an opportunity to percolate

back into the soil. This could be mitigated by reducing the amount of asphalt along the property's frontage and restoring the right-of-way to a more natural state. The Council should consider whether the potential safety benefits of the asphalt should take precedence over drainage flows.

The Carmel stone entry path does not affect the flow of drainage.

#### **D. Circulation and Parking.**

1. The proposed encroachment shall not adversely affect vehicular and/or pedestrian traffic nor the parking of vehicles.

Applicant's Response: This section is critical pertaining to the Hansel Cottage. Approximately 4-6 persons per hour, all day every day, come looking for the Hansel & Gretel cottages. The planting areas and borders direct pedestrian onlookers (tourists from across the world who come to see Hansel and Gretel to the viewpoint in front of Hansel. The planting areas, approved in 2018 as part of the Gretel restoration/addition project, prevent parked cars from blocking that view and access. As noted above, the borders protect and define that viewpoint.

Staff's Response: The landscaped areas protect important public views of the historic Hansel & Gretel cottages by preventing parked cars from interfering with the views of the cottages. The defined landscape areas direct visitors to ideal viewing locations, such as the driveway and the front entry gate. While parking along the street edge is encouraged, the Council should consider whether protecting the views of Hansel & Gretel takes precedence over parking in front of this 60-foot wide lot.

2. The proposed encroachment shall not adversely impact existing rights-of-way nor preclude or make difficult the establishment or improvement of existing or potential streets or pedestrian ways.

Applicant's Response: The planting areas help define the roadway and parking spaces, and the borders define the planting areas. There is no existing or proposed adverse impact on rights-of-way.

Staff's Response: The stone borders extend far enough into the right-of-way to prevent on-street parking but not so far as to encroach into the travel lane on Torres Street. The stone border is not so permanent that it would preclude the City's ability to improve the street in the future.

The Carmel stone entry path defines the front entry and would not preclude the City's ability to improve the street in the future.

The additional asphalt provides a benefit by creating enough space for a vehicle to pull out of the travel lane and take photographs of the cottages. The asphalt would not preclude the City's ability to improve the street in the future.

#### **E. Public Use and Enjoyment.**

1. The proposed encroachment shall not diminish public use or enjoyment, either visual or physical, of the City property or public right-of-way to be encroached upon.

Applicant's Response: As noted above, the encroachment (stone borders defining the planting areas) enhances, rather than diminishes, the public enjoyment of this privately owned and city-honored historic resource.

In addition to the characteristics noted above (separation of pavement from planting, definition of pedestrian viewpoint), the stone border is most compatible with the historic stonework and cottages beyond.

Staff's Response: The stone border enhances public use and enjoyment by protecting important views of the historic cottages. The border is easy to remove in the future.

The Carmel stone entry path enhances public use and enjoyment by creating a stable surface to gather and photograph the historic cottages. Its architectural compatibility with the stone site features and the stone on Hansel contributes to the overall experience of visiting these historic cottages. The path is easy to remove in the future.

2. The encroachment and enjoyment shall be in the public interest.

Applicant's Response: The Voris's, owners of Hansel & Gretel, have been and continue to be, stewards of the cottages as public treasures, achieving a balance between tourists desiring to see the resources and their private use of their residence. They do this by discouraging access onto the property while encouraging viewing from the street. To improve this viewpoint, they recently removed an arbor from over the front gate, so visitors can more easily frame and photograph the Hansel Cottage.

Staff's Response: The landscaped areas defined by the stone border are an extension of the on-site landscaping. Combined with the Carmel stone entry path, the encroachments provide an attractive environment for the many visitors observing and photographing the historic cottages.

3. The length of time an encroachment has existed shall not by itself prejudice a decision.

Applicant's Response: Although the request is to retain an existing encroachment, time of existence is not considered a factor. The borders were installed as part of the landscape improvements of the Gretel Restoration/Addition project, and were requested for removal by the Planning Commission as a condition of approval of the upcoming garage construction. Because the border is a positive incremental element to the planting, we now request continuation of that encroachment.

Staff's Response: The stone border, Carmel stone path, and asphalt were installed Spring of 2022. The extent of the planter areas and the landscaping in the right-of-way were shown and approved on a landscape plan. The Carmel stone border and path were not identified on the approved plans. The extent of the asphalt area is shown on the approved plan.

## **F. Compatibility.**

1. The proposed encroachment and its mitigation shall be consistent with the General Plan and the adopted ordinances of the City. Particular attention shall be given to Section P1-48 of the General Plan, which prohibits the construction of sidewalks and concrete curbs in the R-1 district, unless necessary for drainage and/or pedestrian safety.

Applicant's Response: No sidewalks are proposed; the asphalt of the roadway extends as a path to the gate at the property line, allowing visitors to view the resource. No concrete is proposed; the borders separating planting beds from the asphalt are Carmel stone, to reflect the character of the resource. The borders retain drainage.

Staff's Response: General Plan Policy P1-43 states, *Maintain and enhance the informal, vegetated, open space character of the City's rights-of-way. Trees in the rights-of-way shall not be removed to provide parking. With the exception of driveways, installation of new paving in the rights-of-way by private property owners is prohibited. (LUP)*

The property frontage has been improved with new asphalt and landscaping defined by the stone borders. No trees were removed in the right-of-way to accommodate the improvements. A more traditional treatment to the right-of-way would be a natural finish, with or without landscaping, and a rolled asphalt berm at the street edge to keep surface water from flowing from the street onto private property.

A 4-foot wide decomposed granite path is the preferred material for paths in the right-of-way in the R-1 District. Due to the volume of visitors to the historic cottages, the stone path would be more stable and durable than decomposed granite. The Carmel stone path is compatible with similar stone features on the property.

2. The encroachment shall not create, extend, or be reasonably likely to lead to an undesirable land use precedent.

Applicant's Response: Planting areas throughout the city and near to Hansel and Gretel are currently defined by a number of border elements; most are desirable and compatible elements to the properties. There is no precedent made by retention of this stone border.

Staff's Response: It is not uncommon for property owners to propose defining the boundary of a landscaped area with stones, rocks, logs, etc. These features are typically discouraged in favor of a natural, informal forest edge.

While located in the R-1 District, the historic cottages are directly across the street from the Residential and Limited Commercial (RC) District and a commercial driveway that provides ingress and egress to the Carmel Bay View Inn. The proximity of this commercial activity is not so common that it would create an undesirable land use precedent. Residential areas adjacent to commercial districts often contain features in the right-of-way not found in other areas of the R-1 District such as asphalt sidewalks, designated on-street parking spaces, and an improved right-of-way up to the street edge. These improvements support increased vehicular and pedestrian traffic in these areas.

3. Granting of a permit shall not adversely affect the usability or enjoyment of one or more adjoining parcels.

Applicant's Response: Approval will have no bearing on adjoining parcels.

Staff's Response: The proposed encroachments are contained within the frontage of the historic cottages and will not affect the usability or enjoyment of adjoining parcels. The volume of visitors to Hansel & Gretel would not be any less without the encroachments.

4. The proposed encroachment and its mitigation shall be compatible with the surrounding area and adjoining properties.

Applicant's Response: As noted above, some adjoining properties have similar features, and are similar in design to Hansel and Gretel. The encroachment of stone borders around planting areas is compatible with these properties.

Staff's Response: The block of Torres Street between 5<sup>th</sup> and 6<sup>th</sup> Avenues is steep. On the downhill side of the street to the south, there are multiple encroachments, including stone/rock curbs/walls and small wooden logs, which retain the natural soil and define landscaped areas in the right-of-way on the east side of the street. On the west side of the street is the Carmel Bay View Inn; to the south of the hotel is the back of Surf & Sand. At this location, on the west side of the street, is an asphalt sidewalk and stone curb. Considering the immediate context, the proposed encroachments are in keeping with the neighborhood character.

## **G. Public Property/Greenbelt.**

1. The proposed encroachment shall not adversely affect any public property, including existing vegetation or its root structure, and shall not significantly reduce greenbelt area that may be used for tree planting.

Applicant's Response: The stone borders will have no effect on root structures. The planting areas enhance greenbelt area; if damaged or dented by persons or cars because the borders aren't allowed, that could be an adverse effect on the vegetation and greenbelt area.

Staff's Response: The stone borders provide some protection for the landscaping. The excess asphalt does reduce the greenbelt area; however, these areas would not be practical for planting additional trees due to their proximity to the edge of the roadway and the presence of electrical transmission lines on the east side of the street.

2. Significant trees which would be affected by the proposed encroachment shall be identified by the Director of Forest, Parks and Beach and approval for removal shall follow City policy.

Applicant's Response: There is no relationship between the stone borders and existing trees.

Staff's Response: This standard is not applicable. The encroachments do not affect any significant trees.

**H. Mitigation.** When deemed appropriate by the City, the applicant shall include those measures appropriate to compensate the City for the loss of the use of City property or the public right-of-way, or to repair damage thereto.

Applicant's Response: The stone borders are, in fact, protective to City property by defining the planting areas, and as such, should be considered a mitigation.

Staff's Response: The encroachments do not result in a loss of the use of the right-of-way. The landscaping enhances the right-of-way and defines public viewing areas of Hansel and Gretel by preventing vehicles from blocking the view of the cottages and directing the public to important viewing areas.

### **FISCAL IMPACT:**

None.

### **PRIOR CITY COUNCIL ACTION:**

None.

### **ATTACHMENTS:**

- Attachment 1 Detached Garage Plans
- Attachment 2 Applicant Letter
- Attachment 3 Resolution 2024-019-PC
- Attachment 4 Public Comments in Support
- Attachment 5 Existing Photo



Attachment 1

# PROPOSED GARAGE FOR MICHAEL & ROBERTA VORIS

TORRES STREET 4 NE SIXTH AVENUE  
CARMEL-BY-THE-SEA, CALIFORNIA

## PROJECT DATA:

NEW DETACHED GARAGE - EXISTING HISTORIC COTTAGES  
REMOVAL OF TWO SMALL OAK TREES AND  
ONE SPAR OF A LARGE MULTI-SPAR OAK TREE

LEGAL DESCRIPTION: LOT 10 & NORTH 1/2 OF LOT 12, BLOCK 60  
AFN 010-092-010-000

LOCATION: TORRES STREET 4 NE SIXTH, CARMEL-BY-THE-SEA CA.  
LOT SIZE: 6,000 SF. ZONING: RI

OWNERS: MICHAEL & ROBERTA VORIS  
1823 GARDEN HIGHWAY  
SACRAMENTO, CALIFORNIA  
EMAIL: r.voris@comcast.net m.voris@comcast.net

LOT SIZE: 6000 SQUARE FEET ZONING: RI

GARAGE SETBACKS:	ALLOWED	PROPOSED
FRONT (WEST):	0	1'-6"
NORTH SIDE:	3'-0"	33'-11"
SOUTH SIDE:	3'-0"	8'-6"
COMPOSITE:	15'-0"	48'-3"
REAR:	3'-0"	16'-10"
HEIGHT:	15'-0"	12'-0"

FLOOR AREA: (E) HANSEL COTTAGE	250 SF.
(E) GRETEL COTTAGE	1889 SF.
PROPOSED GARAGE	250 SF.
DEDUCT PARKING PAD (-200 SF.)	

TOTAL FLOOR AREA: 2,189 SF.

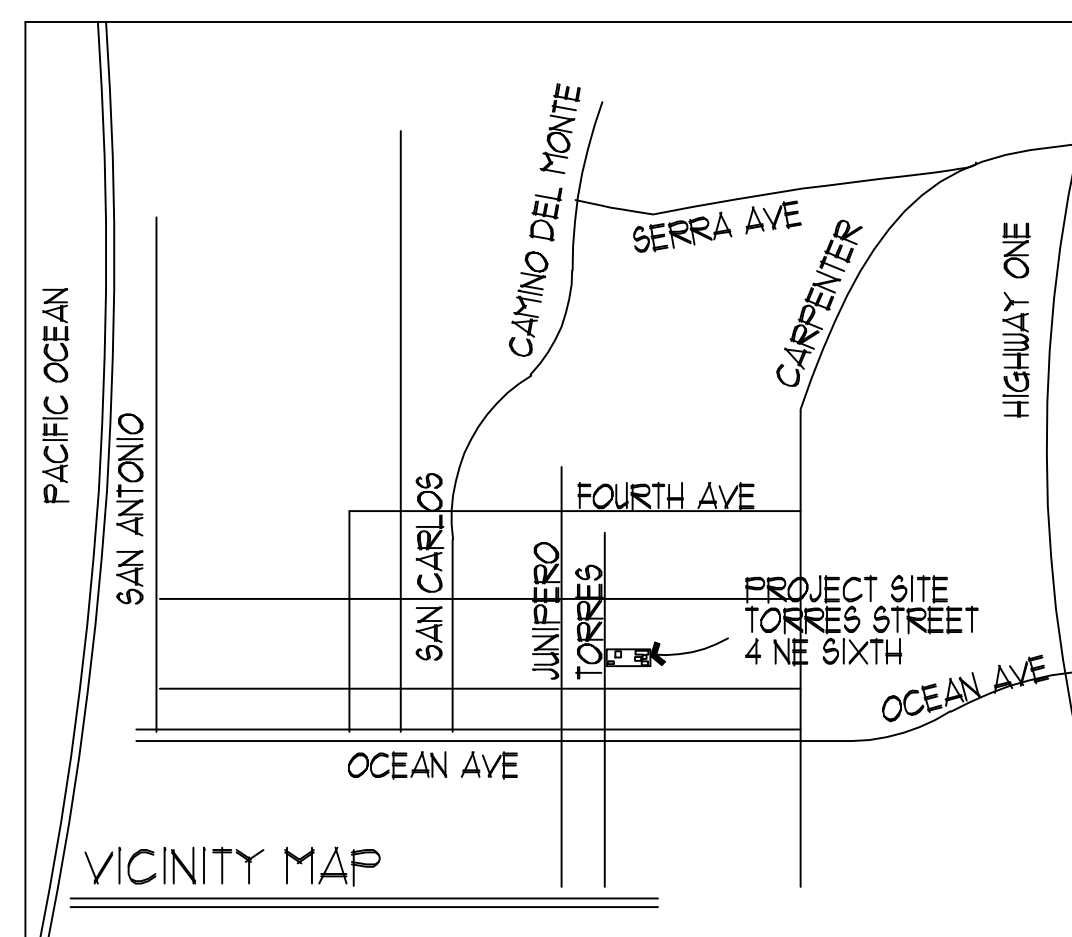
ALLOWED FLOOR AREA: 2,460 SF.

PROPOSED VOLUME - ADDITION ONLY OPTION

GARAGE		
ROOF	250 SF. x 4' / 2 =	500 CF.
FLOOR-TO-PLATE LINE	250 SF. x 8 =	2,000 CF.
AVG GROUND TO FLOOR	250 SF. x 5 =	125 CF.

TOTAL VOLUME PROPOSED = 2,625 CF.  
VOLUME ALLOWED: 250 x12 3,000 CF.

SITE COVERAGE:  
EXISTING COVERAGE IS AS APPROVED DURING PREVIOUS PROJECT.  
NO CHANGE TO COVERAGE FOR CONVERSION OF PARKING PAD TO GARAGE.



ARCHITECT & ENGINEERS  
ARCHITECT: BRIAN CONGLETON  
24720 PINE HILLS DRIVE  
CARMEL CALIFORNIA 93823  
831/915-2666 brian@congletonarchitect.com

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- 11 PROJECT DATA
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- 14 TREE PLAN
- 21 GARAGE PLAN & ELEVATIONS
- DOOR & WINDOW SCHEDULE & DETAILS
- 22 STREET ELEVATIONS
- 23 STREET PHOTO & RENDERING

## PROJECT DATA

DESIGN REVIEW SUBMITTAL  
JULY 11, 2023

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DRAWN BY: BT  
DATE: 7-11-23  
REVISED:

Brian Congleton Architect

(831) 915-2666 brian@congletonarchitect.com

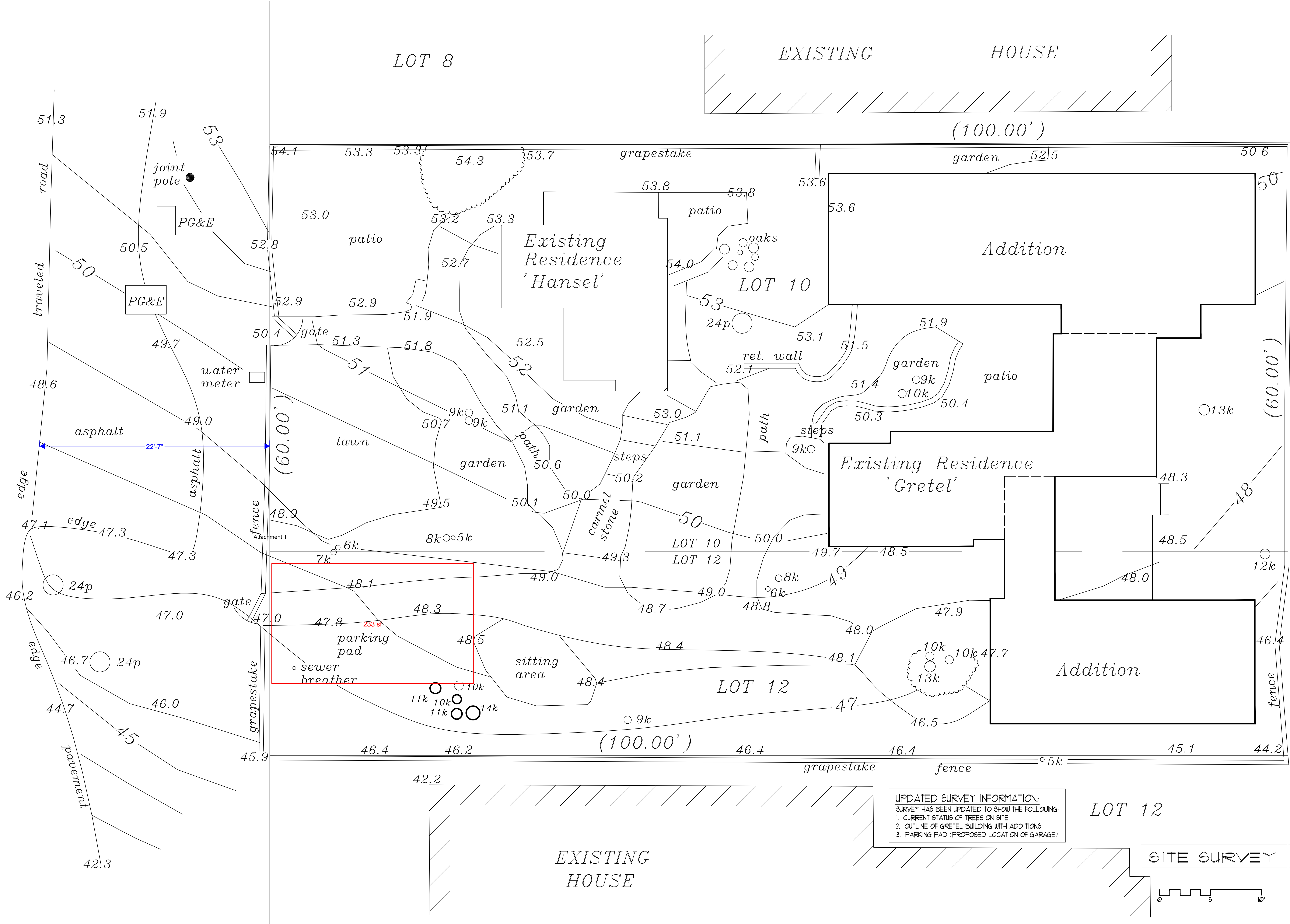
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VORIS GARAGE

TORRES 4 NE SIXTH - CARMEL CALIFORNIA

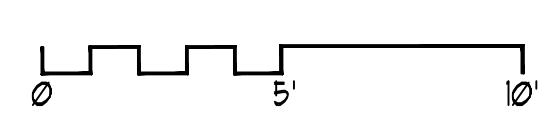
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1.1

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 DATE: 7-11-23  
 REVISED:



UPDATED SURVEY INFORMATION:  
 SURVEY HAS BEEN UPDATED TO SHOW THE FOLLOWING:  
 1. CURRENT STATUS OF TREES ON SITE.  
 2. OUTLINE OF GRETSEL BUILDING WITH ADDITIONS  
 3. PARKING PAD (PROPOSED LOCATION OF GARAGE).

SITE SURVEY



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**VORIS GARAGE**  
 TORRES 4 NE SIXTH - CARMEL, CALIFORNIA

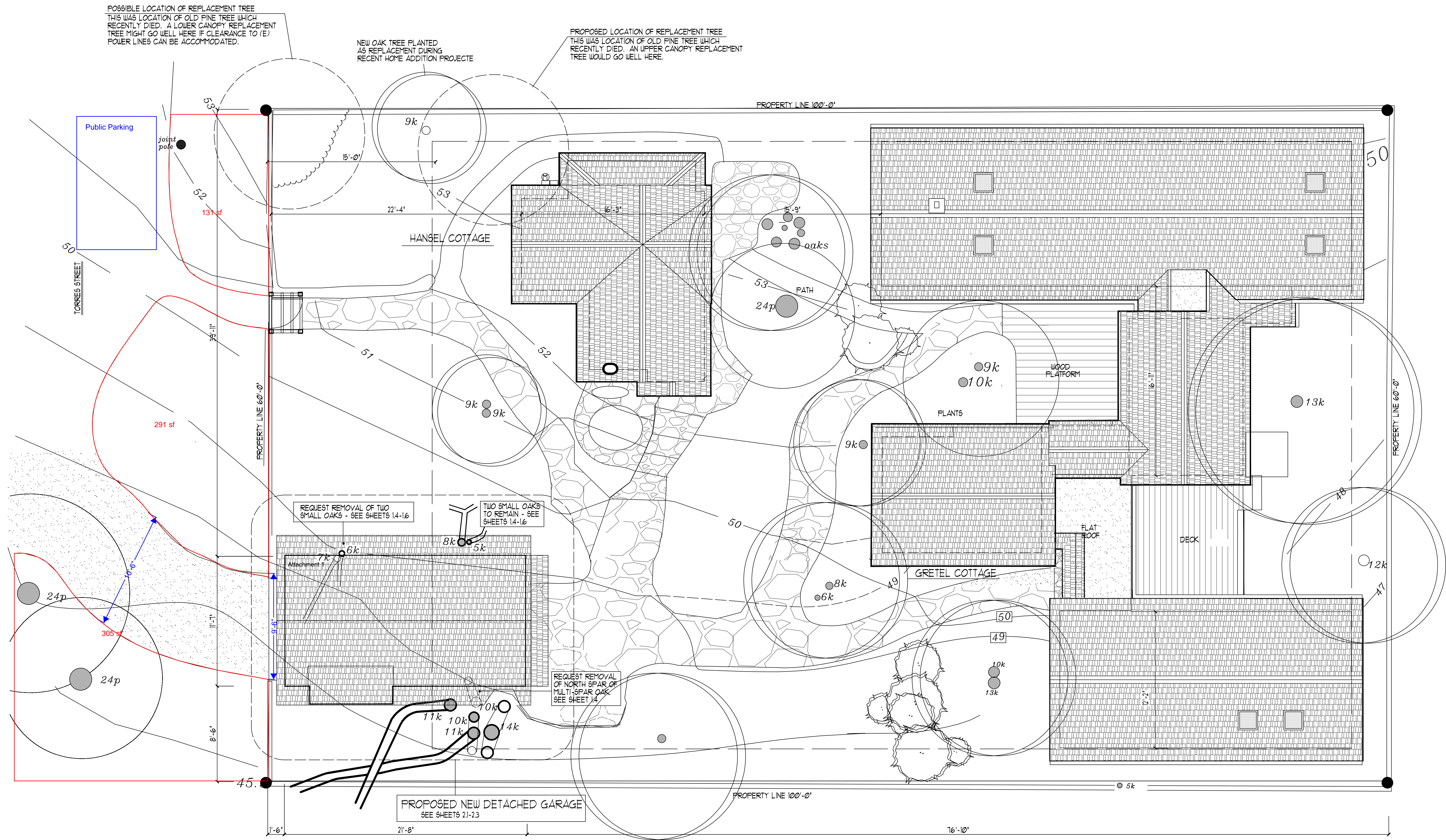
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 DRAWN BY TC  
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 REVISED: 2-28-24

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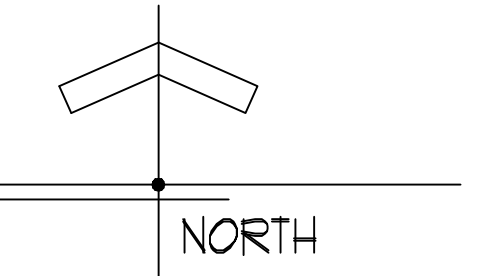
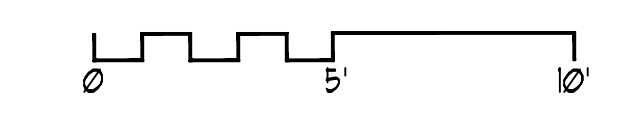
**VORIS GARAGE**  
 TORRES 4 NE SIXTH - CARMEL, CALIFORNIA

SHEET NUMBER  
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SITE PLAN

1/4" = 1'-0"



SITE PLAN



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 DRAWN: BTC  
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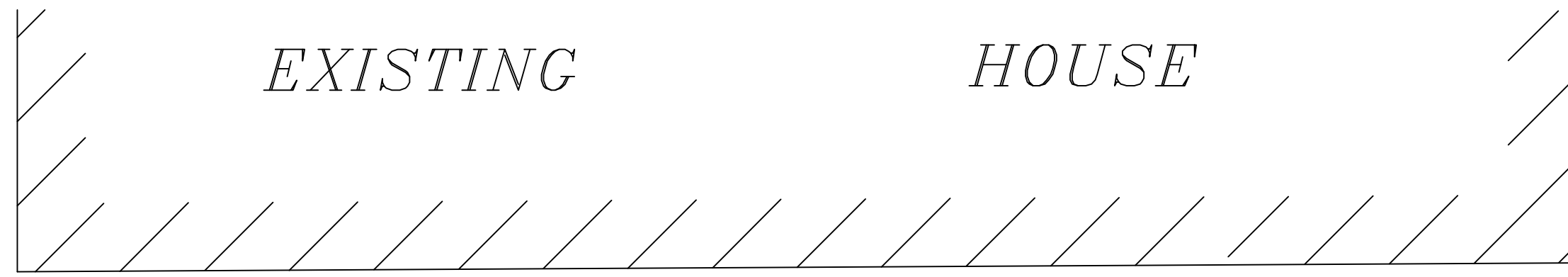
**VORIS GARAGE**  
 TORRES 4 NE SIXTH - CARMEL CALIFORNIA

SHEET NUMBER  
**1.4**

**TREES ON SITE**  
 24 OAK TREES  
 1 PINE TREE (TREE # 22) - 24' PINE  
 REPLACEMENT TREE LOCATIONS SHOWN BELOW

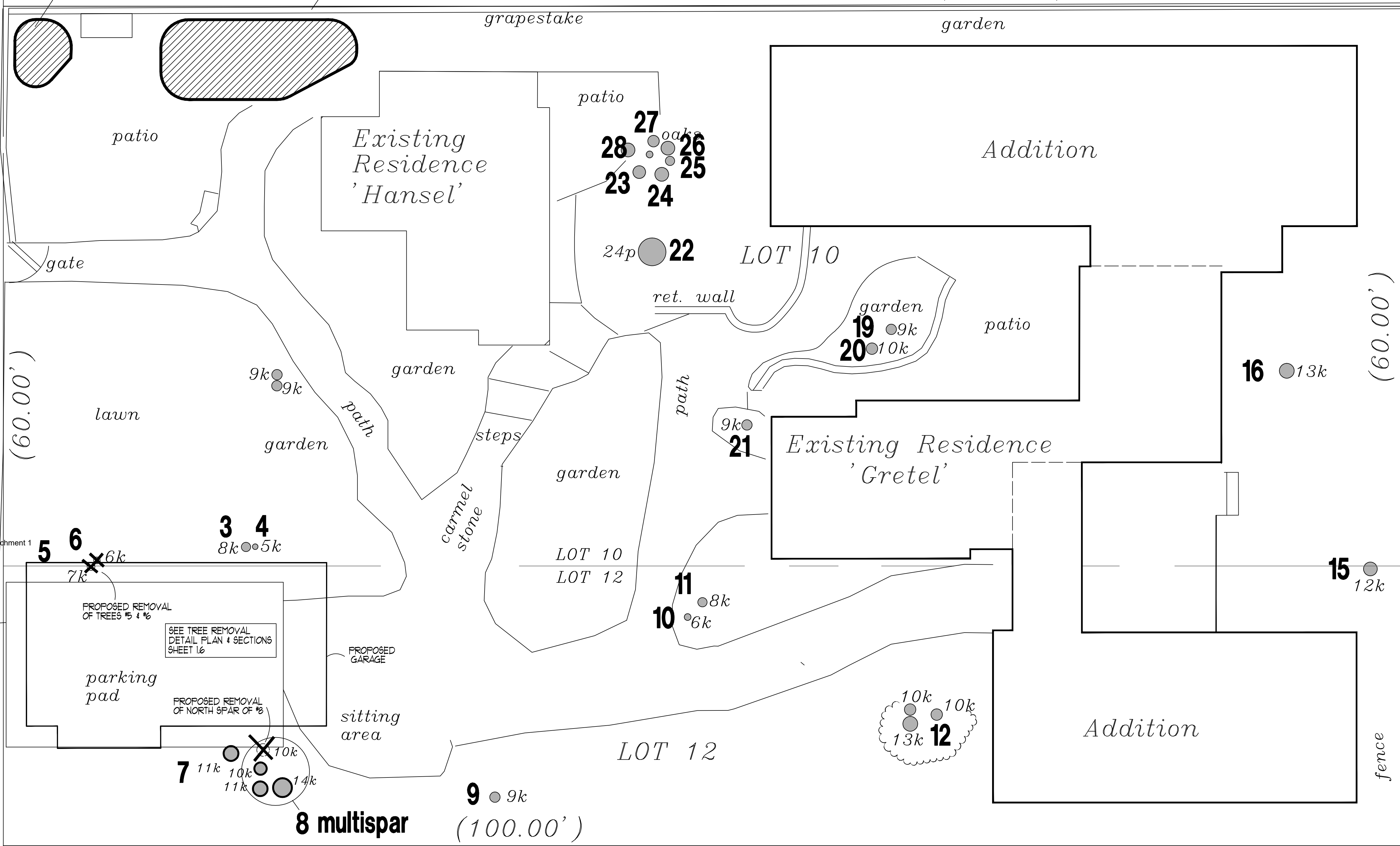
**POSSIBLE LOCATION OF REPLACEMENT TREE**  
 THIS WAS LOCATION OF OLD PINE TREE WHICH RECENTLY DIED. A LOWER CANOPY REPLACEMENT TREE MIGHT GO WELL HERE IF CLEARANCE TO (E) POWER LINES CAN BE ACCOMMODATED.

**PROPOSED LOCATION OF REPLACEMENT TREE**  
 THIS WAS LOCATION OF OLD PINE TREE WHICH RECENTLY DIED. AN UPPER CANOPY REPLACEMENT TREE WOULD GO WELL HERE.



LOT 8

(100.00')



(60.00')

(60.00')

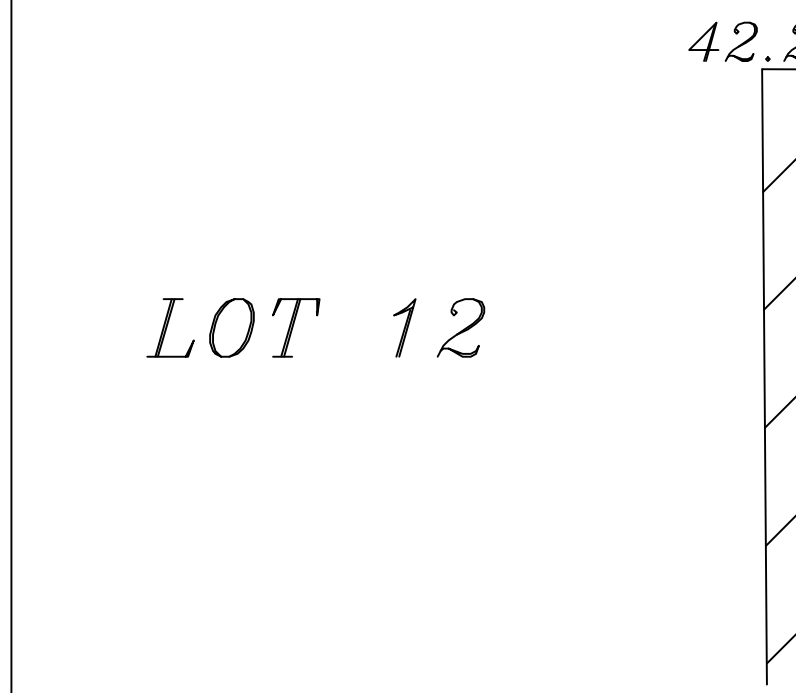
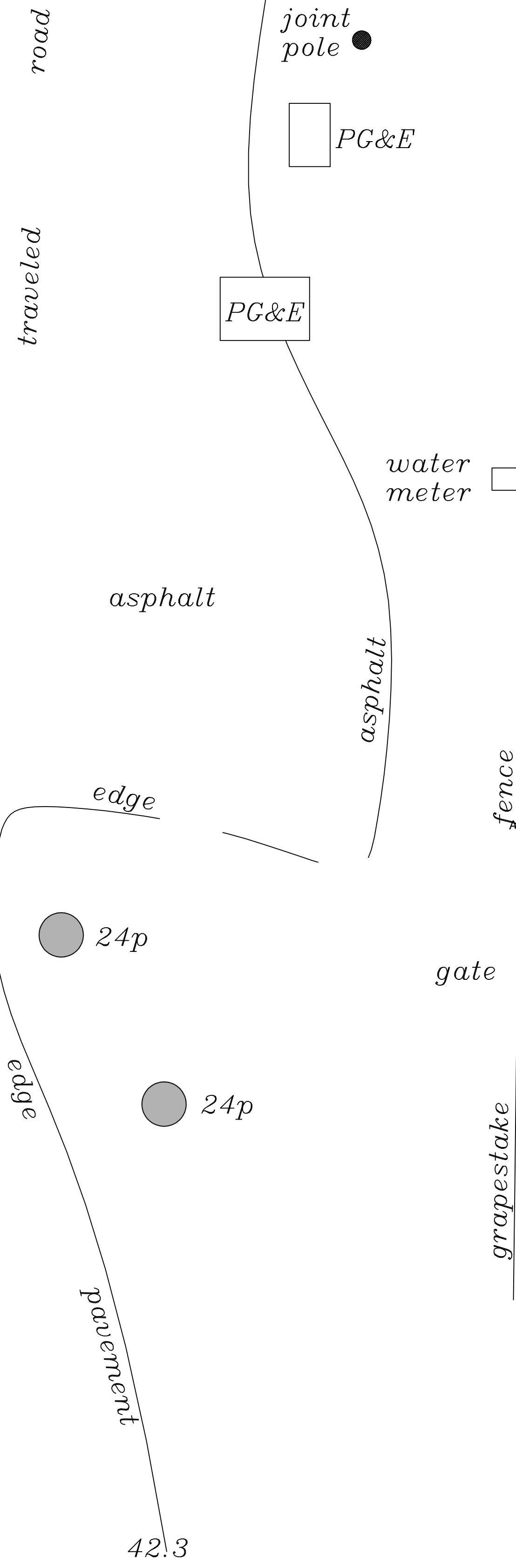
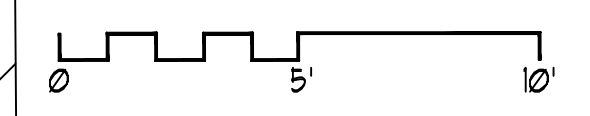
(100.00')

LOT 12

EXISTING HOUSE

**UPDATED TREE INFORMATION:**  
 TREE #1 DIED OF OLD AGE AND HAS BEEN REMOVED.  
 TREE #13 (10' OAK) WAS APPROVED FOR REMOVAL FOR ADDITION 2017.  
 TREE #14 (45' PINE) WAS APPROVED FOR REMOVAL FOLLOWING LIMB FAILURE, 2021.  
 TREES #11 (10' OAK) & #18 (16' OAK) APPROVED FOR REMOVAL FOR ADDITION 2017.

TREE PLAN



Significant Tree Evaluation Worksheet

Block: 60 Lot(s): 10 + N1/2 12 Street Location: E/Torres 4 north of 6th

Part One: Initial Screening:

Complete Part One to determine if further assessment is warranted. Trees must pass all criteria in Part One to be considered significant or moderately significant.

Table A: Does the tree pose an above-normal potential risk to life and property? Columns: Tree # 1-16, YES/NO rows.

Table A: Does the tree pose an above-normal potential risk to life and property? Columns: Tree # 17-28, YES/NO rows.

Any tree with structural impairment likely to cause failure should be marked as unsafe and removed. Use page five of this worksheet to document the safety risk. Trees that have limited and specific defects that can be remedied with selective pruning or other mitigation should be marked as safe and specific recommendations should be given to the owner for tree care. Such trees may still be assessed for significance.

Table B: Is the tree one of the following native species on the Carmel-by-the-Sea recommended tree list? Columns: Tree # 1-16, Species (MP, CO, MC, BP, CL, CS, OT), YES/NO rows.

Table B: Is the tree one of the following native species on the Carmel-by-the-Sea recommended tree list? Columns: Tree # 17-28, Species (MP, CO, MC, BP, CL, CS, OT), YES/NO rows.

MP - Monterey pine, BP - Bishop pine, CO - Coast live oak, CS - California sycamore, OT - Other, MC - Monterey cypress, CR - Coast redwood, CL - Catalina Ironwood, BL - Big leaf maple. (Note: Other species on the recommended tree list may be determined to be Significant Trees only if they are exceptional examples of the species.)

Table C: Does the tree meet the minimum size criteria for significance? Columns: Tree # 1-16, YES/NO rows.

Table C: Does the tree meet the minimum size criteria for significance? Columns: Tree # 17-28, YES/NO rows.

Table C: Does the tree meet the minimum size criteria for significance? Diameter and Height criteria table.

Part Two: Assessment For Tree Significance

For each of the criteria below assign points as shown to assess the tree. If any criteria score is zero the assessment may stop as the tree cannot qualify as significant or moderately significant.

Table D: What is the health and condition of the tree? Columns: Tree # 1-16, score rows.

Table D: What is the health and condition of the tree? Columns: Tree # 17-28, score rows.

- 0 points: The tree is heavily infested with pests or has advanced signs of disease that indicates the tree is declining and has very limited life expectancy.
1 point: The tree shows some pests or disease that impair its condition, but which does not immediately threaten the health of the tree.
2 points: The tree appears healthy and in good condition.
3 points: The tree shows excellent health, is free of pests and disease and is in very strong condition.

Table E: What is the overall form and structure of the tree? Columns: Tree # 1-16, score rows.

Table E: What is the overall form and structure of the tree? Columns: Tree # 17-28, score rows.

- 0 points: Prior pruning, disease or growth habit have left the tree deformed or unsound to an extent that it cannot recover or will never be a visual asset to the neighborhood or will likely deteriorate into a structural hazard.
1 point: The tree has poor form or structure but (a) can recover with proper maintenance or (b) it provides visual interest in its current form, and does not have structural defects that are likely to develop into a safety hazard.
2 points: The tree has average form and structure for the species but does not exhibit all the qualities of excellent form and structure.
3 points: The tree exhibits excellent form and structure. For all species there will be a good distribution of foliage on multiple branches with no defects. For conifers, the tree will have a single straight leader with balanced branching and with good taper. Oaks will exhibit a well-developed canopy with no suppressed branches. Oaks may be single-trunked or multi-trunked and will have a balanced distribution of foliage on each trunk/branch.

F. What is the age and vigor of the tree?

Table F: What is the age and vigor of the tree? Columns: Tree # 1-16, score rows.

Table F: What is the age and vigor of the tree? Columns: Tree # 17-28, score rows.

- 0 points: The tree is over-mature or shows signs of poor or declining vigor such as die-back of major limbs or of the crown, small leaves/needles and/or minimal new growth.
1 point: The tree is mature but retains normal vigor and is likely to continue as a forest asset for a substantial period into the future.
2 points: The tree is young to middle age and shows normal vigor.
3 points: The tree is young to middle age and shows exceptional vigor.

G. Are environmental conditions favorable to the tree?

Table G: Are environmental conditions favorable to the tree? Columns: Tree # 1-16, score rows.

Table G: Are environmental conditions favorable to the tree? Columns: Tree # 17-28, score rows.

- 0 points: The tree is crowded or has no room for growth to maturity. The tree has poor access to light, air or has poor soil for the species.
1 point: The tree has average environmental conditions including room for growth to maturity, access to light, air and soils suitable for the species.
2 points: The tree has room for growth to maturity with no crowding from other significant trees or existing buildings nearby. The tree also has excellent access to light, air and excellent soils for root development.

Part Three: Final Assessment

Please record the total points scored on pages two and three for each tree.

Table H: Final Assessment Summary Table (Trees 1-16)

Table H: Final Assessment Summary Table (Trees 17-28)

A. Did all assessment categories in Part Two achieve a minimum score of 1-point?

Table A: Did all assessment categories in Part Two achieve a minimum score of 1-point? Columns: Tree # 1-16, YES/NO rows.

Table A: Did all assessment categories in Part Two achieve a minimum score of 1-point? Columns: Tree # 17-28, YES/NO rows.

B. Are there any other factors that would disqualify a tree from a determination of significance? (Explain any 'yes' answer)

No \_\_\_X\_\_\_ Yes \_\_\_\_\_

(Explanation)
NOTES:

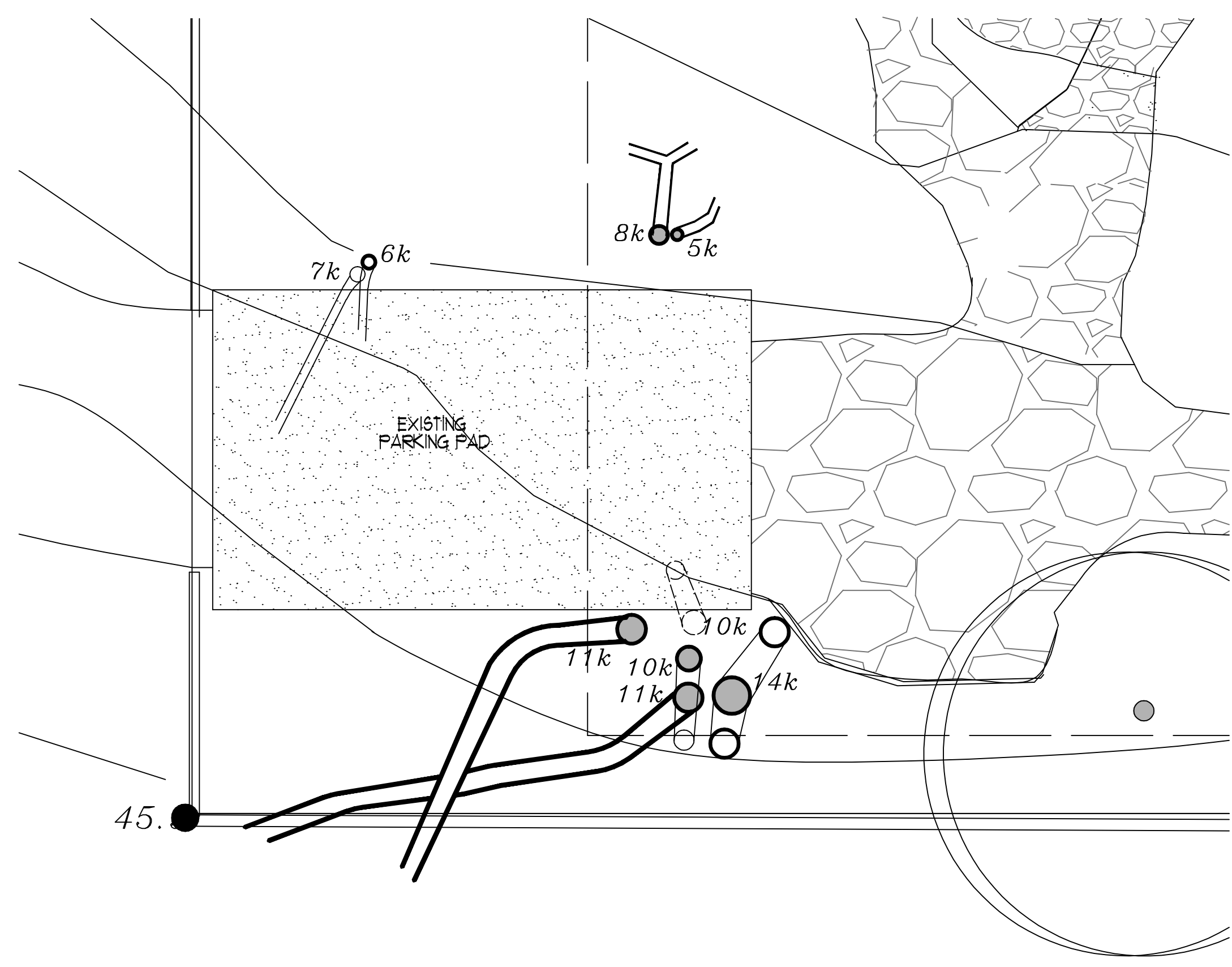
Conclusion: Does The Tree Qualify As Significant Or Moderately Significant?

If the tree meets the species, size and safety criteria identified in Part One and scores at least one point under each of the criteria in Part Two, it shall be classified as Significant if it achieves a score of 6 or more points or shall be classified as Moderately Significant if it achieves a score of 4 or 5 points. Tree species not listed in Part One-B that meet other screening criteria in Part One may be classified by the City Forester as Significant if they score at least 7 points, or as Moderately Significant if they score at least 4 points. All other trees are classified as non-significant.

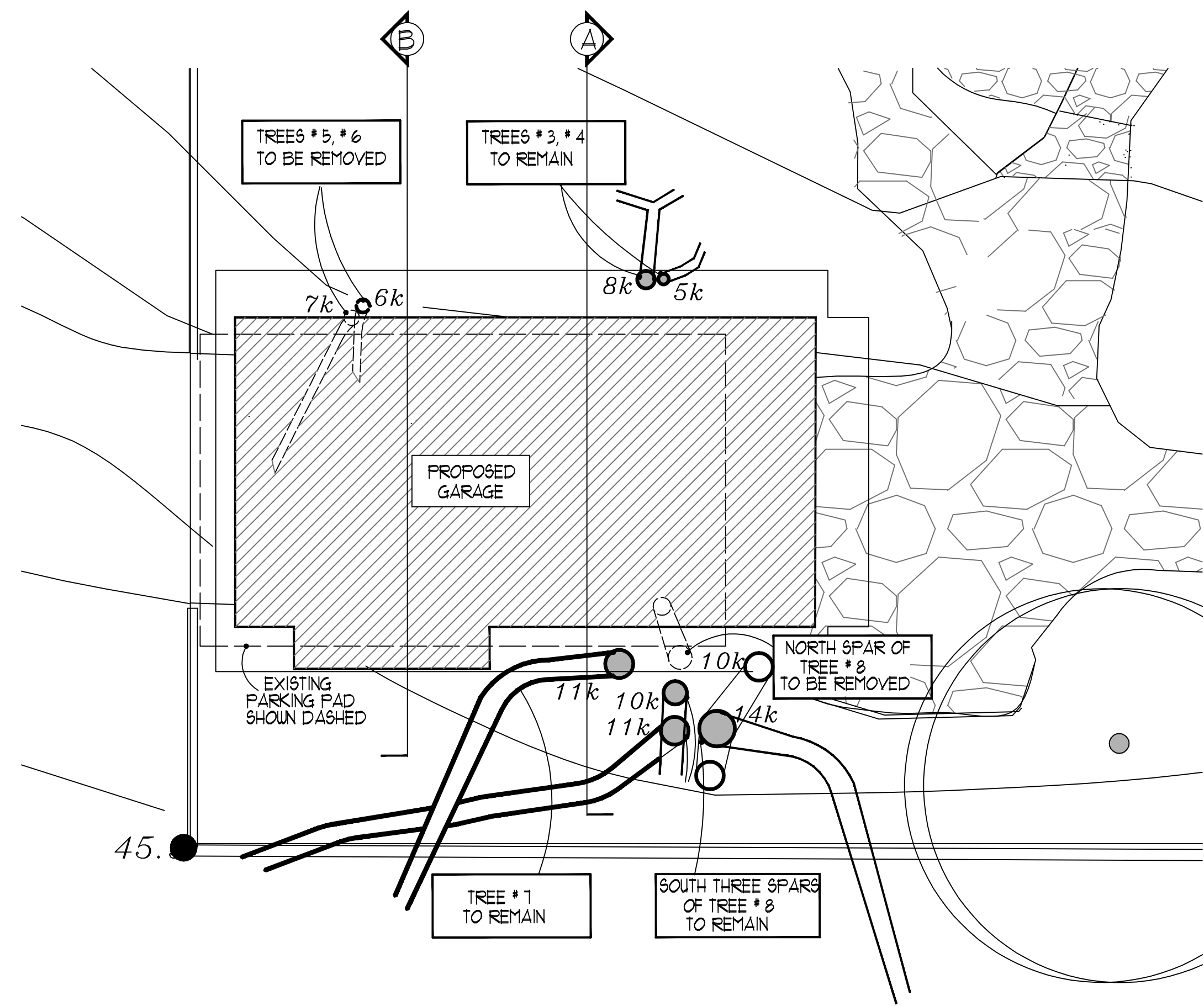
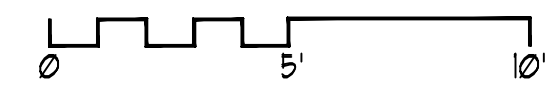
Table I: Classification Summary Table (Trees 1-16)

Table I: Classification Summary Table (Trees 17-28)

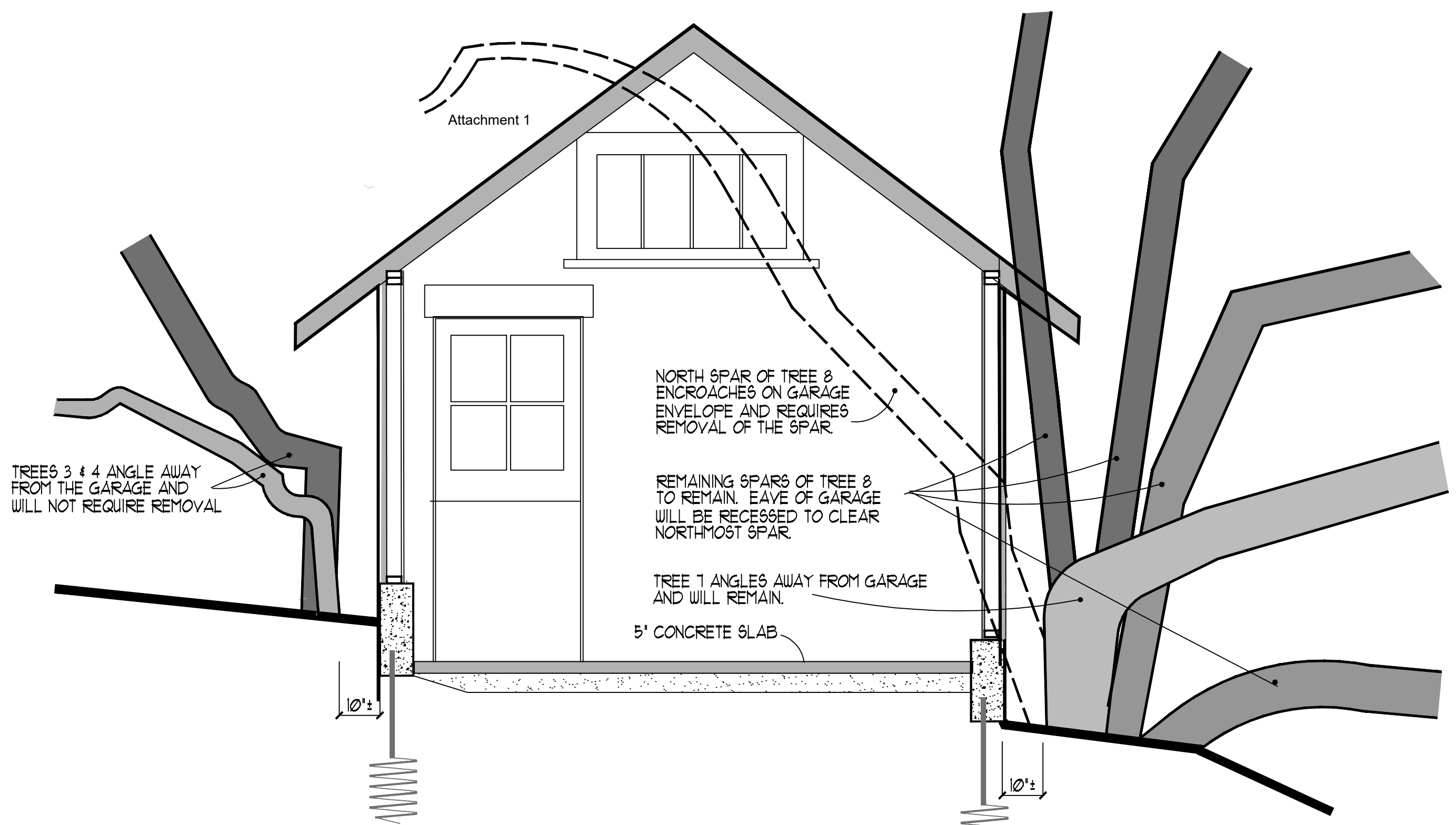
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 DRAWN: BTC  
 DATE: 7-11-23  
 REVISED:  
 2-28-24



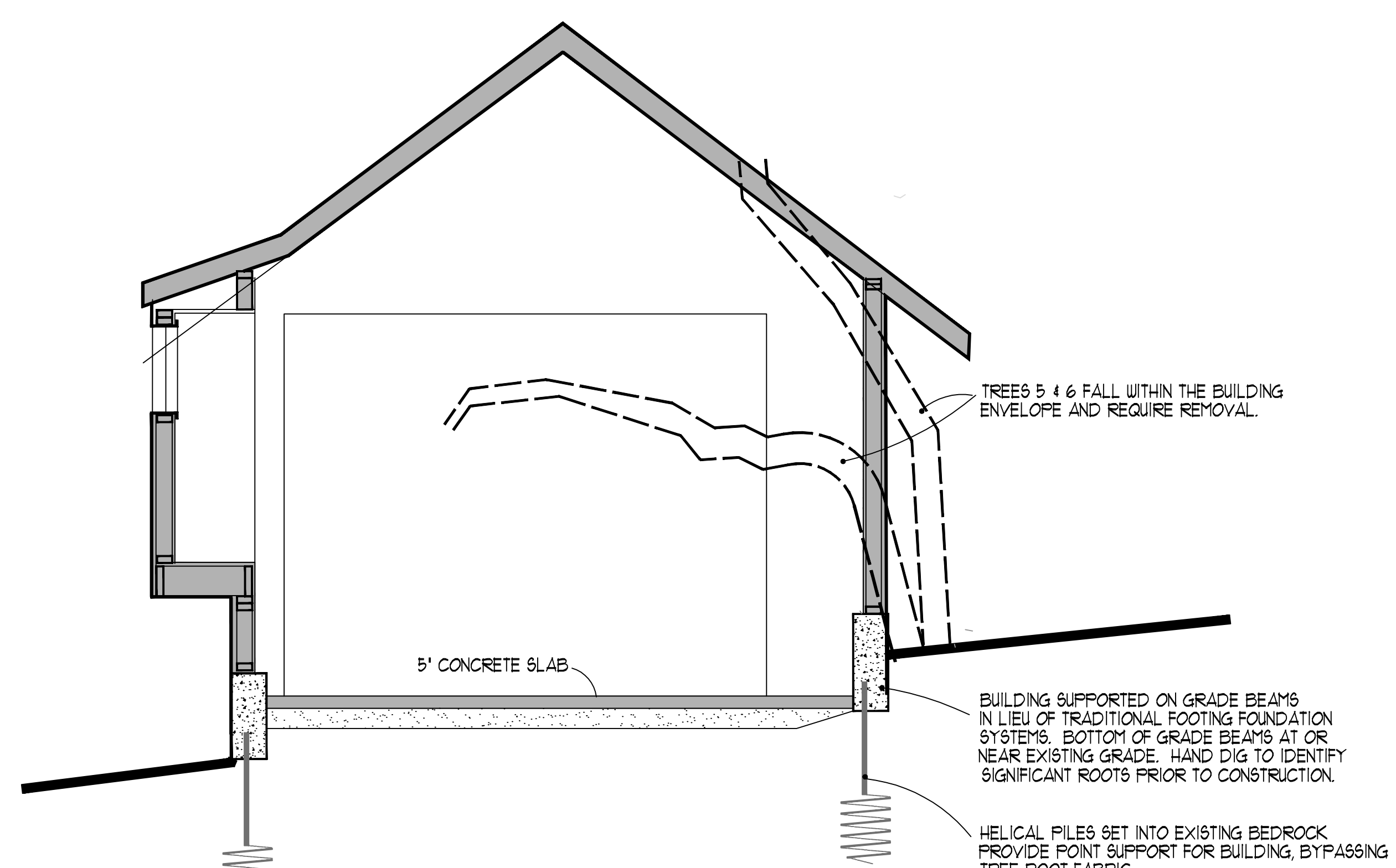
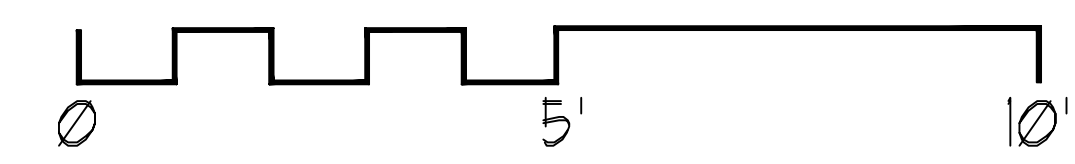
SECTION LOOKING EAST  
 1/4" = 1'-0"



SECTION LOOKING WEST  
 1/4" = 1'-0"



SECTION A SECTION LOOKING EAST  
 1/2" = 1'-0"



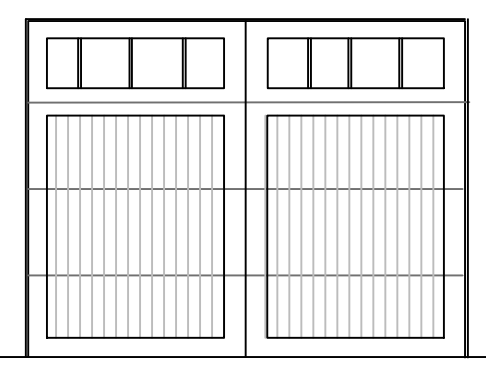
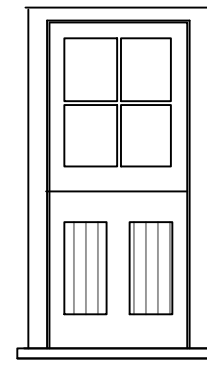
SECTION B SECTION LOOKING WEST  
 1/2" = 1'-0"

TREE PLANS  
 BUILDING SECTIONS

# DOOR TYPES

NOTE: DO NOT ORDER FROM THIS SCHEDULE ALONE. REVIEW PLAN & FIELD CONDITIONS FOR DOOR LOCATIONS AND SIZES.

TYPE	LOCATION	WIDTH	HEIGHT	TYPE	MATL	HARDWARE	REMARKS
A	EXTERIOR DOOR	3'-0" x 6'-8"		DUTCH DOOR WOOD PANEL	CLAD WD	L5,DB,T	TEMPERED GLASS
B	GARAGE DOOR	8'-6" x 7'-0"		WOOD PANEL	STAINED WD	O.H.	TEMPERED GLASS



## LEGEND

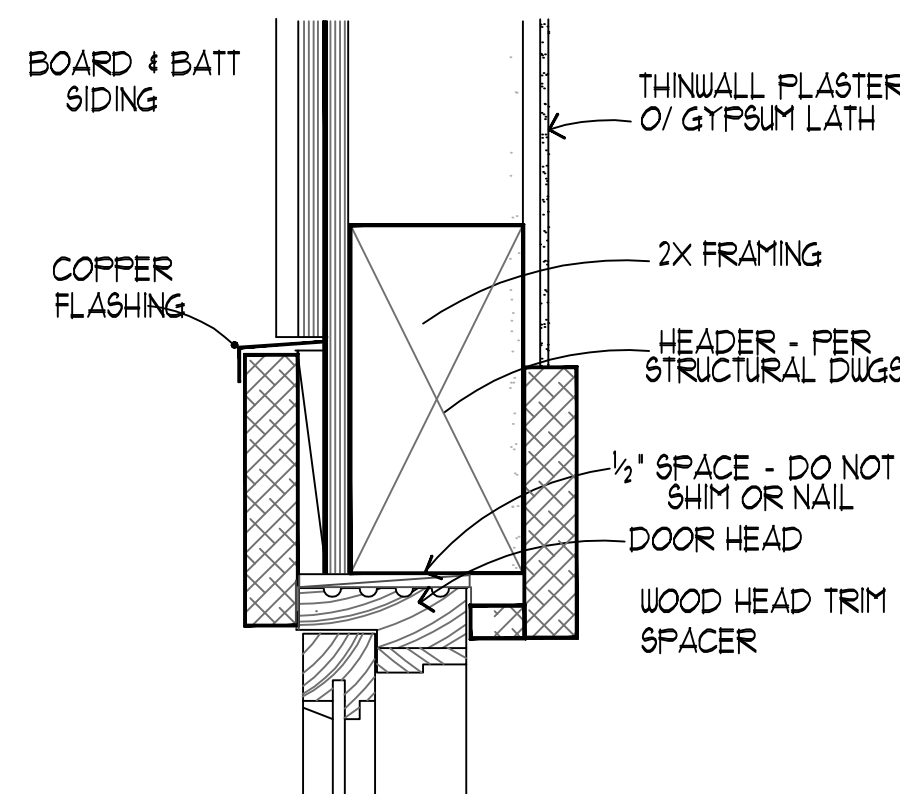
- T THRESHOLD
- DB DEADBOLT
- L5 LOCKSET
- TEMP. TEMPERED
- INSUL. INSULATED
- O.H. OVERHEAD TRACK

## DOOR/WINDOW NOTES

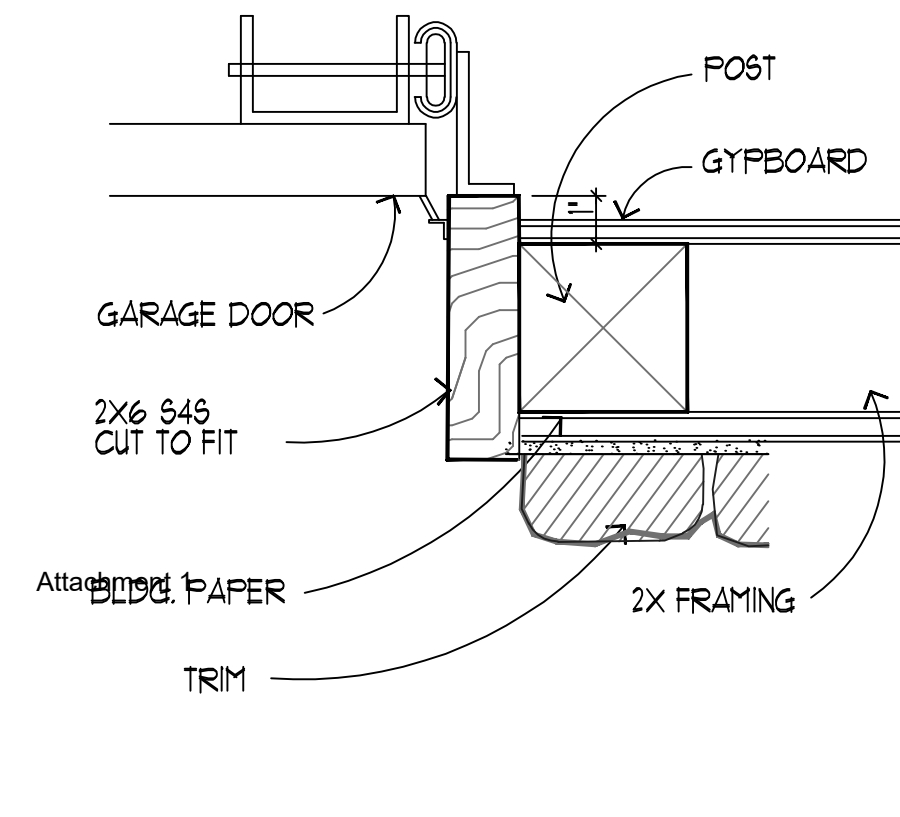
- FIELD VERIFY ALL OPENING SIZES PRIOR TO WINDOW FABRICATION. OPENINGS MAY VARY PARTICULARLY WHERE MULTIPLE UNITS FORM A 'WINDOW WALL'.
- NEW WINDOW UNITS SHALL BE CLAD WOOD SIERRA PACIFIC.
- ALL WINDOW TRIM, DOORS & TRIM SHALL BE PAINTED WOOD.
- MULLIONS ON WINDOWS & DOORS SHALL BE TRUE DIVIDED LIGHT.
- INSTALL HEAD & SILL FLASHING @ ALL WINDOWS & DOORS.
- INSULATED GLASS ALL NEW WIDOS.
- TEMPERED GLASS WHERE REQUIRED BY CODE, WHETHER OR NOT INDICATED ON PLANS.

## WINDOW TYPES

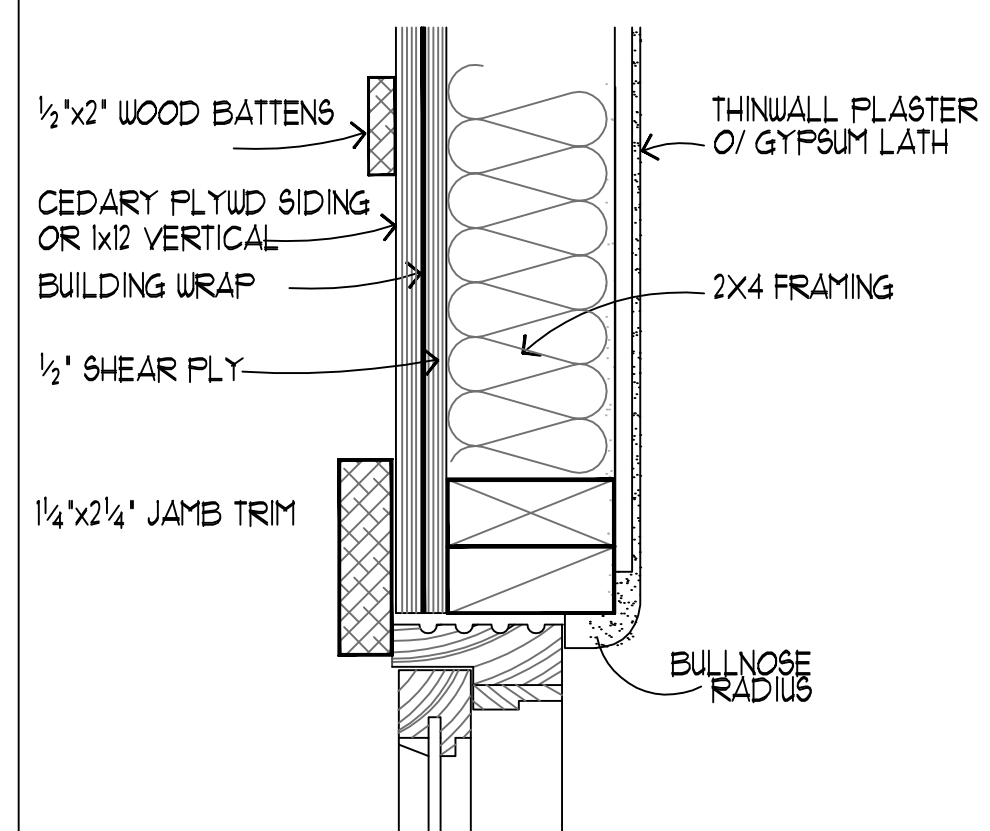
WDO. TYPE	UNIT WIDTH	UNIT HEIGHT	MATERIAL	TYPE	FLOOR TO SILL	FLOOR TO HEAD	REMARKS
A	6'-6" x 1'-6"		CLAD WOOD	FIXED	5'-2"	6'-8"	FROSTED GLASS
B	4'-0" x 2'-4"		CLAD WOOD	FIXED	8'-1"	10'-5"	



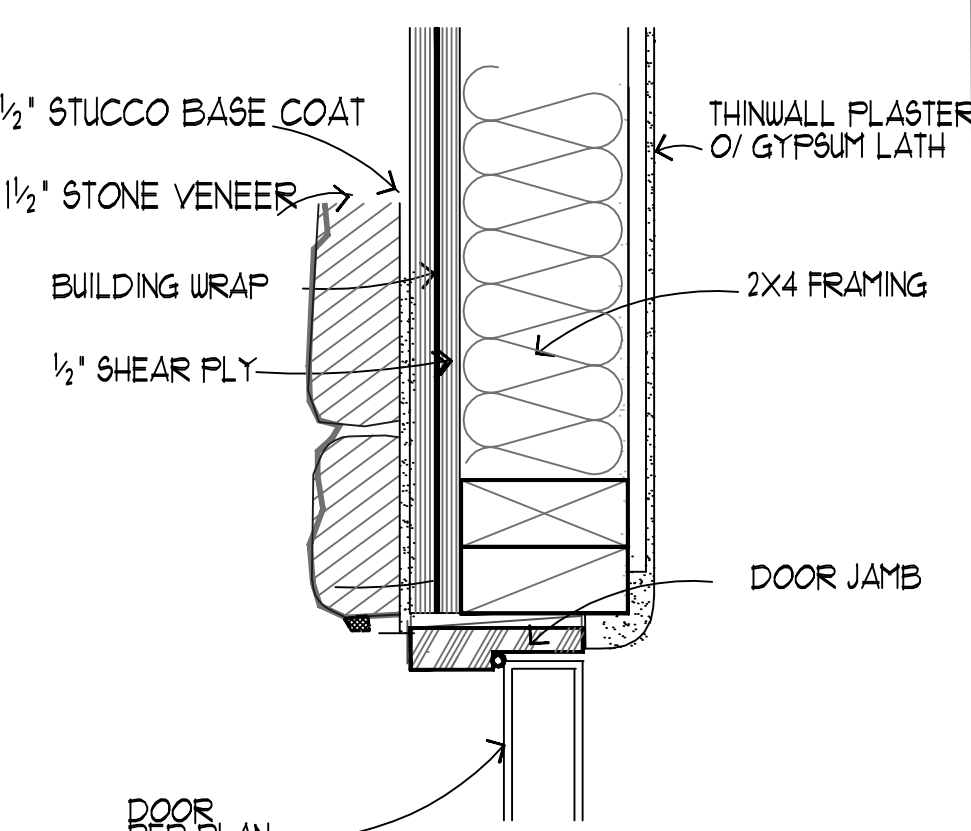
J WINDOW HEAD  
SCALE: 3" = 1'-0"



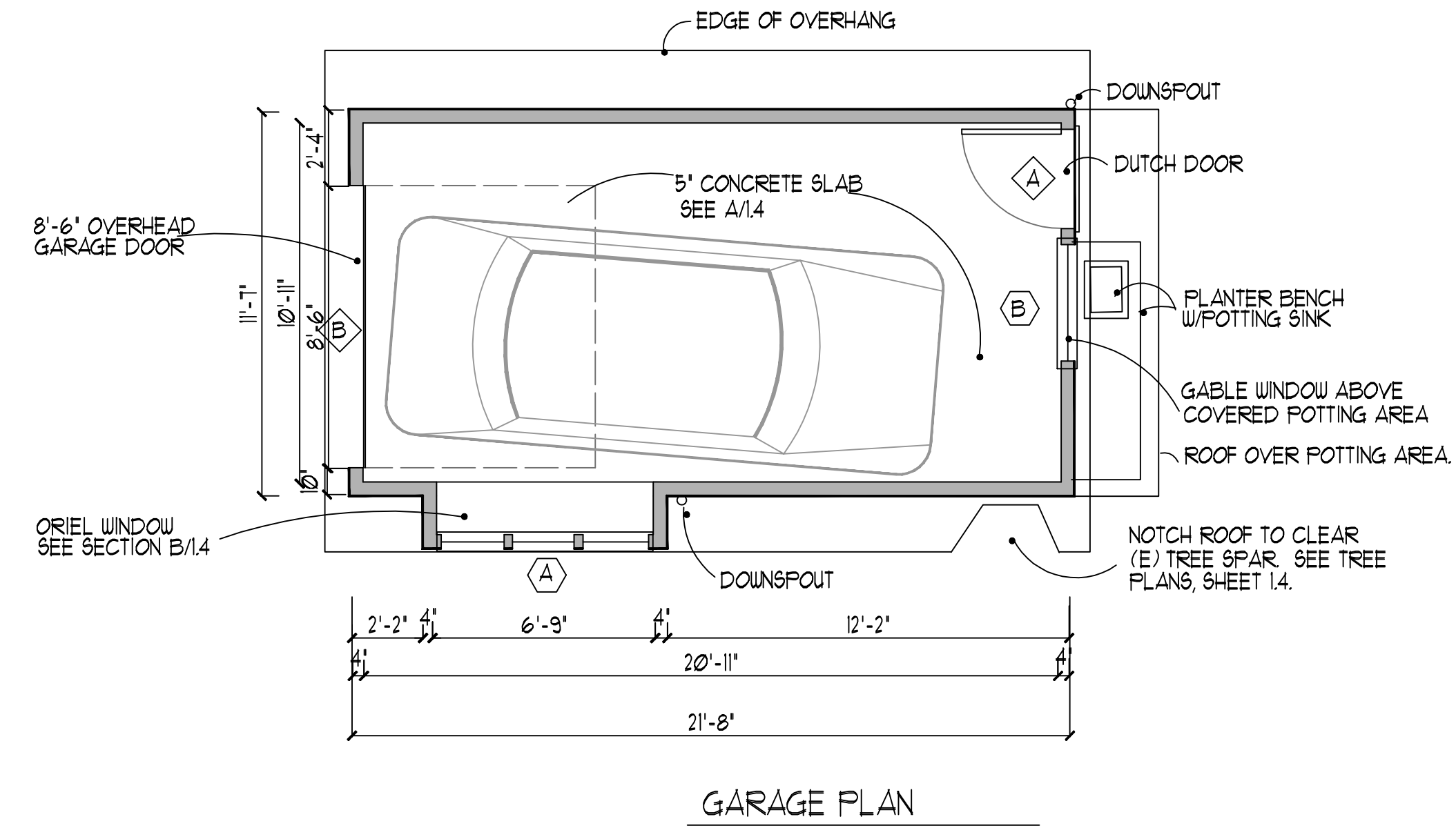
D GARAGE DOOR JAMB  
SCALE: 3" = 1'-0"



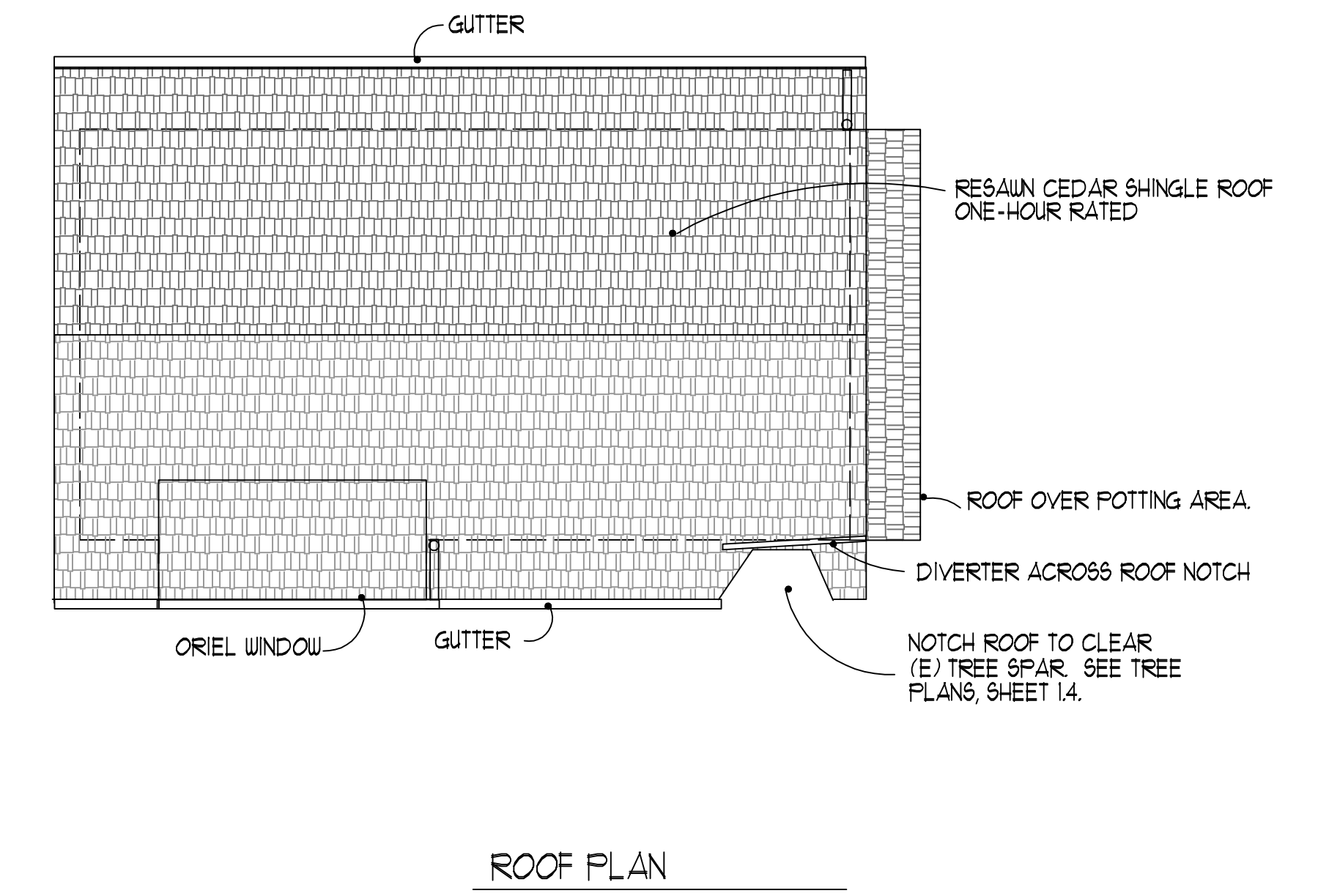
K WINDOW JAMB  
SCALE: 3" = 1'-0"



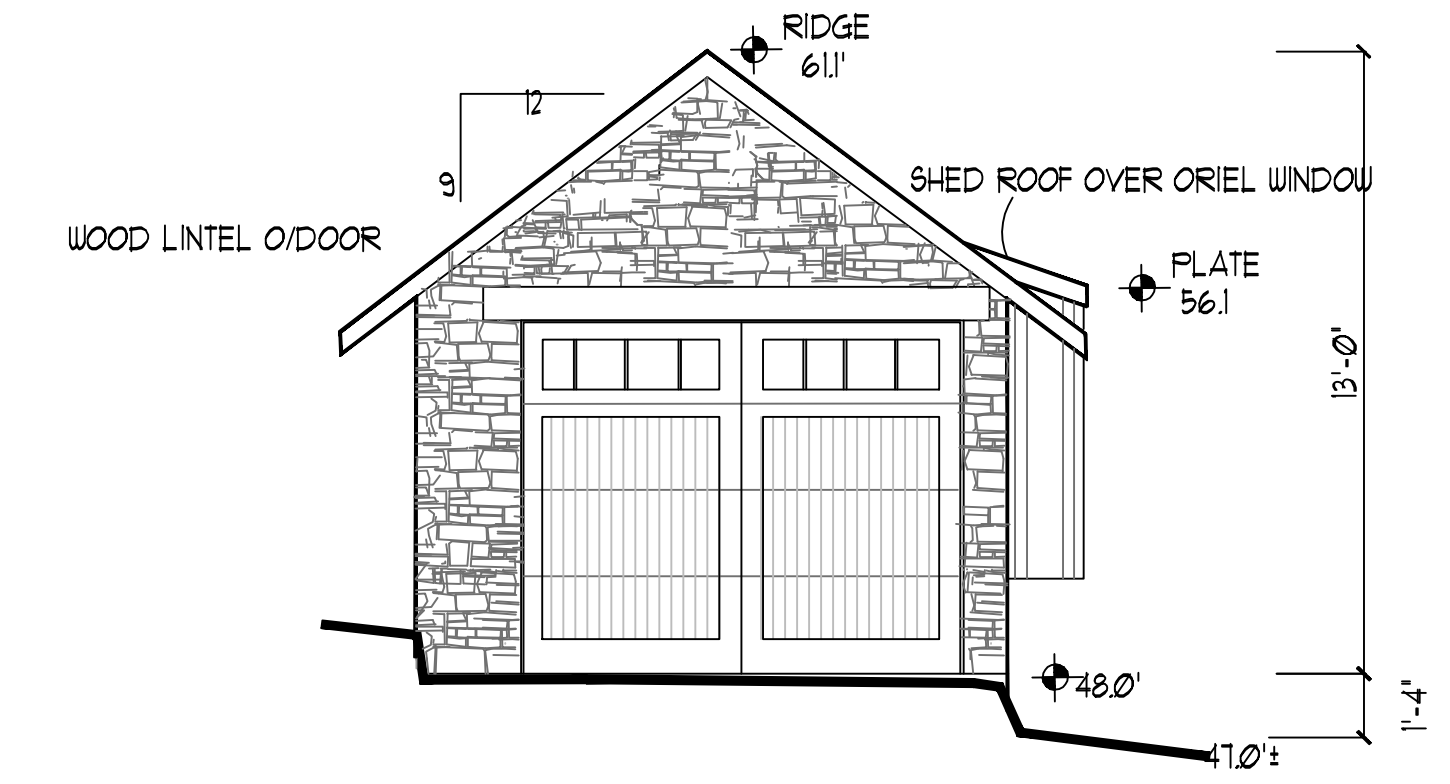
B DOOR JAMB  
SCALE: 3" = 1'-0"



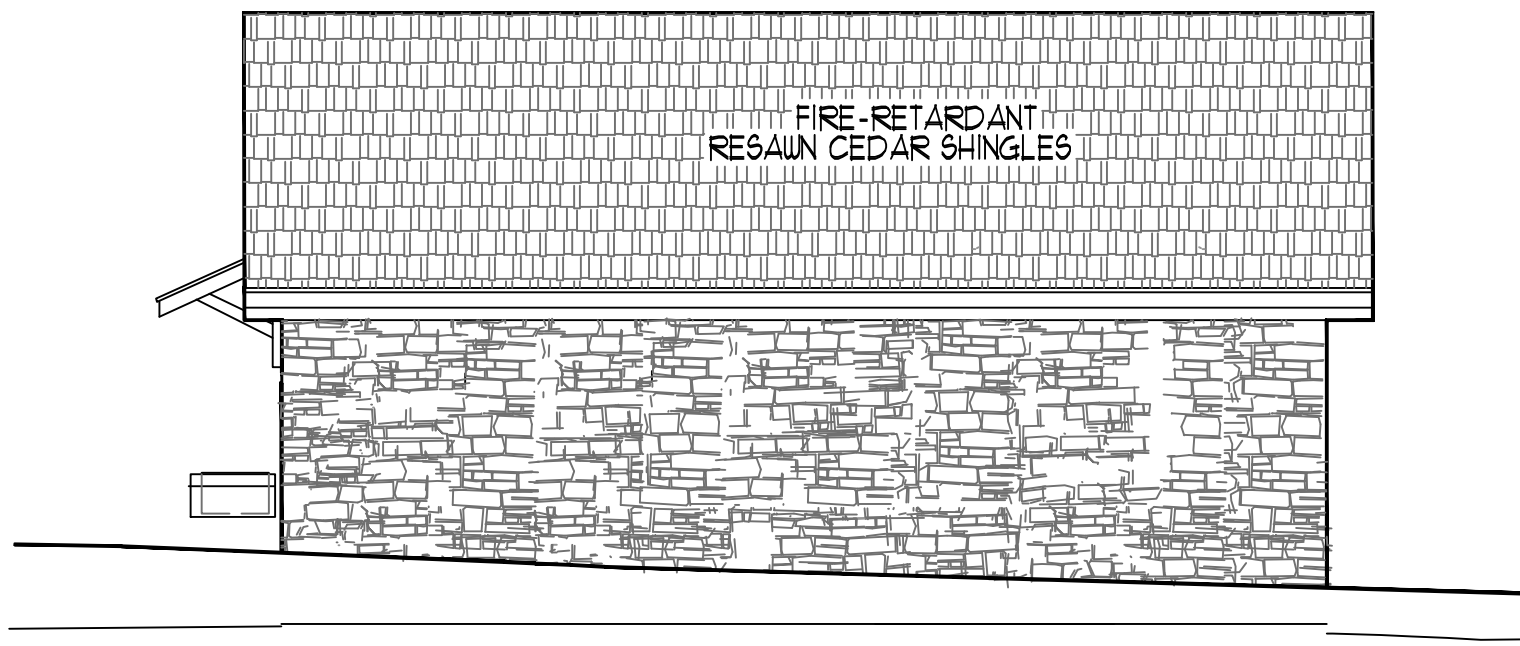
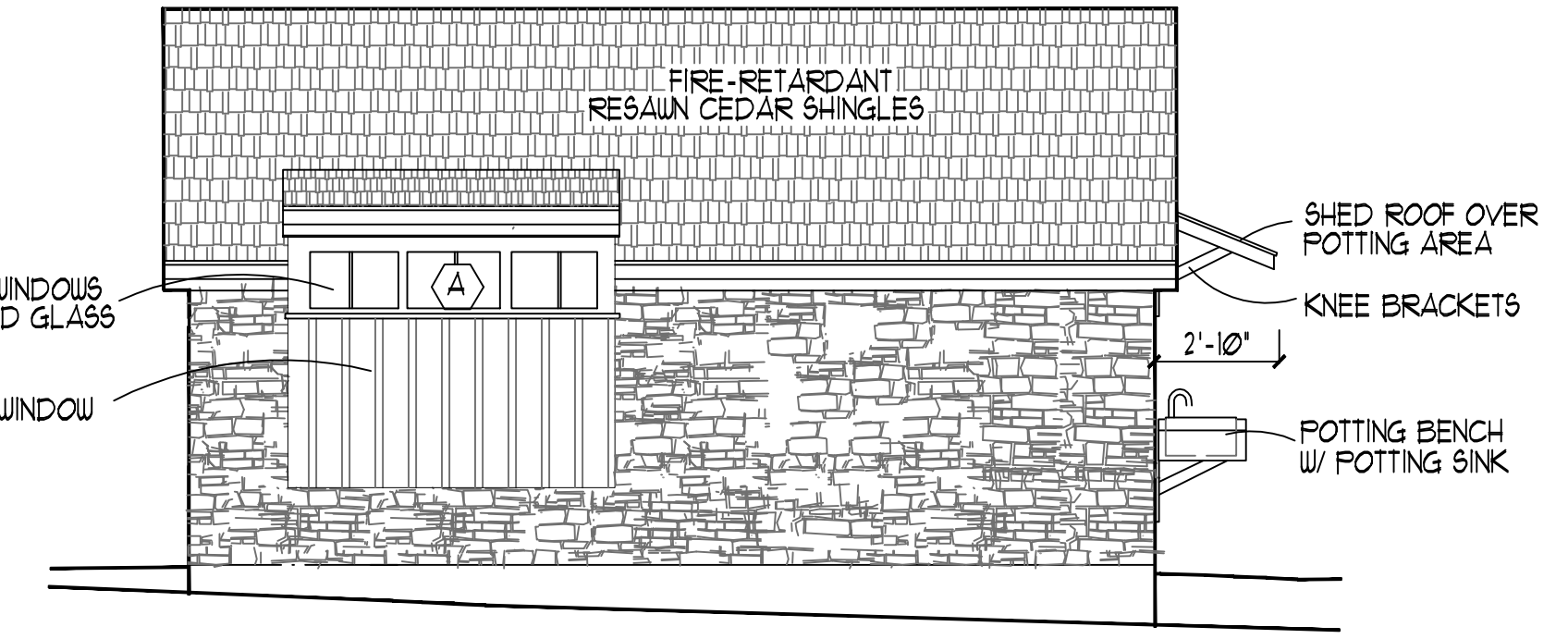
GARAGE PLAN



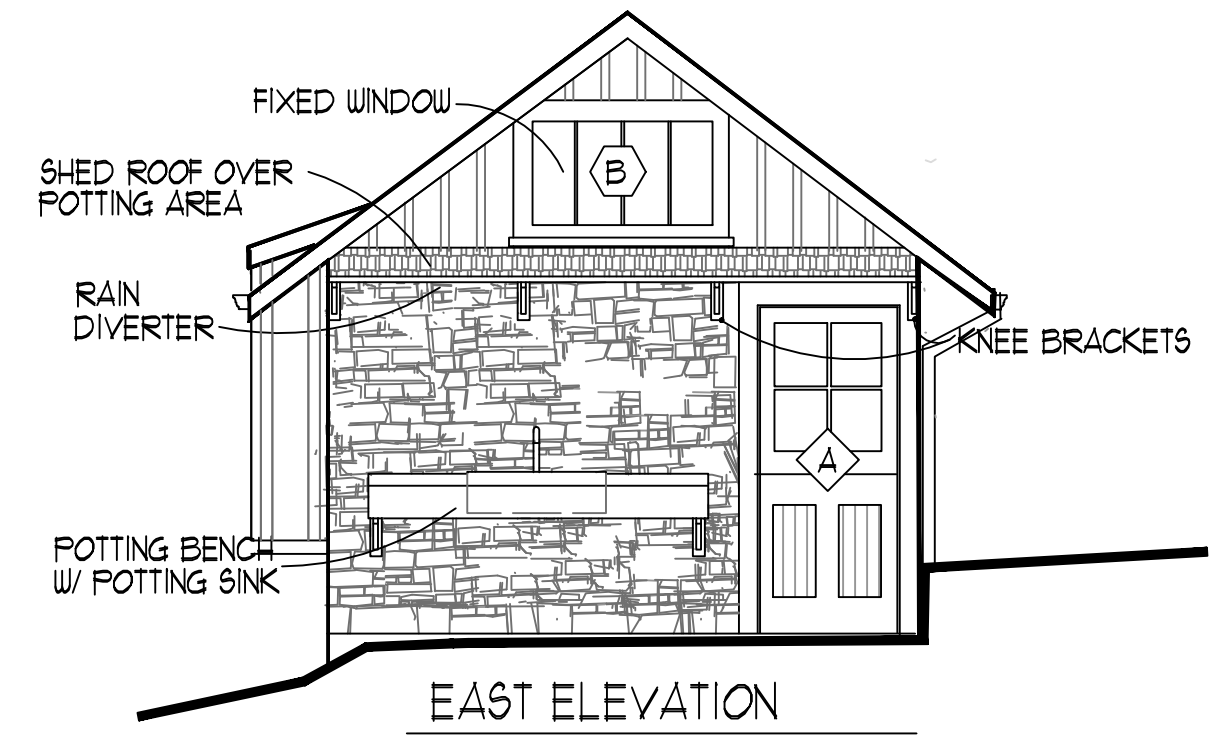
ROOF PLAN



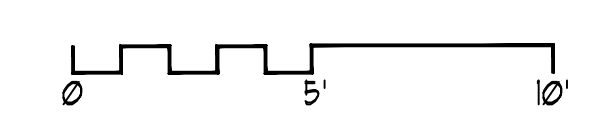
SOUTH ELEVATION



NORTH ELEVATION



EAST ELEVATION



GARAGE PLANS  
GARAGE ELEVATIONS  
DOOR & WINDOW SCHEDULE

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DRAWN: BTC  
DATE: 7-11-23  
REVISED: 7-28-24

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License No. C-16030  
(818) 915-2666  
brian@congletonarchitect.com

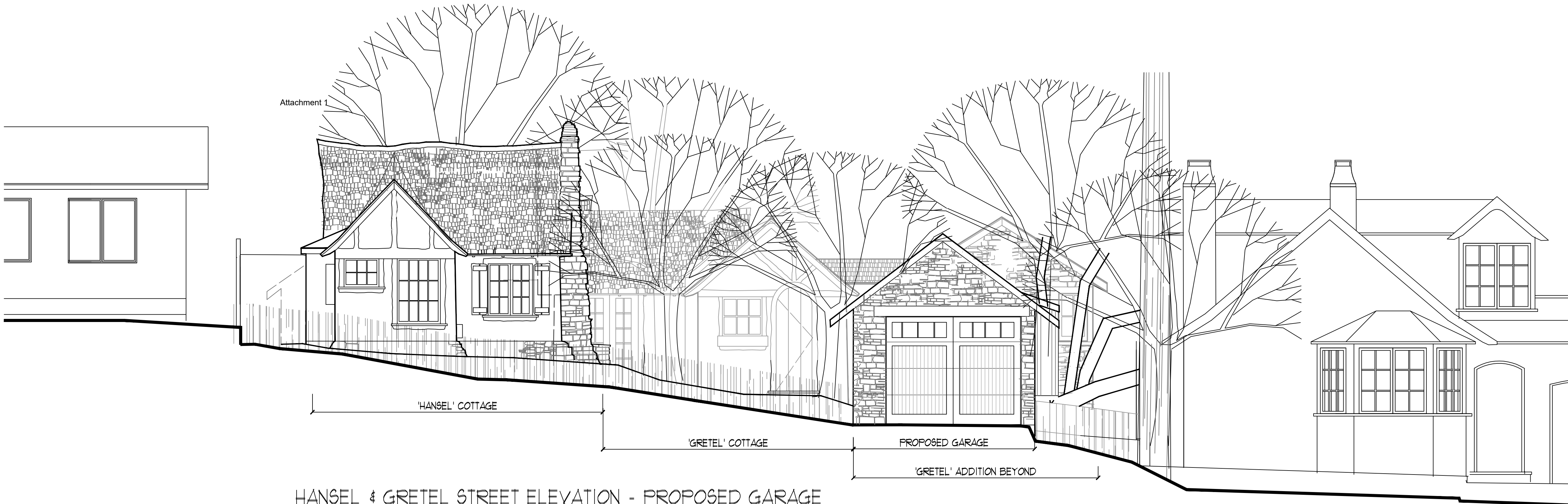
**VORIS GARAGE**  
TORRES & NE SIXTH - CARMEL, CALIFORNIA

SHEET NUMBER  
**21**

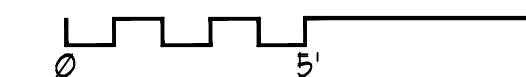
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 DATE: 7-11-23  
 REVISED:



HANSEL & GRETEL STREET ELEVATION - EXISTING  
 1/4" = 1'-0"



HANSEL & GRETEL STREET ELEVATION - PROPOSED GARAGE  
 1/4" = 1'-0"



STREET ELEVATIONS

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 briancongletonarchitect.com

License No. C-16030

**VORIS GARAGE**  
 TORRES & NE SIXTH - CARMEL, CALIFORNIA

SHEET NUMBER

**2.2**

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DRAWN: BTC  
DATE: 7-11-23  
REVISED:



**Torres Street Elevation**



**Street Elevation showing Proposed Garage**

EXISTING STREET PHOTO  
PROPOSED STREET RENDERING



August 5, 2024

Marnie Waffle, Principal Planner  
Carmel Planning & Building Department  
Post Office Drawer C  
Carmel-by-the-Sea, California 93921  
Via email

RE: Encroachment Permit Application  
Voris – Torres 5 NE Sixth (Hansel & Gretel)  
Relief from DS23-217 Condition No. 21 (remove stone border)  
Letter Addressing City Standards for Encroachment Permits

Dear Marnie:

In reviewing the Voris Application for an encroachment permit to waive Condition of Approval #21 and retain the existing stone border in the right-of-way, you sent me the following list of standards by which City Council will review our application. You requested the Voris's and I provide our response to the standards as we present our request.

Following are Owner Statements to address City Encroachment Application Review Standards. Answers are shown in different typeface from standard:

#### 12.08.060 Encroachment Application Review Standards.

A. Need. The applicant shall be determined to have a justifiable need for the encroachment, and the encroachment shall not be contrary to the public interest.

The request is to retain a previously installed stone border around planting areas. The border is needed to (a) retain water and soil in the planting area; (b) prevent auto traffic from driving into the planting area; and (c) identify planting area from paved area for pedestrians and vehicles by contrasting color of the border.

**Brian Congleton Architect**  
24920 Pine Hills Drive – Carmel CA 93923  
831-915-2666  
Email: [brian@congletonarchitect.com](mailto:brian@congletonarchitect.com)

B. Safety. The granting of an encroachment permit shall not create a hazard to public health or safety.

The 6" high stone border is similar to a curb, separating planting from paved areas. The light stone color contrasts with pavement and planting, identifying the demarcation and directing cars and pedestrians to remain on paved areas. Unlike boulders, etc., the curb is familiar to persons as a change in grade.

C. Drainage. The proposed encroachment shall not adversely affect the normal drainage of surface water, unless an acceptable mitigation is included that will be advantageous to the general public and meet the standards herein.

The border retains the normal drainage of surface water within the planting area, whereas if the border is eliminated, water will run off into the street and into the storm drain system.

D. Circulation and Parking.

1. The proposed encroachment shall not adversely affect vehicular and/or pedestrian traffic nor the parking of vehicles.

This section is critical pertaining to the Hansel Cottage. Approximately 4-6 persons per hour, all day every day, come looking for the Hansel & Gretel cottages. The planting areas and borders direct pedestrian onlookers (tourists from across the world who come to see Hansel and Gretel to the viewpoint in front of Hansel. The planting areas, approved in 2018 as part of the Gretel restoration/addition project, prevent parked cars from blocking that view and access. As noted above, the borders protect and define that viewpoint.

2. The proposed encroachment shall not adversely impact existing rights-of-way nor preclude or make difficult the establishment or improvement of existing or potential streets or pedestrian ways.

The planting areas help define the roadway and parking spaces, and the borders define the planting areas. There is no existing or proposed adverse impact on rights-of-way.

E. Public Use and Enjoyment.

1. The proposed encroachment shall not diminish public use or enjoyment, either visual or physical, of the City property or public right-of-way to be encroached upon.



As noted above, the encroachment (stone borders defining the planting areas) enhances, rather than diminishes, the public enjoyment of this privately-owned and city-honored historic resource.

In addition to the characteristics noted above (separation of pavement from planting, definition of pedestrian viewpoint), the stone border is most compatible with the historic stonework and cottages beyond.

2. The encroachment and enjoyment shall be in the public interest.

The Voris's, owners of Hansel & Gretel, have been and continue to be, stewards of the cottages as public treasures, achieving a balance between tourists desiring to see the resources and their private use of their residence. They do this by discouraging access onto the property while encouraging viewing from the street. To improve this viewpoint, they recently removed an arbor from over the front gate, so visitors can more easily frame and photograph the Hansel Cottage.

3. The length of time an encroachment has existed shall not by itself prejudice a decision.

Although the request is to retain an existing encroachment, time of existence is not considered a factor. The borders were installed as part of the landscape improvements of the Gretel Restoration/Addition project, and were requested for removal by the Planning Commission as a condition of approval of the upcoming garage construction. Because the border is a positive incremental element to the planting, we now request continuation of that encroachment.

F. Compatibility.

1. The proposed encroachment and its mitigation shall be consistent with the General Plan and the adopted ordinances of the City. Particular attention shall be given to Section P1-48 of the General Plan, which prohibits the construction of sidewalks and concrete curbs in the R-1 district, unless necessary for drainage and/or pedestrian safety.

No sidewalks are proposed; the asphalt of the roadway extends as a path to the gate at the property line, allowing visitors to view the resource. No concrete is proposed; the borders separating planting beds from the asphalt are Carmel stone, to reflect the character of the resource. The borders retain drainage.

2. The encroachment shall not create, extend, or be reasonably likely to lead to an undesirable land use precedent.

Planting areas throughout the city and near to Hansel and Gretel are currently defined by a number of border elements; most are desirable and compatible elements to the properties. There is no precedent made by retention of this stone border.

3. Granting of a permit shall not adversely affect the usability or enjoyment of one or more adjoining parcels.

Approval will have no bearing on adjoining parcels.

4. The proposed encroachment and its mitigation shall be compatible with the surrounding area and adjoining properties.

As noted above, some adjoining properties have similar features, and are similar in design to Hansel and Gretel. The encroachment of stone borders around planting areas is compatible with these properties.

G. Public Property/Greenbelt.

1. The proposed encroachment shall not adversely affect any public property, including existing vegetation or its root structure, and shall not significantly reduce greenbelt area that may be used for tree planting.

The stone borders will have no effect on root structures. The planting areas enhance greenbelt area; if damaged or dented by persons or cars because the borders aren't allowed, that could be an adverse effect on the vegetation and greenbelt area.

2. Significant trees which would be affected by the proposed encroachment shall be identified by the Director of Forest, Parks and Beach and approval for removal shall follow City policy.

There is no relationship between the stone borders and existing trees.

H. Mitigation. When deemed appropriate by the City, the applicant shall include those measures appropriate to compensate the City for the loss of the use of City property or the public right-of-way, or to repair damage thereto.

The stone borders are, in fact, protective to City property by defining the planting areas, and as such, should be considered a mitigation.

I. For applications that are subject to both Chapters 12.08 and 17.46 CMC, only the

standards in Chapter 17.46 CMC and the applicable administrative guidelines shall apply.

17.46 applies to telecommunications facilities and does not apply to this application.

Marnie, I trust this provides the information you need from the Voris's to process the application for Encroachment Permit. If not, please reach out.

Sincerely,

A handwritten signature in black ink, appearing to read "B.T. Congleton". The signature is stylized and written in a cursive-like font.

Brian T. Congleton

CITY OF CARMEL-BY-THE-SEA  
PLANNING COMMISSION

PLANNING COMMISSION RESOLUTION NO. 2024-019-PC

**A RESOLUTION OF THE PLANNING COMMISSION OF THE CITY OF CARMEL-BY-THE-SEA APPROVING A TRACK ONE DESIGN STUDY FOR THE CONSTRUCTION OF A 250-SQUARE-FOOT DETACHED GARAGE IN THE FRONT YARD SETBACK OF THE HISTORIC “DOLL HOUSE” ALSO KNOWN AS “HANSEL & GRETEL” LOCATED AT TORRES STREET 5 NORTHEAST OF 6TH AVENUE IN THE SINGLE-FAMILY RESIDENTIAL (R-1) ZONING DISTRICT; APN 010-092-010.**

WHEREAS, on July 18, 2023, Brian Congleton (“Applicant”) applied on behalf of Michael and Roberta Voris (“Owners”) requesting approval of Track One Design Study application DS 23-217 (Voris) described herein as (“Application”); and

WHEREAS, the Application has been submitted for a 6,000-square-foot lot located at Torres Street 5 northeast of 6th Avenue in the Single-Family Residential (R-1) Zoning District (Block 60, Lot 10 and N. 20’ of 12); and

WHEREAS, the Applicant is proposing to construct a 250-square-foot detached garage in the front yard setback; and

WHEREAS, in accordance with CMC Section 17.58.040.A (Residential District Track One Design Review), exterior alterations and additions that do not increase the existing floor area by more than 10 percent are eligible for track one review; and

WHEREAS, in accordance with Carmel Municipal Code (CMC) Section 17.10.030.A.1 (Detached Garages and Carports), to encourage variety and diversity in neighborhood design, detached garages, and carports may be authorized by the Planning Commission within rear yard setbacks or front or side yard setbacks facing a street, subject to certain standards; and

WHEREAS, on March 1, 2024, a notice of the public hearing scheduled for March 13, 2024, was published in the Carmel Pine Cone in compliance with State law (California Government Code 65091) and mailed to owners of real property within a 300-foot radius of the project indicating the date and time of the public hearing; and

WHEREAS, on or before March 3, 2024, the Applicant posted the public notice on the project site and hand-delivered a copy of the public notice to each property within a 100-foot radius of the project site indicating the date and time of the public hearing; and

WHEREAS, on or before March 8, 2024, the meeting agenda was posted in three locations in compliance with State law indicating the date and time of the public hearing; and

WHEREAS, on March 13, 2024, the Planning Commission held a duly noticed public hearing to receive public testimony regarding the project, including, without limitation, the information provided to the Planning Commission by City staff and through public testimony on the project; and

WHEREAS, this Resolution and its findings are made based upon the evidence presented to the Commission at the hearing date, including, without limitation, the staff report and attachments submitted by the Community Planning and Building Department; and

WHEREAS, the Planning Commission did hear and consider all said reports, attachments, recommendations, and testimony herein above set forth and used their independent judgment to evaluate the project; and

WHEREAS, the California Environmental Quality Act (California Public Resources Code §§ 21000, et seq., "CEQA"), together with State Guidelines (14 California Code Regulations §§ 15000, et seq., the "CEQA Guidelines") and City Environmental Regulations (CMC 17.60) require that certain projects be reviewed for environmental impacts and that environmental documents be prepared; and

WHEREAS, the Planning Commission finds that pursuant to CEQA regulations, the Application is categorically exempt under Section 15303 (Class 3) – New Construction or Conversion of Small Structures, and no exceptions to the exemption exist pursuant to section 15300.2 of the CEQA Guidelines; and

WHEREAS, the facts set forth in the recitals are true and correct and are incorporated herein by reference.

**NOW THEREFORE, BE IT RESOLVED** that the Planning Commission of the City of Carmel-By-The-Sea does hereby make the following findings and determinations regarding the Residential Track One Design Study (CMC 17.58.040.A):

<b>FINDINGS REQUIRED FOR DESIGN REVIEW APPROVAL</b>		
For each of the required design findings listed below, staff has indicated whether the application supports adopting the findings. For all findings checked "no," the staff report discusses the issues to facilitate the Planning Commission's decision-making. Findings checked "yes," depending on the issues, may or may not be discussed in the report.		
<b>CMC 17.58.060.B, Findings for Design Review Approval</b>	<b>YES</b>	<b>NO</b>
1. Conform to the applicable policies of the General Plan and the Local Coastal Program;	✓	
2. Comply with all applicable provisions of this code;	✓	
3. Are consistent with applicable adopted design review guidelines.	✓	

**BE IT FURTHER RESOLVED** that the Planning Commission of the City of Carmel-by-the-Sea does hereby APPROVE the Design Study DS 23-217 (Voris) for construction of a 250-square foot

detached garage in the front yard setback of a property with an existing residence located at Torres Street 4 northeast of 6th Avenue in the Single-Family Residential (R-1) Zoning District, APN 010-092-010, subject to the following Conditions of Approval:

<b>CONDITIONS OF APPROVAL</b>	
<b>No.</b>	<b>Standard Conditions</b>
1.	<p><b>Authorization.</b> This approval of Design Study DS 23-217 (Voriss) for the construction of a 250-square-foot detached garage in the front yard setback of the historic “Doll House” also known as “Hansel &amp; Gretel” located at Torres Street 5 northeast of 6th Avenue in the Single-Family Residential as depicted in the plans prepared by Brian Congleton Architect approved by City of Carmel-by-the-Sea Planning Commission on March 13, 2024 unless modified by the conditions of approval contained herein.</p>
2.	<p><b>Codes and Ordinances.</b> The project shall be constructed in conformance with all requirements of the R-1 zoning district. All adopted building and fire codes shall be adhered to when preparing the working drawings. If any codes or ordinances require design elements to be changed, or if any other changes are requested when such plans are submitted, such changes may require additional environmental review and subsequent approval by the Planning Commission.</p>
3.	<p><b>Permit Validity.</b> This approval shall be valid for one year from the date of action unless an active building permit has been issued and maintained for the proposed construction.</p>
4.	<p><b>Setback and Height Certifications.</b> A State licensed surveyor shall survey and certify the following in writing:</p> <ul style="list-style-type: none"> <li>• The footing locations are in conformance with the approved plans prior to footing/foundation inspection;</li> <li>• The roof height and plate height are in conformance with the approved plans prior to roof sheathing inspection.</li> </ul> <p>Written certifications prepared, sealed, and signed by the surveyor shall be provided prior to footing/foundation inspection and roof sheathing inspection. In the event that multiple footing/foundation pours are required, a survey letter shall be submitted for each separate section.</p>
5.	<p><b>Service Laterals.</b> All electrical service laterals to any new building or structure, or to any building or structure being remodeled when such remodeling requires the relocation or replacement of the main service equipment, shall be placed underground on the premises upon which the building or structure is located. Undergrounding will not be required when the project valuation is less than \$200,000 or when the City Forester determines that undergrounding will damage or destroy significant trees(s) (CMC 15.36.020).</p>
6.	<p><b>Modifications.</b> The Applicant shall submit in writing, with revised plans, to the Community Planning and Building staff any proposed changes to the approved project plans prior to incorporating those changes. If the Applicant changes the project without first obtaining City approval, the Applicant will be required to submit the change in writing, with revised plans, within 2 weeks of the City being notified. A cease work order may be issued any time at the discretion of the Director of Community Planning and Building until: a) either the Planning Commission or Staff has approved the change, or b) the property owner has</p>

	<p>eliminated the change and submitted the proposed change in writing, with revised plans, for review. The project will be reviewed for its compliance to the approved plans prior to final inspection.</p>
7.	<p><b>Exterior Revisions to Planning Approval Form.</b> All proposed modifications that affect the exterior appearance of the building or site elements shall be submitted on the “Revisions to Planning Approval” form on file in the Community Planning and Building Department. Any modification incorporated into the construction drawings that is not listed on this form, shall not be deemed approved upon issuance of a building permit.</p>
8.	<p><b>Conflicts Between Planning Approvals and Construction Plans.</b> It shall be the responsibility of the Owner, Applicant, and Contractor(s) to ensure consistency between the project plans approved by Planning Staff, the Planning Commission, or the City Council on appeal, and the construction plans submitted to the Building Division as part of the Building Permit review. Where inconsistencies between the Planning approval and the construction plans exist, the Planning approval shall govern, unless otherwise approved in writing by the Community Planning &amp; Building Director, or their designee.</p> <p>When changes or modifications to the project are proposed, the Applicant shall clearly list and highlight each proposed change and bring each change to the City’s attention. Changes to the project that are incorporated into the construction drawings that were not clearly listed or identified as a proposed change shall not be considered an approved change. Should conflicts exist between the originally approved project plans and the issued construction drawings that were not explicitly identified as a proposed change, the plans approved as part of the Planning Department Review, including any Conditions of Approval, shall prevail.</p>
9.	<p><b>Indemnification.</b> The Applicant agrees, at his or her sole expense, to defend, indemnify, and hold harmless the City, its public officials, officers, employees, and assigns, from any liability; and shall reimburse the City for any expense incurred, resulting from, or in connection with any project approvals. This includes any appeal, claim, suit, or other legal proceeding, to attack, set aside, void, or annul any project approval. The City shall promptly notify the Applicant of any legal proceeding, and shall cooperate fully in the defense. The City may, at its sole discretion, participate in any such legal action, but participation shall not relieve the Applicant of any obligation under this condition. Should any party bring any legal action in connection with this project, the Superior Court of the County of Monterey, California, shall be the situs and have jurisdiction for the resolution of all such actions by the parties hereto.</p>
10.	<p><b>Driveway.</b> The driveway material shall extend beyond the property line into the public right of way to connect to the paved street edge. A minimal asphalt connection at the street edge may be required by the Superintendent of Streets or the Building Official, depending on site conditions, to accommodate the drainage flow line of the street. The driveway material and asphalt connection shall be identified on the construction drawings submitted with the building permit application. If a driveway is proposed to be sand set, a dimensioned construction detail showing the base material shall be included in the construction drawings.</p>
11.	<p><b>Cultural Resources.</b> All new construction involving excavation shall immediately cease if cultural resources are discovered on the site, and the Applicant shall notify the Community</p>

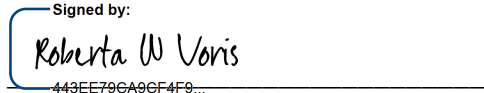
	<p>Planning &amp; Building Department within 24 hours. Work shall not be permitted to recommence until such resources are properly evaluated for significance by a qualified archaeologist. If the resources are determined to be significant, prior to resumption of work, a mitigation and monitoring plan shall be prepared by a qualified archaeologist and reviewed and approved by the Community Planning and Building Director. In addition, if human remains are unearthed during the excavation, no further disturbance shall occur until the County Coroner has made the necessary findings as to origin and distribution pursuant to California Public Resources Code (PRC) Section 5097.98.</p>
12.	<p><b>Truck Haul Route.</b> Prior to Building Permit issuance, the Applicant shall provide for City (Community Planning and Building Director in consultation with the Public Services and Public Safety Departments) review and approval, a truck-haul route, and any necessary temporary traffic control measures for the grading activities. The Applicant shall be responsible for ensuring adherence to the truck-haul route and implementation of any required traffic control measures.</p>
13.	<p><b>USA North 811.</b> Prior to any excavation or digging, the Applicant shall contact the appropriate regional notification center (USA North 811) at least two working days, but not more than 14 calendar days, prior to commencing that excavation or digging. No digging or excavation is authorized to occur on-site until the Applicant has obtained a Ticket Number and all utility members have positively responded to the dig request. (Visit USANorth811.org for more information)</p>
14.	<p><b>Conditions of Approval.</b> All conditions of approval for the Planning permit(s) shall be printed on a full-size sheet and included with the construction plan set submitted to the Building Safety Division.</p>
<p><b>Landscape Conditions</b></p>	
15.	<p><b>Tree Removal.</b> Trees on the site shall only be removed upon the approval of the City Forester or Forest and Beach Commission, as appropriate; all remaining trees shall be protected during construction by methods approved by the City Forester.</p>
16.	<p><b>Significant Trees.</b> All foundations within 15 feet of significant trees shall be excavated by hand. If any tree roots larger than two inches (2”) are encountered during construction, the City Forester shall be contacted before cutting the roots. The City Forester may require the roots to be bridged or may authorize the roots to be cut. If roots larger than two inches (2”) in diameter are cut without prior City Forester approval or any significant tree is endangered as a result of construction activity, the building permit will be suspended and all work stopped until an investigation by the City Forester has been completed. Six inches (6”) of mulch shall be evenly spread across the inside the dripline of all trees prior to the issuance of a building permit.</p>
17.	<p><b>Erosion Control in the Right-of-Way.</b> Projects with a natural slope within the right-of-way immediately adjacent to the property where parking is not practical shall install jute netting and a drought-tolerant ground cover to manage post-construction erosion control. Plants installed within the drip line of trees shall be selected from the City’s “List of Compatible Plants Under and Around Native Trees” located in the Forest Management Plan.</p>
18.	<p><b>Tree Protection Measures.</b> Requirements for tree preservation shall adhere to the following tree protection measures on the construction site.</p>



	<ul style="list-style-type: none"> <li>● Prior to grading, excavation, or construction, the developer shall clearly tag or mark all trees to be preserved.</li> <li>● Excavation within 6 feet of a tree trunk is not permitted.</li> <li>● No attachments or wires of any kind, other than those of a protective nature shall be attached to any tree.</li> <li>● Per Municipal Code Chapter 17.48.110 no material may be stored within the dripline of a protected tree including the drip lines of trees on neighboring parcels.</li> <li>● Tree Protection Zone -- The Tree Protection Zone shall be equal to dripline or 18 inches radially from the tree for every one inch of trunk diameter at 4.5 feet above the soil line, whichever is greater. A minimum of 4-foot-high transparent fencing is required unless otherwise approved by the City Forester. Tree protection shall not be resized, modified, removed, or altered in any manner without written approval. The fencing must be maintained upright and taught for the duration of the project. No more than 4 inches of wood mulch shall be installed within the Tree Protection Zone. When the Tree Protection Zone is at or within the drip line, no less than 6 inches of wood mulch shall be installed 18 inches radially from the tree for every one inch of trunk diameter at 4.5 feet above the soil line outside of the fencing.</li> <li>● The Structural Root Zone -- Structural Root Zone shall be 6 feet from the trunk or 6 inches radially from the tree for every one inch of trunk diameter at 4.5' above the soil line, whichever is greater. Any excavation or changes to the grade shall be approved by the City Forester prior to work. Excavation within the Structural Root Zone shall be performed with a pneumatic excavator, hydro-vac at low pressure, or another method that does not sever roots.</li> <li>● If roots greater than 2 inches in diameter or larger are encountered within the approved Structural Root Zone the City Forester shall be contacted for approval to make any root cuts or alterations to structures to prevent roots from being damaged.</li> </ul> <p>If roots larger than 2 inches in diameter are cut without prior City Forester approval or any significant tree is endangered as a result of construction activity, the building permit will be suspended and all work stopped until an investigation by the City Forester has been completed and mitigation measures have been put in place.</p>
<b>SPECIAL CONDITIONS</b>	
19.	<b>Condition of Approval Acknowledgement.</b> The Condition of Approval Acknowledgement form, available from the Community Planning and Building Department, shall be signed by the appropriate parties prior to the issuance of a building permit. A signed copy of the acknowledgement shall also be printed in the building plan set.
20.	<b>Copper Gutters &amp; Downspouts Not Permitted.</b> Copper gutters and downspouts are prohibited. If gutters and downspouts are required, an alternative material shall be used and shall be reviewed and approved by the Community Planning and Building Department prior to installation.
21.	<b>Right-of-way Encroachments.</b> Prior to final inspection, the applicant shall remove the stone border around the flower beds and the path lights that are located in the public

	right-of-way.
22.	<b>Artificial Turf Removal.</b> Prior to the final inspection, the applicant shall remove the artificial turf in the front yard and replace it with an informal garden of native drought-tolerant plantings.

Acknowledgment and acceptance of conditions of approval.

<small>Signed by:</small>  <small>443EE79CA9CF4F9...</small>	Roberta W Voris	8/28/2024
Property Owner Signature	Printed Name	Date

<small>DocuSigned by:</small>  <small>607D52BD1E804DF...</small>	MICHAEL J VORIS	8/30/2024
Property Owner Signature	Printed Name	Date

<small>DocuSigned by:</small>  <small>AB7E4679726947C...</small>	Brian Congleton	8/28/2024
Applicant Signature	Printed Name	Date

PASSED, APPROVED, AND ADOPTED BY THE PLANNING COMMISSION OF THE CITY OF CARMEL-BY-THE-SEA this 13<sup>th</sup> day of March 2024, by the following vote:

AYES: ALLEN, KARAPETKOV, LOCKE, LEPAGE

NOES:

ABSENT: DELVES

ABSTAIN:

APPROVED:

ATTEST:

<small>Signed by:</small>  <small>4FF97D7E0A3D499...</small>
Michael LePage Chair

<small>DocuSigned by:</small>  <small>2960DA98EC1C495...</small>
Leah Young Planning Commission Secretary

August 10, 2024

Attachment 4

Marnie Waffle  
Carmel Planning & Building Department  
Post Office Drawer C  
Carmel-by-the-Sea, California 93921

Re: The Voris's Encroachment Permit

Dear Ms. Waffle:

I own the Comstock house on the corner of Torres and 6<sup>th</sup> and I consider myself a neighbor of Hansel and Gretel.

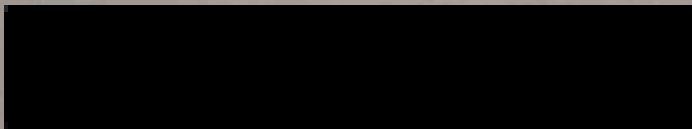
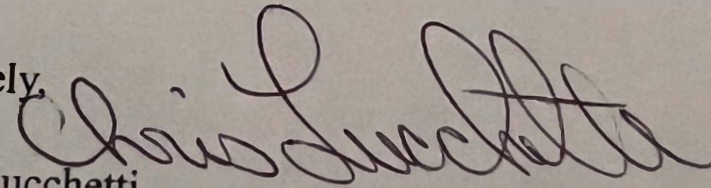
As a fellow Comstock owner, I believe what the Voris's have done with the stone border on the planting beds outside their gates completely fits in with the neighborhood - especially with those cottages, since it repeats the theme of the garden inside their fence.

Not only that, it retains the soil and water in that area on a hill.

Please consider approving their encroachment permit.

Sincerely,

Chris Lucchetti



August 11, 2024

Marnie Waffle  
Carmel Planning and Building Department  
Post Office Drawer C  
Carmel by the Sea, Ca. 93921

Regarding the Hansel & Gretel Encroachment

Dear Marnie,

I own a Comstock cottage in Hansel and Gretel's neighborhood. I strongly urge the city to approve this encroachment permit for several reasons – not the least of which, it fits in and enhances the neighborhood character.

Because I own a house that can be greatly affected by drainage, that is a concern to me. Although this case wouldn't affect me directly, I believe the rock border in question will keep both soil and water in place better than an asphalt berm would.

Unlike the recent encroachment permit application, the area in question does not add to the Voris's yard, it merely enhances the view of Hansel and Gretel for both residents and tourists alike.

Regards,

Carole Lutz

August 10, 2024

Marnie Waffle  
Carmel Planning & Building Department  
Post Office Drawer C  
Carmel-by-the-Sea, California 93921

Re: Voris Encroachment of stone border

Dear Ms. Waffle:

I am the next door neighbor to Hansel and Gretel on Torres Street.

I understand the Voris's have applied for an encroachment permit to keep the stone border around their streetside verge.

I strongly support the approval of this as I believe it fits the neighborhood character and certainly Hansel & Gretel's character. Literally huge amounts of people walk up our street daily to see those houses. I believe the area in question adds to their enjoyment - not to mention mine as a resident of Carmel-by-the-Sea and the neighbor.

Also, our street is quite sloped and this stops water and soil from running down the street.

Sincerely,

Diana Bearman



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## Yes on Encroachment for Hansel & Gretel

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**Marnie R. Waffle** <mwaffle@ci.carmel.ca.us>  
To: "Marnie R. Waffle" <mwaffle@ci.carmel.ca.us>

Mon, Aug 12, 2024 at 8:26 AM

----- Forwarded message -----

From: **Gael Gallagher** <REDACTED>  
Date: Sun, Aug 11, 2024 at 9:20 AM  
Subject: Yes on Encroachment for Hansel & Gretel  
To: <mwaffle@ci.carmel.ca.us>

Dear Ms. Waffle,

As a tour director and owner of CARMEL WALKS since 2012, I would like to offer my opinion to urge the Carmel City Council to approve the encroachment permit for Hansel & Gretel.

The Carmel Stone border in question enhances the gardens, the neighborhood and clearly points out to the enchanted visitors where they should stand/ walk to take pictures.

This is a "must see" stop on the popular CARMEL WALK.

Mike & Bobbie keep this iconic property beautiful and available for the visitors eye.

I also noticed they removed the arbor over the Hansel gate so pictures could be better composed of these iconic cottages.

Anything that enhances residents and visitors experience should be important to the city.

Again I am hoping for approval to keep that lovely stone border.

All smiles,

Gael Gallagher

[www.Gaalgallagher.com](http://www.Gaalgallagher.com)  
[www.Carmelwalks.com](http://www.Carmelwalks.com)



August 18, 2024

To: Marnie Waffle at [mwaffle.ci.carmel.ca.us](mailto:mwaffle.ci.carmel.ca.us)

Dear Ms. Waffle,

I am writing in regard to the Hansel and Gretel property on Torres in Carmel.

I am local working artist on the Monterey peninsula. I am a licensed contractor and decorative painter. Because of my profession, I have had the opportunity to see a wide variety of homes on the peninsula. I am exposed daily to numerous examples of tasteful and not-so-tasteful landscape designs.

I feel the stone border around the plants on the outside of Hansel and Gretel's fence fits in with the character of neighborhood and is a perfect addition to the view of that famous cottage.

From a practical standpoint, the border also appears to retain water and soil well, which I assume the neighbors and the city appreciate.

Sincerely, Lisa Haas

August 10, 2024

Marnie Waffle  
Carmel Planning & Building Department  
Post Office Drawer C  
Carmel-by-the-Sea, California 93921

Re: Encroachment for the Voris's DS23-217  
Condition No. 21 (remove stone border)

Dear Marnie:

I live on Torres Street two doors from Hansel and Gretel.

I support allowing the encroachment permit for the stone border around the front plantings. An asphalt berm wouldn't be as attractive as what is there now; and, as our street is on a slope, the existing border keeps soil and water in place better.

We witness Hansel and Gretel getting a huge number of tourists daily. In addition to the historic houses, the landscaping (both inside the yard, and outside) adds greatly to the public enjoyment of the property.

The City must surely see an advantage to maintaining these plantings and their border also.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. Henderson', with a long, sweeping horizontal line extending to the right.

Rebecca Henderson  
[REDACTED]



August 11, 2024

Marnie Waffle  
Carmel Planning & Building Department  
Post Office Drawer C  
Carmel-by-the-Sea, California 93921

Re: Encroachment Permit for Hansel and Gretel

Dear Marnie:

I own a Comstock house on Junipero in Carmel-by-the-Sea.

As a fellow Comstock owner, I believe the way the border in question repeats the theme of the garden inside the fence fits with the neighborhood character, and especially with the character of Hansel and Gretel. It's certainly looks better than what was there before and better than a rolled asphalt berm - not to mention it solves any drainage issues.

I would hope you would consider approving this encroachment permit.

Sincerely,

Stephanie Ager Kirz

August 19, 2024

Attachment 4

Ms. Marnie Waffle  
[mwaffle@ci.carmel.ca.us](mailto:mwaffle@ci.carmel.ca.us)

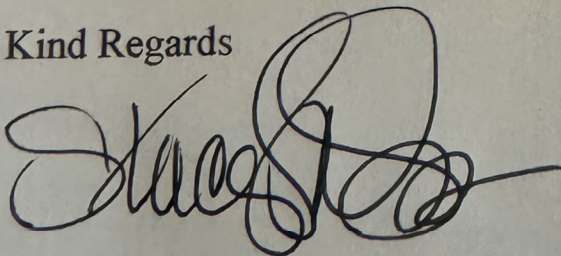
To: Ms. Marnie Waffle:

I own an historic home on Santa Rita, a few blocks from Hansel and Gretel on Torres Street.

The Voris' have told me they have applied for an encroachment permit to keep a stone border around their streetside plantings. My home is in a bit of a low spot, so I can appreciate how important it is to keep water and soil from running down the street or onto neighboring properties.

I believe this border fits in with the neighborhood character and the character of the two historic cottages. I know large amounts people daily go to see Hansel and Gretel. I think the landscaping, including the stone border, add to the tourist's experience - as well as mine as a nearby homeowner.

Kind Regards

A handwritten signature in black ink, appearing to read "Stacey Gregg". The signature is highly stylized and cursive, with large loops and a long horizontal tail.

Stacey Gregg

August 10, 2024

Marnie Waffle  
Carmel Planning & Building Department  
Post Office Drawer C  
Carmel-by-the-Sea, California 93921

Re: Encroachment  
Voris – Torres 4 NE of Sixth (Hansel and Gretel)  
Relief from DS23-217 Condition No. 21 (remove stone  
border)

Dear Ms. Waffle:

I am a neighbor writing in support of granting the Voris's an encroachment permit for a planting bed's stone border on the street-side of their front fence. The low stone border retains water and soil better than a rolled asphalt berm would, is certainly more attractive, and presents a more obvious demarcation between paved and planted areas.

This encroachment also adds to the public enjoyment of this historic property (and the City benefits by the increased tourism these houses attract.) In the past parked cars blocked the view of Hansel from the street. Because of the plantings and stone border, it is now easily seen and photographed by all who appreciate it.

Sincerely,



Steve White  
Comstock Studio  
Santa Fe 666th





**CITY OF CARMEL-BY-THE-SEA  
CITY COUNCIL  
Staff Report**

**October 1, 2024  
ADJOURNMENT**

**TO:** Honorable Mayor and City Council Members  
**SUBMITTED BY:** Nova Romero, City Clerk  
**APPROVED BY:** Chip Rerig, City Administrator  
**SUBJECT:** Correspondence Received After Agenda Posting

**RECOMMENDATION:**

**BACKGROUND/SUMMARY:**

**FISCAL IMPACT:**

**PRIOR CITY COUNCIL ACTION:**

**ATTACHMENTS:**

Correspondence #1  
Correspondence #1  
Correspondence #2



**Carmel-  
by-the-Sea**

Attachment 1  
Nova Romero <nromero@ci.carmel.ca.us>

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**Fwd: Pedestrian Pathway**

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**Chip Rerig** <crerig@ci.carmel.ca.us>  
To: Nova Romero <nromero@ci.carmel.ca.us>  
Cc: Brandon Swanson <bswanson@ci.carmel.ca.us>

Fri, Sep 27, 2024 at 9:07 AM

Please send to the entire CC. Thank you.

Take good care.

Chip Rerig, City Administrator  
City of Carmel-by-the-Sea  
831.620.2058

**City of Carmel-By-The-Sea**

**SEP 27 2024**

**Office of the City Clerk**

----- Forwarded message -----

From: **Jim Beck** <[REDACTED]>  
Date: Fri, Sep 27, 2024 at 8:38 AM  
Subject: Pedestrian Pathway  
To: Dave Potter <dpotter@ci.carmel.ca.us>, Jeff Baron <jbaron@ci.carmel.ca.us>  
Cc: Chip Rerig <crerig@ci.carmel.ca.us>

Gents,

I see the Council has on its agenda next week a resolution to authorize Chip to proceed with an engagement with Sharp Engineering to fix the pathway on San Antonio between 2nd & 4th. We strongly encourage addressing this eyesore to entry to our "charming" town, clearly a need from an aesthetic point of view; but just as importantly from a safety perspective. As we live a bit further north on San Antonio we see the hordes of pedestrian traffic to/from the golf outings, not all participants of which are sober, many of which use the street hindering traffic, as that stretch of pathway provides risks they avoid, or perhaps some day they use the pathway and we end up with a lawsuit for medical bills.

Let's finally get this fixed.

Jim Beck

Sent from my iPad



Carmel-by-the-Sea

Attachment 2

Nova Romero <nromero@ci.carmel.ca.us>

10/1

CalHDF public comment re agenda item 5 for 10/2 Council meeting

James Lloyd <james@calhdf.org>

Mon, Sep 30, 2024 at 2:03 PM

To: dpotter@ci.carmel.ca.us, kferlito@ci.carmel.ca.us, adramov@ci.carmel.ca.us, letsgocarmel@gmail.com, jbaron@ci.carmel.ca.us

Cc: cityclerk@ci.carmel.ca.us, planning@ci.carmel.ca.us, crerig@ci.carmel.ca.us, bpierik@ci.carmel.ca.us, bswanson@ci.carmel.ca.us

Dear Carmel-by-the-Sea City Council,

Please see attached CalHDF's public comment regarding agenda item 5 for the October 2, 2024 Council meeting, the proposed amendment to the City's Housing Element, as well as a legal case cited in the comment.

Sincerely,

James M. Lloyd  
Director of Planning and Investigations  
California Housing Defense Fund  
james@calhdf.org

City of Carmel-By-The-Sea

SEP 30 2024

Office of the City Clerk

2 attachments

Carmel - City-Owned Sites - HE Letter.pdf  
251K

CalHDF v LCF compressed(1)(1).pdf  
3684K



**FILED**  
Superior Court of California  
County of Los Angeles

**MAR 04 2024**

David W. Slayton, Executive Officer/Clerk of Court  
By: F. Becerra, Deputy

**CALIFORNIA HOUSING DEFENSE FUND v. CITY OF LA CAÑADA FLINTRIDGE**  
Case Number: 23STCP02614 [Related to Case No. 23STPC02575]

Hearing Date: March 1, 2024

**ORDER ON PETITIONS FOR WRIT OF MANDATE AND COMPLAINTS FOR DECLARATORY RELIEF**

Under the Housing Accountability Act (HAA), Government Code<sup>1</sup> section 65589.5, a municipality may not "disapprove" a qualifying affordable housing project on the grounds it does not comply with the municipality's zoning and general plan if the developer submitted either a statutorily defined "preliminary application" or a "complete development application" while the city's housing element was not in substantial compliance with state law. (See § 65589.5, subs. (d)(5), (h)(5), (o)(1).) This statutory provision, colloquially known as the "Builder's Remedy," incentivizes compliance with the Housing Element Law by temporarily suspending the power of non-compliant municipalities to enforce their zoning rules against qualifying affordable housing projects.

Respondents, the City of La Cañada Flintridge, the City of La Cañada Flintridge Community Development Department, and the City of La Cañada Flintridge City Council (collectively, Respondents or the City) determined Petitioner 600 Foothill Owner, L.P.'s (600 Foothill) proposed mixed-use development did not qualify for the Builder's Remedy. Petitioner 600 Foothill, Petitioner California Housing Defense Fund (CHDF), and Petitioners-Intervenors the People of the State of California, Ex. Rel. Rob Bonta and the California Department of Housing and Community Development (HCD)(collectively, Intervenors), challenge Respondents' decision.

The petitions are granted. The court orders a writ shall issue directing Respondents to set aside their May 1, 2023 decision finding 600 Foothill's application does not qualify as a Builder's Remedy project and to process the application in accordance with the HAA.

**JUDICIAL NOTICE**

600 Foothill's Request for Judicial Notice (RJN) filed November 8, 2023 is denied as to Exhibit A and granted as to Exhibits B through F. Respondents' objections to Exhibits B through F are overruled. Respondents' objections 1 and 4 are sustained to the extent they pertain to Exhibit A.

<sup>1</sup> All further undesignated statutory references are to this code.



Respondents' RJN in support of its opposition to the 600 Foothill petition is granted as to all referenced exhibits except as to Exhibits D-3, V and BB.<sup>2</sup>

600 Foothill's Reply RJN of Exhibit AA is granted.

CHDF's RJN of Exhibits A through D is granted.

Respondents' RJN in support of its opposition to the CHDF petition is granted as to all referenced exhibits except as to Exhibit D-3 and V. Except as to Exhibits D-3 and V, the objections of Intervenors and CHDF are overruled.

For all RJNs, the court does not judicially notice any particular interpretation of the records. Nor does the court judicially notice the truth of hearsay statements within the judicially noticed records.

**EVIDENTIARY OBJECTIONS, MOTION *IN LIMINE* AND CODE OF CIVIL PROCEDURE SECTION 1094.5, SUBDIVISION (E)**

Preliminarily, the court finds none of the parties' evidentiary objections are material to the disposition of any cause of action or issue. The court nonetheless rules on the objections for completeness. The court notes it is not required to parse through long narratives with generalized objections. The court may overrule an objection if the material objected to contains unobjectionable material. The parties make many objections to multiple sentences where much or some of the material is not objectionable. (See *Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, United Steelworkers . . .* (1964) 227 Cal.App.2d 675, 712.)

600 Foothill's Objections

Declaration of Lynda-Jo Hernandez: All objections are overruled.

Declaration of Kim Bowan: All objections are overruled except 3, 12 and 17.

Declaration of Peter Sheridan: All objections are overruled.

Declaration of Keith Eich: All objections are overruled.

Declaration of Susan Koleda: All objections are overruled.

Declaration of Teresa Walker: All objections are overruled except 3, 11, 17, 26 and 29.

Declaration of Richard Gunter III: All objections are overruled except 5-8 and 14-20.

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<sup>2</sup> Contrary to 600 Foothill's assertion, Respondents did not request judicial notice of Exhibit A to the Koleda declaration. 600 Foothill and Intervenors appear correct—Respondents did not submit Exhibits D-3 or V with the Koleda declaration. Accordingly, the court cannot judicially notice Exhibits D-3 or V.

Respondents' Objections to 600 Foothill's Evidence

Declaration of Melinda Coy: All objections are overruled.

Reply Declaration of Garret Weyand: All objections are overruled except 3, 4, 7 and 8.<sup>3</sup>

Intervenors' Objections

Declaration of Susan Koleda: All objections are overruled.

CHDF's Objections

Declaration of Teresa Walker: All objections are overruled except 2, 4 and 6.

Declaration of Susan Koleda: All objections are overruled.

Declarations of Eich, Bowman, Gunter III and Hernandez are all overruled as discussed *infra*.

Motion In Limine

Respondents' Motion *In Limine* to Exclude Issues or Evidence (filed February 5, 2024) is denied. Respondents do not demonstrate 600 Foothill has submitted any evidence concerning "infeasibility" of the project that is *outside* of the administrative record. Respondents do not require discovery to respond to 600 Foothill's infeasibility arguments given such arguments are based entirely on the administrative record. (See § 65589.5, subd. (m)(1); Code Civ. Proc., § 1094.5, subd. (e).)

Code of Civil Procedure section 1094.5, Subdivision (e)

Section 65589.5, subdivision (m)(1) in the HAA specifies "[a]ny action brought to enforce the provisions of this section shall be brought pursuant to Section 1094.5 of the Code of Civil Procedure. . . ." Accordingly, the HAA causes of action are subject to the limitations on extra-record evidence in Code of Civil Procedure section 1094.5, subd. (e). Nonetheless, the HAA causes of action involve questions of substantial compliance with the Housing Element Law, governed, at least in part, by Code of Civil Procedure section 1085. (See e.g., § 65587, subd. (d)(2).) Code of Civil Procedure section 1094.5, subdivision (e) does not apply to a cause of action governed by Code of Civil Procedure section 1085.

The parties have neglected to suggest which parts of their declarations are subject to Code of Civil Procedure sections 1094.5, 1085 or both. The parties also have not moved to augment the administrative record pursuant to Code of Civil Procedure section 1094.5, subdivision (e). Under the circumstances, the court will admit and consider the parties' declarations despite the court

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<sup>3</sup> The declaration is properly submitted to respond to the defense of unclean hands and allegations of "manipulation of the HCD approval process" discussed in Respondents' opposition brief.

having made no order to augment the record.<sup>4</sup> The court notes, however, even if the court excluded all the extra-record evidence submitted, including the lengthy Koleda declarations, the result here would not change.

## BACKGROUND

### The Housing Element Law<sup>5</sup>

"In 1980, the Legislature enacted the Housing Element Law, 'a separate, comprehensive statutory scheme that substantially strengthened the requirements of the housing element component of local general plans.' " (*Martinez v. City of Clovis* (2023) 90 Cal.App.5th 193, 221-222 [*Martinez*].)

A housing element within a general plan must include certain components, including, but not limited to: an assessment of housing needs and the resources available and constraints to meeting those needs; an inventory of sites available to meet the locality's housing needs at different income levels, including the Regional Housing Needs Allocation (RHNA); a statement of goals, quantified objectives, and policies to affirmatively further fair housing; and a schedule of actions to address the housing element's goals and objectives. (§ 65583, subds. (a), (b), (c).)

"A municipality must review its housing element for the appropriateness of its housing goals, objectives, and policies and must revise the housing element in accordance with a statutory schedule. (§ 65588, subds. (a), (b).) The interval between the due dates for the revised housing element is referred to as a planning period or cycle, which usually is eight years." (*Martinez, supra*, 90 Cal.App.5th at 221-222.)

"Before revising its housing element, a local government must make a draft available for public comment and, after comments are received, submit the draft, as revised to address the comments, to the Department of Housing and Community Development (HCD). (§ 65585, subd. (b)(1); see § 65588 [review and revision of housing element by local government].) After a draft is submitted, the HCD must review it, consider any written comments from any public agency, group, or person, and make written findings as to whether the draft substantially complies with the Housing Element Law. (§ 65585, subds. (b)(3), (c), (d); . . .) [¶] If the HCD finds the draft does not substantially comply with the Housing Element Law, the local government must either (1) change the draft to substantially comply or (2) adopt the draft without changes along with a resolution containing findings that explain its belief that the draft substantially complies with the law. (§ 65585, subd. (f).)" (*Martinez, supra*, 90 Cal.App.5th at 221-222.)

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<sup>4</sup> At the conclusion of the hearing, the parties agreed the court could consider all of the evidence before it without regard to Code of Civil Procedure section 1094.5, subdivision (e).

<sup>5</sup> See section 65580, *et seq.*

The City's October 2021 and October 2022 Draft Housing Elements, and HCD's Findings the City Had Not Attained Substantial Compliance with the Housing Element Law

Under the Housing Element Law, the City had a statutory deadline of October 15, 2021 to adopt a substantially compliant 6th cycle housing element. (AR 443.) The City submitted its draft housing element to HCD on that day. (AR 443.)

On December 3, 2021, HCD informed the City while the draft "addresses many statutory requirements," to comply with the Housing Element Law, significant revisions were required. (AR 443, 445-453.) HCD identified fourteen areas within the first version of the City's draft housing element that required specific programmatic revisions, organized into three broad categories—housing needs, resources, and constraints; housing programs; and public participation. (AR 445-453.) As examples, HCD found the draft Housing element lacked a sufficient site inventory analysis identifying potential sites for housing development distributed in a manner to affirmatively further fair housing, or an inadequate site inventory of the City's vacant and underutilized sites to meet the City's RHNA determination. (AR 445-447.)

Ten months later, on October 4, 2022, the City adopted its 2021-2029 housing element (October 2022 Housing Element). (AR 4504-4508, 4509 [Housing Element].) The City thereafter submitted its adopted Housing Element to HCD for review. (AR 5263.)

On December 6, 2022, HCD informed the City "[t]he adopted housing element addresses most statutory requirements described in HCD's [prior] review; however, additional revisions are necessary to fully comply with State Housing Element Law." (AR 5263 [referencing a May 26, 2021 review].) HCD's findings of non-compliance for the October 2022 Housing Element are discussed further in the Analysis section *infra*.

600 Foothill's Preliminary Application

On November 10, 2022—after the City's adoption of the October 2022 Housing Element but before HCD's December 6, 2022 review—600 Foothill submitted the Preliminary Application seeking the City's approval to construct a mixed-used project on a site located at 600 Foothill Boulevard, which is currently occupied by two vacant church buildings and a surface parking lot. (AR 5241.) 600 Foothill proposed to build 80 apartments on the site, 16 of which (or 20 percent) would be reserved for persons earning less than sixty percent of the area median income (the Project). (AR 5243.) 600 Foothill's Preliminary Application explained "given that the City continues to have a Housing Element that is out of compliance with state law," 600 Foothill proposed the Project as a Builder's Remedy project pursuant to section 65589.5, subdivision (d)(5) meaning the Project was not required to account for the City's zoning ordinance or general plan land use designation. (AR 5235.)

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The City Staff Acknowledge Changes to the October 2022 Housing Element Are Necessary to Comply with HCD's Findings

The City's Director of Community Development, Susan Koleda, acknowledged on January 11, 2023 in an email communication that "[a]ll additional changes to the Housing Element have yet to be determined but will likely require additional [Planning Commission/City Council] approval." (AR 12894.) At the City's January 12, 2023 Planning Commission meeting, City staff acknowledged revisions were required for "the Housing Element to be in conformance" with applicable law. (AR 5274-5275.) Director Koleda also stated in a February 9, 2023 email communication that "additional clarifications were required" to the October 2022 Housing Element, and "[t]he additional information will be incorporated into a revised Housing Element, scheduled to be adopted by the City Council on February 21, 2023. It will then be submitted to HCD for review as a third submittal." (AR 13011.)

The City Adopts a February 2023 Housing Element, Fails to Rezone, and "Certifies" Its Substantial Compliance with the Housing Element Law

On February 21, 2023, the City adopted its third revised housing element which addressed the deficiencies to the October 2022 Housing Element identified by HCD. (AR 6274-6279.) In its resolution adopting the revised housing element, the City Council stated it "certifies that the City's Housing Element was in substantial compliance with State Housing Element law as of the October 4, 2022 Housing Element adopted by the City Council. . . ." (AR 6274.) Despite use of the word "certifies" in the City's resolution, Director Koleda opined at the February 21, 2023 council meeting that the "consensus" from the City Attorney, the City's consultants, and HCD was that "self-certification" of the City's housing element "is not an option." (AR 6207-6208; see also Opposition to Intervenor 19:18-21:7 ["wrongly accuse . . . of 'back-dating' and 'self-certifying'"].)

At the time the City adopted its third revised housing element on February 21, 2023, it had not completed the rezoning required by the Housing Element Law. Accordingly, on April 24, 2023, HCD found, although the February 2023 housing element addressed the previously identified deficiencies in the October 2022 Housing Element, and met "most of the statutory requirements of State Housing Law," the City was not in substantial compliance with the Housing Element Law because the City adopted the February 2023 housing element more than one year past the statutory due date of October 15, 2021 and the City had not completed its statutorily required rezoning. (AR 6297-6300; see also AR 7170-7171.) As a result, HCD found the City could not be deemed in substantial compliance with state law *until* it completed all required rezones. (AR 6297-6300; see § 65588, subd. (e)(4)(C)(iii). ["A jurisdiction that adopts a housing element more than one year after the statutory deadline . . . shall not be found in substantial compliance with this article until it has completed the rezoning required by" the Housing Element Law].)

In its April 24, 2023 letter, HCD also opined that "a local jurisdiction cannot 'backdate' compliance to the date of adoption of a housing element," and the City was not in substantial

compliance with the Housing Element Law as of October 4, 2022, notwithstanding its "certification" in the City's February 21, 2023 resolution. (AR 6297-6298.)

The City Determines 600 Foothill's Preliminary Application Could Not Rely on the Builder's Remedy and the City Council Affirms the Decision

On February 10, 2023, in response to 600 Foothill's Preliminary Application, the City issued an incompleteness determination (the First Incompleteness Determination) requesting additional detail on several issues. The First Incompleteness Determination did not allege any inconsistencies between the Project and the City's zoning ordinance and general plan. (AR 5276-5279.) Petitioner supplemented its application materials in response to the First Incompleteness Determination on April 28, 2023. (See AR 6305, 7095-7096, 7152-7153, 7169, 7166, 8050-8060.)

On March 1, 2023, the City issued a second incompleteness determination (the Second Incompleteness Determination). The Second Incompleteness Determination advised 600 Foothill the Builder's Remedy did not apply to the Project making the Preliminary Application incomplete for its failure to comply with the City's general plan zoning laws and residential density limitations. (AR 6280-6281; see AR 7176.)

On March 9, 2023, 600 Foothill appealed the Second Incompleteness Determination. (See § 65943, subd. (c); AR 6282-6287, AR 12926.) In support of its appeal, 600 Foothill provided a letter from its attorney explaining 600 Foothill's position the City Council's failure to grant the appeal would constitute a violation of the HAA. (AR 6304-6462, 6317 ["flouts the law"].)

The City Council heard 600 Foothill's appeal on May 1, 2023. The City Council voted unanimously to adopt Resolution No. 23-14, denying the appeal and upholding the Second Incompleteness Determination (the May 1, 2023 Decision). (AR 7151-7160, AR 7161-7168.)

On June 8, 2023, HCD sent the City a Notice of Violation advising the City it violated the HAA and Housing Element Law by denying 600 Foothill's appeal. (AR 7170-7175.) HCD summarized the alleged violations:

The City cannot 'backdate' its housing element compliance date to an earlier date so as to avoid approving a Builder's Remedy application. In short, the October 4, 2022 Adopted Housing Element did not substantially comply with State Housing Element Law, regardless of any declaration by the City. Therefore, the Builder's Remedy applies, and the City's denial of the Project application based on inconsistency with zoning and land use designation is a violation of the HAA. (AR 7170.)

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The City Determines the Application is Complete and the Project is Inconsistent with City's Zoning Code and General Plan

On May 26, 2023, the City informed 600 Foothill that its Project application was complete. (AR 7169.) On June 24, 2023, the City advised 600 Foothill:

[I]t remains the City's position (as affirmed by City Council on May 1, 2023) that the 2021-2029 Housing Element was in substantial compliance with state law as of October 4, 2022. Based on that, staff reviewed the project for consistency with the General Plan, applicable provisions of the Downtown Village Specific Plan (DVSP), the Zoning Code, and the density proposed within the 2021-2029 Housing Element. In accordance with [] § 65589.5(j)(2)(A), this letter serves as an explanation of the reasons that the City considers the proposed project to be inconsistent, not in compliance, or not in conformity with these aforementioned guiding documents. (AR 7176.)

The City Completes Rezoning and HCD Certifies the City's Substantial Compliance with the Housing Element Law

On September 12, 2023, the City adopted a resolution completing its rezoning commitments set forth in its housing element. HCD reviewed the materials and, on November 17, 2023, sent a letter to the City finding the City had "completed actions to address requirements described in HCD's April 24, 2023 review letter." (Coy Decl. ¶ 12, Exh. D.)

Writ Proceedings

On July 21, 2023, 600 Foothill filed its verified petition for writ of mandate and complaint for declaratory and injunctive relief against Respondents. On July 25, 2023, CHDF filed its verified petition for writ of mandate and complaint for declaratory relief. The court has related the two actions and coordinated them for trial and legal briefing. The court denied Respondents' motion to consolidate the two actions.

On December 20, 2023, pursuant to a stipulation, Intervenors filed their petition for writ of mandate and complaint for declaratory relief in the CHDF proceeding.

For this proceeding, the court has considered 600 Foothill's Opening Brief, CHDF's Opening Brief, Intervenors' Opening Brief, Respondents' three opposition briefs, 600 Foothill's Reply Brief, CHDF's Reply Brief, Intervenors' Reply Brief, the administrative record, the joint appendix, all requests for judicial notice, and all declarations (including exhibits).<sup>6</sup>

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<sup>6</sup> The court accounted for its evidentiary rulings as to the evidence.

## STANDARD OF REVIEW

Pursuant to the Los Angeles County Court Rules (Local Rules), “[t]he opening and opposition briefs must state the parties’ respective positions on whether the petitioner is seeking traditional or administrative mandamus, or both.” (Local Rules, Rule 3.231, subd. (i)(1).) The parties must also provide their position on the standard of review in their briefing. (See Local Rule, Rule 3.231, subd. (i)(3).)

600 Foothill, CHDF and Respondents do not suggest the standard of review that applies to the causes of action. Intervenor’s argue Code of Civil Procedure section 1085, not Code of Civil Procedure section 1094.5, applies to their petition.

Under Code of Civil Procedure section 1094.5, subdivision (b), the relevant issues are whether (1) the respondent has proceeded without jurisdiction, (2) there was a fair trial, and (3) there was a prejudicial abuse of discretion. An abuse of discretion is established if the agency has not proceeded in the manner required by law, the decision is not supported by the findings, or the findings are not supported by the evidence. (Code Civ. Proc., § 1094.5, subd. (b).)

In administrative mandate proceedings not affecting a fundamental vested right, the trial court reviews administrative findings for substantial evidence. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion (*California Youth Authority v. State Personnel Board* (2002) 104 Cal.App.4th 575, 584-85), or evidence of ponderable legal significance which is reasonable in nature, credible and of solid value. (*Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 305 n. 28.) Under the substantial evidence test, “[c]ourts may reverse an [administrative] decision only if, based on the evidence . . . , a reasonable person could not reach the conclusion reached by the agency.” (*Sierra Club v. California Coastal Com.* (1993) 12 Cal.App.4th 602, 610.) The court does “not weigh the evidence, consider the credibility of witnesses, or resolve conflicts in the evidence or in the reasonable inferences that may be drawn from it.” (*Doe v. Regents of University of California* (2016) 5 Cal.App.5th 1055, 1073.)

To obtain a traditional writ of mandate under Code of Civil Procedure section 1085, there are two essential findings. First, there must be a clear, present, and ministerial duty on the part of the respondent. Second, a petitioner must have a clear, present, and beneficial right to the performance of that duty. (*California Ass’n for Health Services at Home v. Department of Health Services* (2007) 148 Cal.App.4th 696, 704.) “Generally, mandamus is available to compel a public agency’s performance or to correct an agency’s abuse of discretion when the action being compelled or corrected is ministerial.” (*AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health* (2011) 197 Cal.App.4th 693, 700.)

An agency is presumed to have regularly performed its official duties. (Evid. Code, § 664.) Under Code of Civil Procedure section 1094.5, the “trial court must afford a strong presumption of correctness concerning the administrative findings.” (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817.) A petitioner seeking administrative mandamus has the burden of proof and must cite



the administrative record to support its contentions. (See *Alford v. Pierno* (1972) 27 Cal.App.3d 682, 691.) Similarly, a petitioner “bears the burden of proof in a mandate proceeding brought under Code of Civil Procedure section 1085.” (*California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1154.) A reviewing court “will not act as counsel for either party to a [challenge to an administrative decision] and will not assume the task of initiating and prosecuting a search of the record for any purpose of discovering errors not pointed out in the briefs.” (*Fox v. Erickson* (1950) 99 Cal.App.2d 740, 742 [context of civil appeal.]

“ ‘On questions of law arising in mandate proceedings, [the court] exercise[s] independent judgment.’ . . . Interpretation of a statute or regulation is a question of law subject to independent review.” (*Christensen v. Lightbourne* (2017) 15 Cal.App.5th 1239, 1251.)

## ANALYSIS

### Petition for Writ of Mandate – Violations of the HAA

600 Foothill, CHDF, and Intervenors seek a writ of mandate to enforce the requirements of the HAA against the City. Among other relief, they seek a writ directing Respondents to set aside the City Council’s “decision, on May 1, 2023, to disapprove an application for a housing development project at 600 Foothill Boulevard, and compelling Respondent to approve the application or, in the alternative, to process it in accordance with the law.” (CHDF Pet. Prayer ¶ 1; see also 600 Foothill Pet. Prayer ¶¶ 3-5 and Intervenors Pet. Prayer ¶¶ 1-3.)<sup>7</sup>

#### Standard of Review

As noted, the HAA at section 65589.5, subdivision (m)(1) specifies “[a]ny action brought to enforce the provisions of this section shall be brought pursuant to Section 1094.5 of the Code of Civil Procedure. . . .” Nonetheless, Intervenors argue Code of Civil Procedure section 1085, not Code of Civil Procedure section 1094.5, applies because Respondents have a “ministerial duty under the HAA to process the Foothill Owner’s Builder’s Remedy application.” (Intervenors’ Opening Brief 10:27; see *Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215, 221-222. [“A writ of mandate may be issued by a court to compel the performance of a duty imposed by law.”])

While there is a colorable argument Code of Civil Procedure section 1085 applies to parts of the HAA claims involving the Housing Element Law, given the Legislature’s clear instructions in section 65589.5, subdivision (m)(1), the court concludes Petitioners’ writ petitions to enforce the HAA are all governed by Code of Civil Procedure section 1094.5.

<sup>7</sup> 600 Foothill’s writ claims under the HAA are alleged in its third through fifth causes of action while CHDF’s and Intervenors’ are alleged in their first causes of action.

The court's task "is therefore to determine whether the City 'proceeded in the manner required by law,' with a decision supported by the findings, and findings supported by the evidence; if not, the City abused its discretion." (*California Renters Legal Advocacy and Education Fund v. City of San Mateo* (2021) 68 Cal.App.5th 820, 837.) The City "bear[s] the burden of proof that its decision has conformed to all of the conditions specified in Section 65589.5." (§ 65589.6.)

As noted, based on the circumstances, the court reaches the same result in its analysis even if the petitions, or parts thereof, are governed by Code of Civil Procedure section 1085. (See e.g., § 65587, subd. (d)(2) [action to compel compliance with Housing Element Law "shall" be brought pursuant to Code of Civil Procedure section 1085].) The HAA claims raise legal questions of statutory construction and concerns about Respondents' substantial compliance with the Housing Element Law. The court decides such issues independently, regardless of whether Code of Civil Procedure section 1094.5 or 1085 governs. (See e.g. *Martinez, supra*, 90 Cal.App.5th at 237.)

The City "Disapproved" the Builder's Remedy Project

600 Foothill contends the City "disapproved" the Project, as the term is defined in the HAA, because the City "determined that the Project could not proceed because it believed the Builder's Remedy was inapplicable." (600 Foothill Opening Brief 7:11-12.) CHDF and Intervenors make the same argument. (CHDF Opening Brief 21:25-28; Intervenors' Opening Brief 15:27-16:3.)

The Builder's Remedy, at section 65589.5, subdivision (d)(5) provides in pertinent part:

(d) A local agency **shall not disapprove** a housing development project . . . for very low, low-, or moderate-income households . . . unless it makes written findings, based upon a preponderance of the evidence in the record, as to one of the following:

.....

(5) The housing development project . . . is inconsistent with both the jurisdiction's zoning ordinance and general plan land use designation as specified in any element of the general plan as it existed on the date the application was deemed complete, **and** the jurisdiction has adopted a revised housing element in accordance with Section 65588 that is in substantial compliance with this article. (Emphasis added.)

Thus, to prove their claim under the HAA and to proceed with the Project as a Builder's Remedy, Petitioners must show the City "disapprove[d] a housing development project."

(§ 65589.5, subd. (d).)<sup>8</sup> Section 65589.5, subdivision (h)(6) provides to “ ‘disapprove the housing development project’ **includes** any instance in which a local agency does any of the following: (A) Votes on a proposed housing development project application and the application is disapproved, **including any required land use approvals or entitlements necessary for the issuance of a building permit . . .**” (Emphasis added.)

Here, on May 1, 2023, the City Council denied Petitioner’s appeal of the Second Incompleteness Determination stating:

[T]he City Council of the City of La Cañada Flintridge hereby denies the appeal and upholds the Planning Division’s March 1, 2023, incompleteness determination for the mixed use project at 600 Foothill Boulevard, on the basis that the ‘builder’s remedy’ under the Housing Accountability Act does not apply and is not available for the project, and that the project did not ‘vest’ as a ‘builder’s remedy’ project as alleged in the project’s SB 330 Preliminary Application submission dated November 14, 2022, because the City’s Housing Element was, as of October 4, 2022, in substantial compliance with the Housing Element law. (AR 7167.)

Notably, Director Koleda informed the City Council, prior to its vote on the appeal, that “if the appeal is denied, the project will be processed accordingly as a standard, nonbuilder’s remedy project.” (AR 7103.) Thus, the City Council “voted” on a proposed housing development project application and determined the Project could not proceed as a Builder’s Remedy project—that is, the Project would be subject to the City’s discretionary approvals.

The Legislature has expressed its intent that the HAA “be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing.” (§ 65589.5, subd. (a)(2)(L); *California Renters Legal Advocacy & Education Fund. v. City of San Mateo*, *supra*, 68 Cal.App.5th at 854.) In addition, “[a]s a basic principle of statutory construction, ‘include’ is generally used as a word of enlargement and not of limitation. . . . Thus, where the word ‘include’ is used to refer to specified items, it may be expanded to cover other items.” (*Rea v. Blue Shield of California* (2014) 226 Cal.App.4th 1209, 1227.) Applying these canons of statutory construction, the court finds section 65589.5, subdivision (h)(6) should be given a broad construction. Because the City Council made clear any required land use approvals or entitlements would not be issued for the Project, **as a Builder’s Remedy project**, the City Council’s May 1, 2023 decision falls within the HAA’s broad definition of “disapprove.”

<sup>8</sup> It is undisputed the Project constitutes a “housing development project . . . for very low, low-, or moderate-income households” within the meaning of the HAA. HCD advised the City on June 8, 2023: “The Project is proposed as an 80-unit mixed-use project where 20 percent of the units (16 units) will be affordable to lower-income households. The residential portion equates to approximately 89 percent of the Project; therefore, the Project qualifies as a ‘housing development project’ under the HAA (Gov. Code, § 65589.5, subd. (h)(2)(B)).” (AR 7171.) Respondents develop no argument to the contrary.

Respondents contend:

600 Foothill defined the “approvals” and “entitlements” it sought in its application – namely, a Conditional Use Permit (USE-2023-0016), Tentative Tract Map 83375 (LAND-2023-0001), and Tree Removal Permit (DEV-2023-0003). (AR 5285.) There was no vote on May 1, 2023, on any of these “required land use approvals” or “entitlements” and, thus, . . . the “vote” needed under the HAA has not occurred. (Opposition to 600 Foothill 19:22-26 [emphasis in original].)

Respondents’ narrow interpretation of the statute is unpersuasive. (See § 65589.5, subd. (a)(2)(L).) While the City Council may not have voted to deny the conditional use permit, tentative tract map, and tree removal permit, the City Council voted on May 1, 2023 and determined the Project could not proceed as the project proposed—a Builder’s Remedy project. Because the Project was proposed as a Builder’s Remedy, the City Council’s May 1, 2023 vote on the project application was a “disapproval” within the meaning of the HAA.

Respondents also contend “[t]he City cannot as a matter of law approve or disapprove a development project, including a project under the Builder’s Remedy, prior to conducting environmental review under CEQA . . . .”<sup>9</sup> (Opposition to 600 Foothill 16:15-16.) Respondents argue the HAA does not authorize the court “to order the City to accommodate CEQA review after a possible finding by the Court of a violation of the HAA.” (Opposition to 600 Foothill 16:25-26 [emphasis in original].)

Again, Respondents’ arguments are unpersuasive—a city can disapprove a project without having undertaken CEQA review. Nothing requires a city to undertake CEQA review *before deciding to disapprove a project*. CEQA does not apply to “[p]rojects which a public agency rejects or disapproves.” (Pub. Res. Code, § 21080, subd. (b)(5).) “[I]f an agency at any time decides not to proceed with a project, CEQA is inapplicable from that time forward.” (*Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 850.) Respondents do not cite any language from the HAA that supports their position.<sup>10</sup>

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<sup>9</sup> CEQA refers to the California Environmental Quality Act at Public Resources Code section 21000, *et seq.*

<sup>10</sup> During argument, the City emphasized its reliance on section 65589.5, subdivision (m)(1) its language concerning finality—an action cannot be brought to enforce the HAA’s provisions until there is a “final action on a housing development project” and the City did not take final action on the Project—it merely determined the Project could not be built as a Builder’s Remedy project and would be subject to discretionary approvals. As noted by 600 Foothill, an action to enforce the HAA may be initiated after a municipality imposes conditions upon, disapproves or takes final action on a housing project. The City made clear in its May 1, 2023 Decision that the Project could not proceed as proposed as a Builder’s Remedy project.

While CEQA review is preserved by the HAA<sup>11</sup> nothing suggests a disapproval under the HAA can occur only after CEQA review or that a court lacks authority to issue a writ to *compel compliance with the HAA*, even if a Builder's Remedy project is subject to CEQA compliance. Notably, a suit to enforce the HAA must be filed "no later than 90 days from" project disapproval. (§ 65589.5, subd. (m)(1).) Further, the HAA must "be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing." (§ 65589.5, subd. (a)(2)(L).) Respondents' interpretation of the HAA, under which a disapproval cannot occur prior to CEQA review, would hinder the approval and provision of housing. Accordingly, an agency may "disapprove" a project under the HAA before conducting any environmental review under CEQA, and a petitioner's claim to enforce the HAA may be ripe for consideration even if CEQA review has not been performed or completed.

Respondents' reliance on *Schellinger Brothers v. City of Sebastopol* (2009) 179 Cal.App.4th 1245, 1262 [*Schellinger*] is misplaced. *Schellinger* involved a request to **compel** the certification of an environmental impact report. *Schellinger* did not hold that all claims under the HAA or other housing laws are unripe or cannot be filed until CEQA review is completed. The case did not address CEQA in the context of a claim to enforce the Builder's Remedy provision in the HAA. The case also did not suggest a trial court lacks discretion to structure a writ issued pursuant to the HAA in a manner that allows for CEQA review to be completed. "An opinion is not authority for propositions not considered." (*People v. Knoller* (2007) 41 Cal.4th 139, 154-55.)

The court acknowledges *Schellinger* advised the HAA "specifically pegs its applicability to the approval, denial or conditional approval of a 'housing development project' . . . which, as previously noted, can occur *only after the EIR is certified*. (CEQA Guidelines, § 15090(a).)" (*Schellinger, supra*, 179 Cal.App.4th at 1262.) Nonetheless, the court's statement must be interpreted in the context of the issues before that Court. Because the agency there had not disapproved the project at issue, the Court's reference to the "denial" of a housing development project was a dictum. In any event, as discussed, *Schellinger* did not decide the legal question presented here—whether the City "disapproved" a Project when it determined, through a vote of its City Council, the Builder's Remedy Project did not qualify for the Builder's Remedy under the HAA.<sup>12</sup>

<sup>11</sup> See section 65589.5, subdivisions (e) and (o)(6).

<sup>12</sup> Respondents indicate the City took action to pay for CEQA review of the Project starting in September 2023. (Opposition to 600 Foothill 18:11-14 [citing Sheridan Decl. Exh. JJ].) By that time, however, the City Council had already determined the Project could not proceed as proposed pursuant to the Builder's Remedy. (AR 7167; see also AR 7176.) Respondents do not explain the purpose of CEQA review for a project the City Council has determined could not be approved consistent with the law. This evidence does not support Respondents' position the City Council's May 1, 2023 Decision did not constitute a "disapproval" under the HAA.

Based on the foregoing, Petitioners have demonstrated the City Council “disapproved” the Project with its May 1, 2023 Decision within the meaning of the HAA. Respondents do not show the petitions are “unripe” because CEQA review has not been completed, or that CEQA review is a prerequisite to the “disapproval” of a Project under the HAA. In light of the court’s conclusion, the court need not reach the parties’ contentions regarding *California Renters v. City San Mateo* (2021) 60 Cal.App.5th 820 and appellate briefing from that case. (See Opposition to 600 Foothill 17:10-28 [citing Sheridan Decl. Exh. EE and FF].)

“Vesting” of the Builder’s Remedy and the Date the Project Application was Deemed Complete

Respondents assert the filing of a SB 330 preliminary application does not “vest” the Builder’s Remedy because “when a city is determining whether it can make the finding in subsection (d)(5), it considers the status of its Housing Element *as of the date the finding is made.*” (Opposition to 600 Foothill 23:11-13 [emphasis in original].)

The HAA defines “deemed complete” to mean that “the applicant has submitted a *preliminary application* pursuant to Section 65941.1.” (§ 65589.5, subd. (h)(5) [emphasis added].) Section 65589.5, subdivision (o)(1) states “a housing development project shall be subject only to the ordinances, policies, and standards adopted and in effect when a preliminary application including all of the information required by subdivision (a) of Section 65941.1 was submitted.” Construing these statutory provisions, along with section 65589.5, subdivision (d), the court concludes a Builder’s Remedy “vests” if the local agency does not have a substantially compliant housing element at the time a complete preliminary application pursuant to section 65941.1 is submitted and “deemed complete.”

Respondents have not developed any argument the Preliminary Application, submitted in November 2022, lacked the information required by section 65941.1 or was otherwise incomplete within the meaning of the HAA. (See AR 5234-5246.)<sup>13</sup> Thus, if the City’s housing element did not substantially comply with the Housing Element Law at that time (see analysis *infra*), the Builder’s Remedy “vested” when 600 Foothill submitted its Preliminary Application in November 2022.<sup>14</sup>

Respondents’ reliance on subdivision (o) of the HAA is misplaced. Section 65589.5, subdivision (o)(4) provides “ ‘ordinances, policies, and standards’ includes **general plan**, community plan, specific plan, zoning, design review standards and criteria, subdivision standards and criteria, and any other rules, regulations, requirements, and policies of a local agency.” (Emphasis added.)

<sup>13</sup> 600 Foothill’s Preliminary Application used the form generated by the City. 600 Foothill completed the form and included necessary attachments.

<sup>14</sup> 600 Foothill’s Preliminary Application was “deemed complete,” within the meaning of the HAA, when 600 Foothill submitted its application in November 2022. (See AR 5241-5246, 7171; see also Gov. Code §§ 65589.5, subdivision (h)(5) and 65941.1.) During argument, Respondents appeared to conflate the Preliminary Application with a formal project application.

The housing element is a mandatory element of the general plan. (§ 65582, subd. (f).) Section 65589.5, subdivision (o)(1) precludes Respondents from retroactively applying a housing element to a Builder's Remedy project that "vested" before certification of the housing element.

Respondents' vesting argument is also inconsistent with the HAA's policy of promoting housing. (§ 65589.5, subd. (a)(2)(L).) If Respondents' position was correct, as a practical matter "no housing developer would ever submit a builder's remedy application because of the uncertainty about whether the project would remain eligible long enough to be approved." (CHDF Reply 19:8-9.)

600 Foothill's Preliminary Application was "deemed complete," for purposes of the HAA, in November 2022 when 600 Foothill submitted its Preliminary Application. If the Builder's Remedy applies (see *infra*), it therefore "vested" in November 2022.<sup>15</sup>

The City Could Not Be in Substantial Compliance with the Housing Element Law until it Completed Rezoning

Petitioners contend the City's housing element was not in substantial compliance with the Housing Element Law when 600 Foothill filed its Preliminary Application because the City had not completed the rezoning required by sections 65583, subdivision (c)(1)(A) and section 65583.2, subdivision (c). (See 600 Foothill Opening Brief 12:21-23.) Petitioners are correct.

Section 65588, subdivision (e)(4)(C)(i) states:

For the adoption of the sixth revision and each subsequent revision, a local government that does not adopt a housing element that the department has found to be in substantial compliance with this article within 120 days of the applicable deadline described in subparagraph (A) or (C) of paragraph (3) shall comply with subparagraph (A) of paragraph (1) of subdivision (c) of Section 65583 and subdivision (c) of Section 65583.2 within one year of the statutory deadline to revise the housing element.

Section 65588, subdivision (e)(4)(C)(iii) states:

A jurisdiction that adopts a housing element more than one year after the statutory deadline described in subparagraph (A) or (C) of paragraph (3) **shall not be found in substantial compliance with this article until it has completed the**

<sup>15</sup> However, the court reaches the same result in its analysis below even if the application was deemed complete or "vested" anytime up to May 1, 2023, the date of City Council's decision. The City did not complete its required rezoning until September 12, 2023. (See § 65588, subd. (e)(4)(C)(iii).)

**rezoning required by subparagraph (A) of paragraph (1) of subdivision (c) of Section 65583 and subdivision (c) of Section 65583.2. (Emphasis added.)<sup>16</sup>**

Thus, the statute mandates the jurisdiction “shall not be found in substantial compliance” until completing the rezoning. (*Ibid.*)<sup>17</sup> The plain language of the statutory prohibition is not limited to HCD; the prohibition therefore applies to the courts.

As applied here, the City’s statutory deadline to adopt a substantially compliant 6th cycle housing element was October 15, 2021. (AR 443.) The City submitted its draft housing element to HCD on October 15, 2021. (AR 443.) Because the City failed to secure certification of its 6th cycle housing element within 120 days of its statutory deadline of October 15, 2021 (see AR 443-447), October 15, 2022 served as the City’s deadline to complete its required rezoning. (§ 65583, subd. (c)(1)(A).) It is undisputed the City did not complete the required rezoning until September through November 2023.

Pursuant to the plain language of section 65588, subdivision (e)(4)(C)(iii), the City “shall not be found” in substantial compliance with the Housing Element Law until the City completed its rezoning in September through November 2023. As a result, the City did not have a substantially compliant housing element when 600 Foothill submitted its Preliminary Application to the City in November 2022; the Builder’s Remedy therefore applies to the Project.

Respondents do not challenge the plain language interpretation of section 65588, subdivision (e)(4)(C)(iii).<sup>18</sup> Thus, they concede where an agency has failed to adopt a substantially compliant housing element by more than a year after the statutory deadline to do so, the agency cannot be found in substantial compliance with the Housing Element Law by HCD or a court until it

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<sup>16</sup> During argument, Respondents objected to the court’s consideration of legislative history referenced in the court’s tentative order distributed prior to the hearing. The court relied 600 Foothill’s RJN, Exh. D at 82 and Exh. E at 149. Respondents correctly argued resort to legislative history here is inappropriate given the plain language of the statute and lack of ambiguity. (See *River Garden Retirement Home v. Franchise Tax Bd.* (2010) 186 Cal.App.4th 922, 942.) While the parties later agreed the court could rely on all of the evidence that had been submitted by the parties, the court nonetheless revised its decision to eliminate the discussion of legislative history. Given Respondents’ argument, there can be no claim the statute is unclear. “If there is no ambiguity, we presume the Legislature meant what is said and the plain meaning of the language controls.” (*Ibid.*)

<sup>17</sup> In any event, as discussed *infra*, the court concludes the City did not adopt a substantially compliant housing element until after 600 Foothill submitted its complete Preliminary Application. Accordingly, even if the statutory bar of section 65588, subdivision (e)(4)(C)(iii) does not apply to the courts, the court still concludes the Builder’s Remedy applies to the Project.

<sup>18</sup> As noted *supra* in footnote 16, Respondents agree there is no ambiguity in the statute.



completes its required rezoning. (*Schulster Tunnels/Pre-Con v. Traylor Brothers, Inc.* (2003) 111 Cal.App.4th 1328, 1345, fn. 16 [failure to address point is "equivalent to a concession"].)

Respondents contend the "City could not rezone until it had a General Plan Housing Element under Section 65860(c), HCD did not promulgate draft [Affirmatively Further Fair Housing] requirements for the 6th Cycle housing element until April 23, 2020, and did not promulgate the final version until April 2021, only six months before the then-existing deadline (within SCAG) for submitting a 6th RHNA Cycle Housing Element." (Opposition to CHDF 8: 11-15.)

Respondents' evidence does not demonstrate actions or omissions of HCD or the Southern California Association of Governments (SCAG) precluded the City from adopting a substantially compliant housing element or the required rezoning. Director Koleda advises the final affirmatively further fair housing requirements were available by April 2021, and the City's RHNA increased by only two dwelling units between March 22, 2021 and July 1, 2021. (Koleda Decl. ¶¶ 20, 36.) As persuasively argued by Intervenor, the City "had sufficient time to accommodate its RHNA allocation, or at the very least, the two additional dwelling units added between March and July 2021." (Intervenor's Reply 16, fn. 8.) Respondents also do not show, with persuasive evidence, the timing of HCD's promulgation of affirmatively further fair housing requirements prevented the City from adopting a substantially compliant housing element.

Respondents also argue section 65588, subdivision (e)(4)(C)(iii)'s rezoning requirement "is illegal, unconstitutional, and unenforceable" because "[t]he Government Code specifically contemplates that rezoning will occur after adoption of an amendment to a General Plan, including Housing Elements, . . ." (Opposition to Intervenor 12:19, 14:26-27.) Respondents' statutory argument is not fully developed, lacks sufficient analysis of governing legal principles, and is unpersuasive.

Respondents wholly fail to explain how section 65588, subdivision (e)(4)(C)(iii) is "illegal" or "unconstitutional." At most, Respondents assert section 65588, subdivision (e)(4)(C)(iii) conflicts with other statutes requiring consistency between the zoning ordinances of a general law city and its general plan, and the requirement such zoning ordinances be amended "within a reasonable time" to be consistent with a general plan that is amended. (Opposition to Intervenor 13:13-16 [citing § 65860].)

Respondents do not show a conflict between section 65588, subdivision (e)(4)(C)(iii) and section 65860 or any other statute. Contrary to Respondents' assertion, a city could comply with both statutes. Thus, as argued by 600 Foothill, a city could update its zoning simultaneously with the adoption of its housing element. A city could also adopt a housing element that is provisionally certified by HCD and then subsequently complete the rezoning, which is what occurred here. While section 65588, subdivision (e)(4)(C)(iii) may subject a city to the Builder's Remedy if it does not complete its rezoning at the same time adopts its housing element, Respondents do not show such possibility conflicts with section 65860 or that the

Legislature lacked the authority to impose such measures to encourage the development of housing.<sup>19</sup>

Because the City had not completed its required rezoning, the City's housing element was not in substantial compliance with the Housing Element Law when 600 Foothill filed the Preliminary Application in November 2022. As a result, the City Council prejudicially abused its discretion when it found the Builder's Remedy did not apply to the Project in its May 1, 2023 Decision.

Did the City's October 2022 Housing Element Substantially Comply with the Housing Element Law Without Consideration of Rezoning?

In its May 1, 2023 Decision, the City Council found "the 'builder's remedy' under the Housing Accountability Act does not apply and is not available for the project . . . because the City's Housing Element was, as of October 4, 2022, in substantial compliance with the Housing Element law." (AR 7167.) Petitioners contend the City Council's finding was a prejudicial abuse of discretion. The court agrees. The October 4, 2022 Housing Element was not in substantial compliance with the Housing Element Law.

Standard of Review—Substantial Compliance with Housing Element Law

"In an action to determine whether a housing element complied with the requirements of the Housing Element Law, the court's review 'shall extend to whether the housing element . . . *substantially complies* with the requirements' of the law. (§ 65587, subd. (b), italics added.) Courts have defined substantial compliance as '*actual* compliance in respect to the substance essential to every reasonable objective of the statute,' as distinguished from 'mere technical imperfections of form.' [Citations.] Such a review is limited to whether the housing element satisfies the statutory requirements, 'not to reach the merits of the element or to interfere with the exercise of the locality's discretion in making substantive determinations and conclusions about local housing issues, needs, and concerns.'" (*Martinez, supra*, 90 Cal.App.5th at 237.)

HCD is mandated by statute to determine whether a housing element substantially complies with the Housing Element Law. (See e.g., § 65585, subds. (i)-(j); Health & Saf. Code § 50459, subds. (a), (b).) Given HCD's statutory mandate and its expertise, HCD's determination of substantial compliance with the Housing Element Law, or lack thereof, is entitled to deference from the courts. (See *Hoffmaster v. City of San Diego* (1997) 55 Cal.App.4th 1098, 1113, fn. 13

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<sup>19</sup> Further, even assuming a conflict existed, Respondents do not explain why section 65860 would take precedence over section 65588, subdivision (e)(4)(C)(iii) under the specific circumstances presented here (i.e., a statutory bar to attaining substantial compliance with the Housing Element Law until rezoning is complete). (See *State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 960-961. ["If conflicting statutes cannot be reconciled, later enactments supersede earlier ones [citation], and more specific provisions take precedence over more general ones."])

["We substantially rely on the Department of Housing and Community Development's interpretation [. . .] regarding compliance with the housing element law . . ."]; accord *Martinez, supra*, 90 Cal.App.5th at 243 ["courts generally will not depart from the HCD's determination unless 'it is clearly erroneous or unauthorized' ".].)

However, "HCD's housing element compliance determinations are not binding on courts." (See Intervenor Reply 10:2; see also 600 Foothill Opening Brief 15:8-9.) The trial and appellate courts "'independently ascertain as a question of law whether the housing element at issue substantially complies with the requirements of the Housing Element Law.' . . ." (*Martinez, supra*, 90 Cal.App.5th at 237.)<sup>20</sup> Thus, to be clear (and as noted during the hearing) the court has not deferred to HCD concerning substantial compliance—the issue is properly subject to the court's independent review as a question of law.

#### Affirmatively Further Fair Housing

As background, HCD found the City's October 2022 Housing Element did not substantially comply with the City's duties under the Housing Element Law to analyze how the housing element will affirmatively further fair housing. Specifically, HCD wrote:

While the element now analyzes census tracts and sites with a concentration of affordable units (p. D71-73), it should still discuss whether the distribution of sites improves or exacerbates conditions. This is critical as the sites to accommodate the lower-income households are only located along Foothill Boulevard near the 210 Freeway. If sites exacerbate conditions, the element should include programs to mitigate conditions (e.g., anti-displacement strategies) and promote inclusive communities. (AR 5263-5264.)

HCD also found "the element must include a complete assessment of fair housing. Based on the outcomes of that analysis, the element must add or modify programs." (AR 5264.)

<sup>20</sup> While *Martinez* advises " '[t]he burden is on the challenger to demonstrate that the housing element . . . is inadequate" (*ibid.*), the HAA provides the City "bear[s] the burden of proof that its decision has conformed to all of the conditions specified in Section 65589.5." (§ 65589.6; see also § 65587, subd. (d)(2) [city has burden of proof in action to compel compliance with requirements of section 65583, subd. (c)(1)-(3)].) The parties do not address the language in *Martinez* or how it should be applied, if at all, in this proceeding. The court concludes based on sections 65589.6 and 65587, subdivision (d)(2) the burden is on Respondents to show the City Council's May 1, 2023 Decision complied with the HAA. Such a showing requires the City to demonstrate it attained substantial compliance with the Housing Element Law before 600 Foothill's submitted its Preliminary Application and it was "deemed complete." The court notes and clarifies, however, it would reach the same result herein even if the initial burden of proof is with Petitioners.

Housing elements must contain “an inventory of land suitable and available for residential development, including vacant sites and sites having realistic and demonstrated potential for redevelopment during the planning period to meet the locality’s housing need for a designated income level”—the “sites inventory.” (§ 65583, subd. (a)(3).) The sites inventory must be accompanied by “an analysis of the relationship of the sites identified in the land inventory to the jurisdiction’s duty to affirmatively further fair housing.” (*Ibid.*) In addition, each updated housing element must include “a statement of the community’s goals, quantified objectives, and policies relative to affirmatively furthering fair housing” (§ 65583(b)(1)), and must commit to programs that will, among other things, “Affirmatively further fair housing in accordance with [Section 8899.50].” (§ 65583, subd. (c)(10).)<sup>21</sup>

Here, the October 2022 Housing Element discloses the sites identified by the City to accommodate affordable housing are all located near the Foothill Freeway. (AR 5130.) In this context, HCD found the October 2022 Housing Element lacked sufficient analysis of the relationship of the sites identified in the land inventory to the City’s duty to affirmatively further fair housing, i.e. whether the site inventory would improve or exacerbate fair housing conditions. (AR 5263-5264.)

Respondents do not cite to any specific analysis in the October 2022 Housing Element addressing the concern raised by HCD. (See Opposition to 600 Foothill 9:14 [citing AR 1741, 5203].) In fact, neither AR 1741 nor 5203 demonstrate the October 2022 Housing Element analyzed how the clustering of affordable housing near the Foothill Freeway would promote or exacerbate fair housing. While Respondents now explain in the context of *this proceeding* why the City clustered all affordable housing near the freeway (See Koleda Decl. ¶¶ 9-16),

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<sup>21</sup> Section 8899.50, subd. (b)(1) provides: “A public agency shall administer its programs and activities relating to housing and community development in a manner to affirmatively further fair housing, and take no action that is materially inconsistent with its obligation to affirmatively further fair housing.” Compliance with the obligation is mandatory. (*Id.* at subd. (b)(2).) The statute defines “affirmatively further fair housing” as:

taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws. The duty to affirmatively further fair housing extends to all of a public agency’s activities and programs relating to housing and community development. (*Id.* at subd. (a)(1).)

Respondents were required to include that analysis in the October 2022 Housing Element. (See § 65583, subds. (a)(3), (b)(1), and (c)(10).)<sup>22</sup>

Respondents contend the “City undertook numerous outreach efforts to reach a variety of economic groups, including via two housing workshops with 18 different stakeholder organizations.” (Opposition to 600 Foothill 9:10-12 [citing Koleda Decl. ¶¶ 38-50 and AR 3896-3900, 4651].) Respondents do not cite any authority that outreach alone satisfies the City’s statutory obligations to include in its housing element “an **analysis** of the relationship of the sites identified in the land inventory to the jurisdiction’s duty to affirmatively further fair housing.” (§ 65583, subd. (a)(3) [emphasis added].) Exercising its independent judgment on the statutory question, the court concludes outreach alone does not substantially comply with the requirement—outreach does not constitute analysis.

The deficiencies in the October 2022 Housing Element as to the affirmatively further fair housing analysis are demonstrated by changes made by the City in the February 2023 Housing Element.<sup>23</sup> Specifically, the February 2023 Housing Element added analysis—“the sites to accommodate the lower and moderate-income households are concentrated primarily in the western end of the City along the Foothill Boulevard Corridor, and near the 210 Freeway.” (AR 6090.) The analysis recognized “adverse air quality conditions have the potential to be exacerbated” based on “close proximity to the freeway[.]” (AR 6090.) In addition, the revised February 2023 Housing Element committed to Program 24 to mitigate these impacts. (AR 6091; See also AR 5577-5578 [adding Program 24, “Mitigation for Housing in Proximity to Freeways” committing to building design measures for new residential development near the freeway].)

Respondents contend “those air quality mitigation measures were adopted in 2013 and the 2023 Housing Element merely added a heading regarding these existing measures.” (Opposition to 600 Foothill 9:7-8 [citing Koleda Decl. ¶ 33 and AR 4515].) Respondents cite AQ Policy 1.1.6 from its General Plan Air Quality Element, which states the policy to “Ensure that new developments implement air quality mitigation measures, such as ventilation systems, adequate buffers, and other pollution reduction measures and carbon sequestration sinks, especially those that are located near existing sensitive receptors.” (Koleda Decl. ¶ 33.)

<sup>22</sup> During argument, Respondents suggested the material included in the February 23, 2023 housing element had previously been provided in the October 2022 Housing Element. While it is true Table D-12 can be found in both versions of the housing element (compare AR 6090 p. D22 with AR 5158 p. D22), the February 23, 2023 revisions to the October 2022 Housing Element (AR 6090-6092) included additional narrative material beyond repeating information from Los Angeles County’s Department of Public Health. Further, AR 5193-5204, identified by Respondents during the hearing as an analysis of how the clustering of affordable housing near the Foothill Freeway would promote or exacerbate fair housing within the October 2022 Housing Element, does not appear to address the issue. Finally, it does not appear Respondents cited any of this material in their briefs before the court in response to the claims raised by Petitioners. 600 Foothill objected to the argument as new during the hearing.

<sup>23</sup> See *supra* footnote 22.

While Program 24 and AQ Policy 1.1.6 have similarities, they are not the same. Program 24 identifies specific mitigation measures that apply to receptors near the freeways and is enforceable by HCD. (See § 65585, subd. (i) [requiring HCD to investigate a “failure to implement any program actions included in the housing element.”].) In contrast, AQ Policy 1.1.6 is a shorter and more general policy that is *not enforceable by HCD* as a housing element program. Contrary to Respondents’ assertion, the inclusion of Program 24 in the February 2023 Housing Element supports HCD’s findings that the October 2022 Housing Element lacked sufficient analysis of the City’s affirmatively further fair housing obligations.

Exercising its independent judgment on the issue, the court concludes the City’s October 2022 Housing Element did not substantially comply with the affirmatively further fair housing requirements in section 65583, subdivisions (a)(3), (b)(1), and (c)(10).<sup>24</sup>

#### Nonvacant Sites Analysis

HCD found the October 2022 Housing Element’s analysis of nonvacant sites did not sufficiently analyze “redevelopment potential and evaluate the extent existing uses impede additional development.” (AR 5264.) HCD also found “as the element relies on nonvacant sites to accommodate 50 percent or more of the housing needs for lower-income households, the adoption resolution must make findings based on substantial evidence in a complete analysis that existing uses are not an impediment and will likely discontinue in the planning period.” (AR 5264.)

For nonvacant sites, the Housing Element Law provides “the city or county shall specify the additional development potential for each site within the planning period and shall provide an explanation of the methodology used to determine the development potential.” (§ 65583.2, subd. (g)(1).) In addition, “when a city or county is relying on nonvacant sites . . . to accommodate 50 percent or more of its housing need for lower income households, the methodology used to determine additional development potential shall demonstrate that the existing use . . . does not constitute an impediment to additional residential development during the period covered by the housing element. An existing use shall be presumed to impede additional residential development, absent findings based on substantial evidence that the use is likely to be discontinued during the planning period.” (§ 65583.2, subd. (g)(2).)

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<sup>24</sup> In reaching this conclusion, the court has considered Respondents’ assertion the City undertook outreach efforts “in the face of ‘changing goal posts’ and what appeared to be intentional obstructive behavior by HCD.” (Opposition to 600 Foothill 9:16-21.) The court finds Respondents’ evidence does not prove substantial compliance with the affirmatively further fair housing requirements in section 65583 or an excuse from substantial compliance. (See e.g. Koleda Decl. ¶¶ 49-50.) The court has also considered CHDF’s arguments and evidence that the City discriminated on the basis of race and income when it selected sites for rezoning. The court further discusses CHDF’s claims of discrimination and bad faith *infra*.

The Court of Appeal explains “there are many types of sites the Legislature has either deemed infeasible to support lower income housing or that require additional evidence of their feasibility or by-right development approvals before being deemed adequate to accommodate such housing [including] . . . when a city relies on over 50 percent of the inventory to be accommodated on nonvacant sites . . . . The goal is not just to identify land, *but to pinpoint sites that are adequate and realistically available* for residential development targets for each income level.” (*Martinez, supra*, 90 Cal.App.5th at 244 [emphasis added].)

Here, more than 50 percent of the parcels included in the City’s site inventory to accommodate the lower income RHNA are nonvacant. (AR 4506.) Accordingly, the City is required to comply with section 65583.2, subdivision (g)(2). The site inventory in the October 2022 Housing Element does not show substantial compliance with section 65583.2, subdivision (g)(2). (See AR 5124-5129.) The criteria used to describe nearly all of the lower income nonvacant sites are some combination of “underutilized site,” “buildings that are older than 30 years,” “vacant lot or parking lot with minimal existing site improvements,” “property has not been reassessed” in some time, “antiquated commercial uses,” or “existing use retained and institution would add residential units.” (AR 5124-5129; see also AR 4601-4603 [discussing methodology].) While these factors may be relevant to and inform on the analysis of “additional development potential” required by section 65583.2, subdivision (g)(1), they do not sufficiently address in any substantive way whether the sites are “likely to be discontinued during the planning period,” as required by section 65583.2, subdivision (g)(2).

In the resolution adopting the October 2022 Housing Element, the City Council made the following finding:

Based on general development trends resulting from continuously rising land values, changes in desired land uses, the financial pressures placed on religious institutions that have been impacted by falling congregation numbers, aging structures, and underutilized properties, rising demand for housing, adjacency to public transportation and commercial services, and other factors/analysis as identified in the Section 9.4.1.3 Future Residential Development Potential and Section 9.4.1.4 Overview of Residential Development Potential and Realistic Capacity Assumptions by Zone of the Housing Element, the existing uses on the sites identified in the site inventory to accommodate the lower income RHNA are likely to be discontinued during the planning period, and therefore do not constitute an impediment to additional residential development during the period covered by the housing element. (AR 4506.)

The City Council’s generalized statement does not reference any specific evidence to support a finding the existing uses of nonvacant sites, which were identified to accommodate housing need for lower income households, are “likely to be discontinued during the planning period.” (§ 65583.2, subd. (g)(2).)

Further, Petitioners cite record evidence that the owners of several of the nonvacant sites included in the October 2022 site inventory, including certain sites identified for lower income households, informed the City they did not intend to redevelop the site or discontinue the existing use during the planning period. (See AR 5114-5116, 2222, 2238, 2206, 5126, 12812, 5233, 5123-5129, 6054-6061.)<sup>25</sup> Significantly, the City subsequently amended the housing element to disclose that some of the identified lower income category sites are “not currently available” and were included in the site inventory “as a buffer site because it may become available further along in the 6<sup>th</sup> cycle HE planning period.” (AR 6054-6061, 6098.) Such a change in characterization is a major substantive change in the site inventory and demonstrates the October 2022 Housing Element did not substantially comply with the Housing Element Law.

The court has also reviewed Director Koleda’s summary of changes to the October 2022 Housing Element. The court concludes, on the whole, Director Koleda’s summary is consistent with Petitioners’ arguments the October 2022 Housing Element was not substantially compliant and required significant changes. (See Koleda Decl. ¶ 56 and Exh. A.) As Intervenor argue, the substantial changes to the October 2022 Housing Element show the City did not substantially comply with section 65583.2, subdivision (g)(2) until *after* it adopted the October 2022 Housing Element.

Respondents assert the City “adopted a Site Inventory using both a data-driven model endorsed by HCD . . . and along with that gathered ‘substantial evidence’ by sending TWO mailings to each commercial and religious property owner in the City to determine potential inclusion on the Site Inventory.” (Opposition to 600 Foothill 11:9-12 [citing Koleda Decl. ¶¶ 29, 54-56].) However, Respondents do not dispute it included multiple nonvacant sites in the October 2022 Site Inventory for which the City lacked substantial evidence, *in October 2022*, that the existing uses were “likely to be discontinued during the planning period.” (§ 65583.2, subd. (g)(2).) Notably, Respondents do not cite any written communications with the nonvacant site owners, prior to the adoption of the October 2022 Housing Element, as evidence the uses were “likely to be discontinued during the planning period.” (§ 65583.2, subd. (g)(2).)

Respondents assert their methodology should be sufficient. During the hearing, they followed HCD guidance and should not be penalized for doing so. Respondents also argue for purposes of section 65583.2, subdivision (g)(2), they should not be required to knock on owners’ doors and undertake an active investigation for its sites inventory.

The court cannot find on this record the City followed HCD guidance on the section 65583.2, subdivision (g)(2) issue. While the City’s reliance on methodology alone may be consistent with

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<sup>25</sup> For example, a representative of a restaurant (Panda Express) wrote “we have NO intention of discontinuing the current use of this property during the next eight-year housing planning period.” (AR 5115.) The owner of sites 86-89 on the October 2022 site inventory (identified in the lower income category) similarly informed the City that the premises are leased to retail store (Big Lots) under a 20-year lease with two 10-year extension options, and it had no intention of discontinuing the current use during the planning period. (AR 5116.)



HCD's section 65583.2, subdivision (g)(1) compliance guidance, that is not the case for section 65583.2, subdivision (g)(2).

As discussed during the hearing, HCD guidance specifies at Step 3 how to prepare a nonvacant sites inventory when a municipality has relied on "nonvacant sites to accommodate more than 50 percent of the RHNA for lower income households." (Koleda Decl., Exh. Q p. 26.) Consistent with section 65583.2, subdivision (g)(2), the guidance makes clear:

If a housing element relies on nonvacant sites to accommodate 50 percent or more of its RHNA for lower income households, the nonvacant site's existing use is presumed to impede additional residential development, unless the housing element describes findings based on substantial evidence that the use will likely be discontinued during the planning period. (*Id.* at 27.)

"The goal is not just to identify land, but to pinpoint sites that are adequate and realistically available for residential development targets . . ." (*Martinez, supra*, 90 Cal.App.5th at 244 [emphasis added].) Accordingly, HCD guidance also explains the "housing element should describe the findings and include a description of the substantial evidence they are based on," and a housing element "should describe the findings and include a description of the substantial evidence they are based on." (Koleda Decl., Exh. Q at 27.) (*Ibid.*)

HCD further advised substantial evidence "includes facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (*Ibid.*) HCD provides specific examples of what constitutes substantial evidence "that an existing use will likely be discontinued in the current planning period . . ." (*Ibid.*) Those examples include:

- [1] The lease for the existing use expires early within the planning period,
- [2] The building is dilapidated, and the structure is likely to be removed, or a demolition permit has been issued for the existing uses,
- [3] There is a development agreement that exists to develop the site within the planning period,
- [4] The entity operating the existing use has agreed to move to another location early enough within the planning period to allow residential development within the planning period.
- [5] The property owner provides a letter stating its intention to develop the property with residences during the planning period. (*Ibid.*)

Of the 21 nonvacant sites identified by the City as "sites that are adequate and realistically available for residential development targets" for lower income persons (*Martinez, supra*, 90 Cal.App.5th at 244), 19 percent or only four (sites 74, 91, 95 and 96) provide any site-specific evidence to support the City's inclusion of the site in its sites inventory. (AR 5124-5128.) For the four sites, the owner indicated some interest in redevelopment. (AR 5126, 5128.) The

remaining sites rely on the City's generalized methodology to meet their obligations under section 65583.2, subdivision (g)(2).

Respondents argue 600 Foothill's principal "actively manipulated" certain sites that were later deemed "buffer sites." (Opposition to 600 Foothill 10:22.) Respondents also blame deficiencies in their October 2022 site inventory on "dilatory guidance" of HCD and dilatory actions of SCAG. (Opposition to 600 Foothill 12:9-10.) Having considered the evidence cited by Respondents, the court finds Respondents' arguments unpersuasive. As discussed *infra* with Respondents' unclean hands defense, Respondents do not demonstrate 600 Foothill or its principals have engaged in any inequitable or wrongful conduct related to these proceedings, including the City's adoption of its housing element. Respondents also do not prove deficiencies in the site inventory of the October 2022 Housing Element resulted from actions or omissions of 600 Foothill, SCAG or HCD. Nor do Respondents cite any authority suggesting a city or county may be excused from substantial compliance with the Housing Element Law based on actions or omissions of SCAG, HCD or a project applicant.

Respondents contend the City was permitted "to rely upon letters with site owners and between itself and HCD not included specifically in its Housing Element" and the City "made reasonable inferences" from the information it received from site owners. (Opposition to 600 Foothill 12:15-19.) Respondents rely on *Martinez* to support their claims. (See *Martinez, supra*, 90 Cal.App.5th at 248.)

*Martinez* addressed the City of Clovis' nonvacant site analysis under section 65583.2, subdivision (g)(1); the Court did not analyze the heightened requirements of section 65583.2, subdivision (g)(2). (See *Martinez, supra*, 90 Cal.App.5th at 248-250.) While *Martinez* held the substantive material required by section 65583.2, subdivision (g)(1), need not appear in the Housing Element itself, the Court did not suggest nonvacant sites may be included in a site inventory if the agency lacks substantial evidence, or has not sufficiently investigated or analyzed, whether the sites are "likely to be discontinued during the planning period." (§ 65583.2, subdivision (g)(2).)

Here, Respondents have not cited substantial evidence to support the City's position multiple nonvacant sites listed in the October 2022 inventory could realistically be developed in a manner to satisfy the City's RHNA obligations. In addition, that Respondents made substantive revisions to the site inventory **after** October 2022 also supports a reasonable inference the City did not complete the analysis and attain the evidence required by section 65583.2, subdivision (g)(2), for many of the sites on its site inventory, **before** it adopted the October 2022 Housing Element. (Compare AR 5124-5129 with 6054-6061.)

Exercising its independent judgment, the court concludes the City's October 2022 Housing Element did not include a nonvacant site analysis that substantially complied with the Housing Element Law, including section 65583.2, subdivision (g)(2).

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### Realistic Assessment of Development Capacity

The Housing Element Law requires that municipalities “specify for each site [in its inventory] the number of units that can realistically be accommodated on that site.” (§ 65583.2, subd. (c).) The law provides “the number of units calculated” for each site “shall be adjusted” to account for “the land use controls and site improvements requirement identified in paragraph (5) of subdivision (a) of Section 65583, the realistic development capacity for the site, typical densities of existing or approved residential developments at a similar affordability level in that jurisdiction, and on the current or planned availability and accessibility of sufficient water, sewer, and dry utilities.” (*Id.* at subd. (c)(2).)

CHDF contends the October 2022 Housing Element did not substantially comply with these statutory provisions because it failed to apply a “downward adjustment on the number of units projected on each site to account for, among other constraints, the City’s maximum floor-area ratio of 1.5 (AR 4607), its 80-percent maximum lot-coverage requirement (AR 4566), its 35-foot height limit (AR 4567), and significant parking requirements (AR 4572) for sites in mixed-use zones.” (CHDF Opening Brief 20:4-7.)

Respondents did not address or rebut CHDF’s argument. (*Schulster Tunnels/Pre-Con v. Traylor Brothers, Inc.*, *supra*, 111 Cal.App.4th at 1345, fn. 16 [failure to address point is “equivalent to a concession”].) The court concludes the City’s October 2022 Housing Element did not substantially comply with Housing Element Law because the City failed to adjust the development capacity for each site based on the factors set forth in section 65583.2, subdivision (c)(2).<sup>26</sup>

### Government Code Section 65583.2, Subdivision (h)

CHDF argues fewer than 50 percent of the October 2022 Housing Element’s low-income sites were zoned exclusively for residential use, and the City did not include analysis showing it would “accommodate all of the very low and low-income housing need on sites designated for mixed use [and] allow 100 percent residential use and require that residential use occupy 50 percent of the total floor area of a mixed-use project.” (CHDF Opening Brief 20:21-23 [citing § 65583.2, subd. (h)].) CHDF supports its assertion with citations to the administrative record. (CHDF Opening Brief 21:1-4 [citing AR 5124-5129, 4607-4610]; see also AR 4612.) Based on the

<sup>26</sup> During argument, the court engaged CHDF and Respondents at length on this issue. While Respondents provide an explanation that their rezoning included the required adjustments, the court finds Respondents conceded the issue by not addressing it in their brief. (Compare CHDF Opening Brief 19:20-20:15 with Opposition to CHDF 10:10-11:20.) Respondents’ analysis of development constraints is not entirely clear and undeveloped in their brief. (See AR 4565-4570.)

evidence, CHDF argues the October 2022 Housing Element did not substantially comply with section 65583.2, subdivision (h).<sup>27</sup>

Respondents do not squarely address CHDF's position, and they do not show, with citation to the administrative record, the October 2022 Housing Element substantially complied with section 65583.2, subdivision (h). (Opposition to CHDF 12:4-9.) Accordingly, the court concludes the October 2022 Housing Element did not substantially comply with the Housing Element Law for this reason as well.

Based on the foregoing, the court concludes the October 2022 Housing Element did not substantially comply with the Housing Element Law. Accordingly, the City Council prejudicially abused its discretion when it found in its May 1, 2023 Decision the Builder's Remedy did not apply to the Project.

#### Respondents' Defenses to the HAA Causes of Action

Respondents raise a defense of unclean hands to the HAA causes of action asserted by 600 Foothill. Respondents also raise defenses of ripeness, exhaustion of administrative remedies, and claim the petitions violate rules designed to prevent piecemeal litigation.

#### Unclean Hands

A party seeking equitable relief must have "clean hands" and inequitable conduct by the party seeking relief is a complete defense. (*Dickson, Carlson & Campillo v. Pole* (2000) 83 Cal.App.4th 436, 446; *Salas v. Sierra Chem. Co.* (2014) 59 Cal.4th 407, 432.) The plaintiff must "come into court with clean hands, and keep them clean," or the plaintiff "will be denied relief, regardless of the merits of his claim." (*Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 978.) For the doctrine to apply, "there must be a direct relationship between the misconduct and the claimed injuries." (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 846, citation omitted.)

Respondents contend "the only reasonable inference to draw [from the opposition evidence] is that on the eve of final review and approval of the Housing Element containing the Site Inventory, 600 Foothill's principal was running around town attempting to manipulate owners to 'decline' inclusion on the inventory and derail the process." (Opposition to 600 Foothill 14:2-5.) The court has reviewed all of the evidence cited by Respondents. (Koleda Decl. ¶¶ 46-51; Hernandez Decl. ¶¶ 4, 5; AR 7081-7085, 5233; Sheridan Decl. Exh. DD.) Respondents' assertion

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<sup>27</sup> Section 65583.2, subdivision (h) provides in pertinent part: "At least 50 percent of the very low and low-income housing need shall be accommodated on sites designated for residential use and for which nonresidential uses or mixed uses are not permitted, except that a city or county may accommodate all of the very low and low-income housing need on sites designated for mixed use if those sites allow 100 percent residential use and require that residential use occupy 50 percent of the total floor area of a mixed-use project."

that Garret Weyand, one of 600 Foothill's principals, engaged in "deliberate attempts to manipulate the Site Inventory" is speculative and not supported by the evidence. (Opposition to 600 Foothill 10:22.) To the contrary, the court finds Weyand's public advocacy in support of the Project is not evidence of inequitable conduct. (See Reply Weyand Decl.) Respondents have not demonstrated, by a preponderance of the evidence, 600 Foothill or any of its principals, including Weyand and Jon Curtis, engaged in inequitable conduct that has a direct relationship to any cause of action in 600 Foothill's petition. Respondents failed to meet their burden of demonstrating unclean hands and their entitlement to the defense.<sup>28</sup>

#### Ripeness, Exhaustion, and Piecemeal Litigation

" 'A decision attains the requisite administrative finality when the agency has exhausted its jurisdiction and possesses 'no further power to reconsider or rehear the claim.' . . . Until a public agency makes a 'final' decision, the matter is not ripe for judicial review." (*California Water Impact Network v. Newhall County Water Dist.* (2008) 161 Cal.App.4th 1464, 1485.) Relatedly, "[t]he exhaustion doctrine precludes review of an intermediate or interlocutory action of an administrative agency. A party must proceed through the full administrative process 'to a final decision on the merits.' " (*Id.* at 1489.) There are exceptions to the exhaustion requirement, including "when the aggrieved party can positively state what the administrative agency's decision in his particular case would be." (*Edgren v. Regents of University of California* (1984) 158 Cal.App.3d 515, 520.)

Respondents do not show any lack of finality or any further administrative remedy to exhaust as to the May 1, 2023 Decision. The May 1, 2023 Decision of the City Council is final because there is no further avenue for administrative appeal. As discussed, the City disapproved (within the meaning of the HAA) the Project. Nothing in the HAA requires Petitioners to complete CEQA review before suing to enforce the HAA.

Respondents argue 600 Foothill did not sufficiently raise issues pursued in this proceeding, including that the City failed to rezone, the housing element does not meet its affirmatively further fair housing obligation, as well as the site inventory issues. The court concludes Petitioners sufficiently raised and preserved their contentions during the administrative proceedings. (See AR 6284-6286, 6307-6317.) Many of the issues in these petitions were also raised by HCD in letters to the City at the administrative level, including a notice of violation. (AR 7170-7175.)

Respondents argue "[n]o express 'disapproval' of the entire project occurred here . . . ." (Opposition to CHDF 16:25.) While not entirely clear, Respondents seemingly suggest 600 Foothill should *redesign the Project* to avoid reliance on the Builder's Remedy. Respondents do not develop an argument 600 Foothill has any legal obligation, under the circumstances here, to redesign the Project "as a standard, nonbuilder's remedy project." (AR 7103.) Respondents

<sup>28</sup> This defense only applies to 600 Foothill. Respondents do not develop any argument the HAA claims of CHDF or Intervenors are subject to the defense.

also do not show that any further administrative action, including appeal of the City's June 24, 2023 letter describing inconsistency between the Project and the City's general plan and zoning ordinances (see AR 7176), could remedy the harm suffered by 600 Foothill when the City Council determined the Builder's Remedy does not apply to the Project.

Moreover, Petitioners can positively state what the City's decision is with respect to 600 Foothill's application to develop the Builder's Remedy Project. In its May 1, 2023 Decision, the City Council made clear any required land use approvals or entitlements would not be issued for the Project as a Builder's Remedy project. Based on its review of the administrative record and the parties' declarations, the court finds no reasonable possibility Respondents, including the City Council, will change their position and process 600 Foothill's Project as a Builder's Remedy under the HAA. Accordingly, even if some additional appeal or administrative process were available, the futility exception to exhaustion applies under these facts. (See, e.g., *Felkay v. City of Santa Barbara* (2021) 62 Cal.App.5th 30, 40-41 [futility exception, which is a question of fact, applied where city "made plain" it would not permit the proposed development]; *Ogo Associates v. City of Torrance* (1974) 37 Cal.App.3d 830, 832-34 [futility exception applied where it was "inconceivable the city council would grant a variance for the very project whose prospective existence brought about the enactment of the rezoning" that necessitated the variance in the first place].)

Respondents do not demonstrate (1) the HAA claims in the petitions are unripe, (2) Petitioners failed to exhaust their administrative remedies, or (3) Petitioners have violated rules designed to prevent piecemeal litigation. Further, even if Petitioners have additional administrative remedies (such as an appeal of the June 24, 2023 inconsistency letter), the court finds exhaustion of such remedies is futile under the circumstances presented here.

#### CHDF's Claims of Bad Faith and Discrimination Based on Race and Income

CHDF contends:

La Cañada Flintridge officials *clearly* acquiesced to the biases and prejudices of city residents when they revised the draft Housing Element's sites inventory and rezoning program to eliminate multiple 'low-income' sites south of Foothill Boulevard. This was a blatant violation of California and Federal fair housing laws alike. (See Gov. Code, § 65008, subd. (b)(1)(C) . . . ; Cal. Code Regs, tit. 2, § 12161, subd. (c) . . . ; *Mhany Management, Inc., supra*, 819 F.3d 581 . . . ) (CHDF Opening Brief 17:13-21.)

As acknowledged in reply, CHDF did not plead a cause of action in its petition alleging the City violated the Fair Housing Act or state or federal discrimination laws. (CHDF Reply 10:15-20.) CHDF also did not move to amend its petition or request leave to amend its petition. (See *Simmons v. Ware* (2013) 213 Cal.App.4th 1035, 1048. ["The pleadings are supposed to define the issues to be tried."])

In reply, CHDF argues the “City’s discriminatory site-selection practices demonstrates the City did not substantially comply with the Housing Element Law’s requirements to affirmatively further fair housing.” (CHDF Reply 10:18-19.) However, CHDF failed to plead that claim in its petition. (See CHDF Reply 10:20-21 [citing CHDF Pet. ¶¶ 22, 26, 29-30 (generalized allegations the City “did not affirmatively further fair housing or provide an assessment of fair housing”)].)

On the merits of CHDF’s claim, even if the affirmatively further fair housing allegations in the petition are interpreted to encompass CHDF’s arguments about race and income discrimination (a difficult task), the court finds Respondents’ opposition persuasive. (Opposition to CHDF 13:5-15:21.) There is insufficient evidence the City Council “acquiesced” to or acted based on public comments at the August and September 2022 public hearings highlighted in CHDF’s briefs. (See e.g., AR 2602-2603 [“different value system and much more high crime . . . the value system is different than people that move here”], 3491-3494 [similar comments from same individual at AR 2602-2603], 3539-3541, 3543-3545 [“dust off my shotgun” “likelihood of being some bad apples”], 3493 [additional similar comments from commenter at AR 2602-2603 and AR 3491-3494], 5107-5110 [crime and will become dangerous community], 5112 [“fear poor or homeless people will move into La Canada and bring crime”].)

While some of the public comments were quite unfortunate, CHDF cites statements of councilmembers out of context and does not show those councilmembers “agreed” with the public comments highlighted by Petitioners. (CHDF Opening Brief 10:13-11:6.) Even if the councilmembers could have stated their disagreement with certain public comments, but did not, there is insufficient evidence to support an inference the City Council took any action on the housing element based on the unfortunate public comments and discrimination.<sup>29</sup>

#### Other Contentions Related to the HAA Causes of Action

Several other contentions are not necessary to the court’s ruling on the HAA claims. For completeness, the court briefly addresses them.

The court agrees with Intervenors that the City did not have authority under the HAA or Housing Element Law to backdate its housing element and “self-certify” or declare its housing element to be in substantial compliance with state law as of October 2022. (Intervenors Opening Brief 14:3-15:24.) Respondents appear to concede the point. (See Opposition to Intervenors 19:18-21:7 [asserting City did not back date or self-certify].)

<sup>29</sup> During argument, 600 Foothill provided a series of acts undertaken by Respondents that it believed demonstrated bad faith. Many of those acts, however, flowed from the City’s belief it properly adopted the October 2022 Housing Element or the City’s violation of the Permit Streamlining Act (PSA) discussed *infra*. Based on all of the evidence before the court, the evidence is insufficient to establish the City acted with bad faith and “will continue to use all means to obstruct” as suggested by CHDF during argument.

As argued by 600 Foothill, when HCD found the October 2022 Housing Element did not substantially comply with the law, section 65585, subdivision (f) required City to take “one” of the following actions: “(1) Change the draft element or draft amendment to substantially comply with this article; [or] (2) Adopt the draft element or draft amendment without changes [, but with] written findings which explain the reasons the legislative body believes that the draft . . . substantially complies with this article despite the findings of the department.” (600 Foothill Opening Brief 14:16-19.) The court agrees the “City unlawfully blended these approaches by making some changes in response to HCD’s comments, adopting the February 2023 Housing Element with written findings explaining why the October 2022 Housing Element was sufficient, and then resubmitting its revised draft to HCD.” (600 Foothill Opening Brief 14:19-22.)

If the City believed its October 2022 Housing Element substantially complied with the Housing Element Law, it should have taken the action set forth in section 65585, subdivision (f)(2). Thereafter, the City could have sued for a judicial declaration that its October 2022 Housing Element substantially complied with state law. The City did not do so here.

The court finds 600 Foothill’s arguments based on section 65589.5, subdivisions (j) and (o) are not ripe at this time. Once ripe, the claims are subject to exhaustion. (See 600 Foothill Opening Brief 9:12-10:21; Pet. ¶¶ 134-162.) Upon the remand ordered here, the City is required to process the application as a Builder’s Remedy project and in accordance with the HAA, including sections 65589.5, subdivisions (j) and (o). Thus, it is premature to adjudicate today whether the City has complied with those provisions of the HAA.

Relatedly, since the court concludes the City is required by law to process the application pursuant to the Builder’s Remedy provision of the HAA, the court need not address the financial infeasibility of a redesigned project. (600 Foothill Opening Brief 8:21-9:3 and 10, fn. 6.)

#### Summary of HAA Causes of Action and Scope of Writ Relief

The court finds the City Council prejudicially abused its discretion with its finding in its May 1, 2023 Decision that the Builder’s Remedy does not apply to the Project. As a remedy, the court grants 600 Foothill’s petition and will issue a writ directing Respondents to set aside the May 1, 2023 City Council decision finding 600 Foothill’s Project does not qualify as Builder’s Remedy and compelling the City to process the application in accordance with the HAA and state law. That remedy is consistent with section 65589.5, subdivision (k)(1)(A)(ii) of the HAA (compliance required in 60 days) and Code of Civil Procedure section 1094.5, subdivision (f).

CHDF argues the court should order the Project “approved” due to the City’s alleged bad faith and unlawful discrimination. (CHDF Opening Brief 23:18-24:24.) For the reasons discussed, the court finds evidence the City Council “acquiesced” to or acted based on the public comments from the August and September 2022 public hearings highlighted in CHDF’s briefs insufficient. (See e.g., AR 2602-2603, 3491-3494, 3539-3541, 3543-3545, 3493, 5107-5110, 5112.) CHDF has



not met its burden of demonstrating Respondents acted in bad faith in connection with those public comments.

CHDF also argues “[w]hen 600 Foothill subsequently proposed a project under the HAA’s builder’s remedy, the City Council concocted a bizarre scheme to evade judicial review of their decision to disapprove that project, . . . .” (CHDF Opening Brief 24:15-18.) 600 Foothill contends the court should order Respondents to approve the Project on similar grounds. (600 Foothill Reply 18:13-19:8.) While the court finds the City prejudicially abused its discretion with its May 1, 2023 Decision finding the Builder’s Remedy inapplicable to the Project, the court does not find sufficient evidence to conclude the City Council acted in bad faith when it made its legally incorrect decision.

Further, even if it could be argued the City Council lacked a good faith reason to find the Project did not qualify as a Builder’s Remedy, Petitioners do not show it would be equitable for the court to compel the City to approve the Project. Among other reasons, CEQA review is specifically preserved by the HAA. (See § 65589.5, subds. (e) and (o)(6); *Schellinger, supra*, 179 Cal.App.4th at 1245.) In the exercise of the court’s discretion, the court finds a writ compelling Respondents to approve the Project, without CEQA review, would not be an equitable or proportionate remedy for the violations of the HAA at issue. Respondents should be permitted on remand to process 600 Foothill’s application, as a Builder’s Remedy, in conformance with state law, including the HAA and CEQA.

Based on the foregoing, the HAA causes of action are GRANTED IN PART.

#### 600 Foothill’s First Cause of Action – Violation of Housing Element Law

600 Foothill prays for a writ of mandate “compelling Respondents to adopt a revised housing element pursuant to Government Code Section 65754. 2” and “to complete the required rezoning consistent with an HCD-approved housing element.” (Pet. Prayer ¶¶ 1-2.) 600 Foothill filed its petition on July 21, 2023. The petition alleged the City had not substantially complied with the Housing Element Law at that time. (Pet. ¶ 91.)

As discussed, the City completed the required rezoning in September through November 2023, after 600 Foothill filed its petition. On November 17, 2023, HCD sent a letter to the City finding the City had “completed actions to address requirements described in HCD’s April 24, 2023 review letter” and was in substantial compliance with the Housing Element Law. (See Coy Decl. ¶ 12, Exh. D.)

600 Foothill has not pleaded in the petition, or argued in its briefing, there is any deficiency in the February 2023 Housing Element that HCD found to be substantially compliant with the Housing Element Law in November 2023, after the City completed its rezoning. Accordingly, the first cause of action is moot. (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1573 [“A case is considered moot when ‘the question addressed was at one time a live issue in the case,’ but has been deprived of life ‘because of events occurring after

the judicial process was initiated.’ . . . ‘The pivotal question in determining if a case is moot is therefore whether the court can grant the plaintiff any effectual relief.’”])

600 Foothill’s first cause of action is DENIED as moot.

600 Foothill’s Second Cause of Action – Affirmatively Furthering Fair Housing

600 Foothill prays for a writ “compelling Respondents to comply with their statutory obligation to Affirmatively Further Fair Housing.” (Pet. Prayer ¶ 9.) 600 Foothill’s writ briefing, however, only challenges the City’s compliance with affirmatively further fair housing obligations as to the October 2022 Housing Element and required rezoning. (See 600 Foothill Opening Brief 21:10-12; Pet. ¶¶ 106-108.) 600 Foothill does not develop any argument the City’s February 2023 housing element, after completion of the required rezoning, does not comply with the City’s affirmatively further fair housing obligations. Accordingly, the second cause of action is moot. (*Wilson & Wilson, supra*, 191 Cal.App.4th at 1573.) Alternatively, to the extent 600 Foothill contends in the petition the City remains out of compliance with its affirmatively further fair housing obligations (see Pet. ¶ 105), 600 Foothill has not sufficiently supported its position with evidence and legal analysis.

600 Foothill’s second cause of action is DENIED as moot.

600 Foothill’s Sixth Cause of Action – Violation of the PSA

600 Foothill contends the City violated the PSA in several ways with its incompleteness determinations and the City Council’s May 1, 2023 Decision. (600 Foothill Opening Brief 19:14-20-25; Pet. ¶¶ 163-175.) 600 Foothill prays for a writ “compelling Respondents review and process applications pursuant to the Permit Streamlining Act’s provisions, including refraining from refusing to process development applications based on erroneous assertions of incompleteness.” (Pet. Prayer ¶ 4.)

600 Foothill has demonstrated Respondents violated the PSA in at least two respects. Specifically, section 65943, subdivision (a) provides “[i]f the application is determined to be incomplete, the lead agency shall provide the applicant with **an exhaustive list** of items that were not complete.” (Emphasis added.) In addition, the list “**shall be limited to those items actually required on the lead agency’s submittal requirement checklist.**” (*Ibid.* [Emphasis added].) “**In any subsequent review** of the application determined to be incomplete, the local agency shall not request the applicant to provide any new information **that was not stated in the initial list of items that were not complete.**” (*Ibid.* [Emphasis added].)

While neither party has cited any published authority interpreting these provisions, the plain language of section 65943, subdivision (a) is clear. The PSA required the City to provide 600 Foothill with an “exhaustive list” of incomplete items in its First Incompleteness Determination; incomplete items are limited to items on the City’s “submittal requirement checklist”; and the City could not later request new information it omitted from the initial list. Respondents

provide no alternative interpretation of the statutory language. (Opposition to 600 Foothill 20:5-21:8.) Director Koleda reports "it is a **common practice** for the City to provide information to a developer in the early stages of the application review regarding ways that the development does not meet applicable development standards." (Koleda Decl. ¶ 42 [emphasis added].) Even if true, the City's common practice does not supersede the statutory requirements of the PSA.

In violation of these provisions of the PSA, the Second Incompleteness Determination found the Project was inconsistent with City's zoning and general plan standards because the Project did not qualify as a Builder's Remedy. (AR 6280-6281.) However, that issue was not raised in the First Incomplete Determination and was also not included on the City's submittal requirement checklist. (See AR 5276-5279, 6280-6281; see also Koleda Decl. ¶ 42.) Accordingly, the City violated section 65943, subdivision (a).<sup>30</sup>

Respondents suggest 600 Foothill was not prejudiced by the violations of the PSA because the application was deemed complete on May 26, 2023. (Oppo. to 600 Foothill 22:19-21 [citing AR 7169].) Respondents do not cite any authority for the proposition that PSA violations are excused by a purported lack of prejudice. Moreover, 600 Foothill was prejudiced when Respondents made a legally unauthorized incompleteness determination.

600 Foothill does not cite a statute or published authority suggesting the appropriate remedy for these types of violations of the PSA is an order compelling the City to approve the project. As discussed for the HAA causes of action, the court will grant a writ directing Respondents to set aside the City Council's May 1, 2023 Decision and process 600 Foothill's application in accordance with the HAA. The violations of the PSA proven by 600 Foothill provide additional support for that remedy. 600 Foothill does not demonstrate any additional relief is justified under the PSA.

To the extent 600 Foothill prays for a writ directing the City to comply with the PSA in the future or with respect to development applications of non-parties (see Prayer ¶ 4), 600 Foothill

<sup>30</sup> 600 Foothill also contends "Respondents' Second Incompleteness Determination was issued on March 1, 2023 (AR 6280-81) more than 30 days after Petitioner submitted the Project application on January 13, 2023." (600 Foothill Opening Brief 20:22-24.) 600 Foothill did not pay the fees for the application until January 31, 2023, which was less 30 days before March 1, 2023. (AR 7161-7162.) When submitting its application, the City advised 600 Foothill "the 30-day time limit to determine completeness of a development application per Government Code Section 65943 does not begin until all invoiced fees have been paid." (AR 7161-7162) Section 65943 is ambiguous as to whether the 30-day period begins running when the application is submitted/received or when the fees are paid. While 600 Foothill has a colorable argument the 30-day period began when City "received" the application on January 13, 2023, Respondents' alternative interpretation is also reasonable. 600 Foothill has not submitted any legislative history to support its interpretation. Accordingly, the court is not persuaded 600 Foothill met its burden as to its complaint about timeliness under the PSA.

does not sufficiently support such a prayer in its briefing. Specifically, 600 Foothill does not explain how it has standing to enforce the PSA on behalf of non-parties, or how any claim with respect to the City's future compliance with the PSA is ripe for judicial review.

600 Foothill's sixth cause of action is GRANTED IN PART. The court finds the City violated the PSA in the manner it processed 600 Foothill's application. As a remedy, the May 1, 2023 Decision finding that the application was incomplete because the Project does not qualify as a Builder's Remedy must be set aside. In all others respect, the sixth cause of action is DENIED.

600 Foothill's Seventh and Eighth Causes of Action – State Density Bonus Law and Subdivision Map Act

600 Foothill argues the City Council's May 1, 2023 Decision effectively denied 600 Foothill's requests for a density bonus and concessions or incentives under the State Density Bonus Law, and "necessarily constituted a disapproval" under the Subdivision Map Act. (600 Foothill Opening Brief 21:25-22:12; see Pet. ¶¶ 176-197.)

The court's analysis of the seventh and eighth causes of action is similar to that set forth earlier with 600 Foothill's claims under section 65589.5, subdivisions (j) and (o). Upon remand, the City will be required to process 600 Foothill's application as a Builder's Remedy and in accordance with the HAA and other state housing laws, including the State Density Bonus Law and the Subdivision Map Act. It is premature at this time to adjudicate whether the City has complied with those statutes. 600 Foothill has been informed that the City's review process under the State Density Bonus Law and the Subdivision Map Act is ongoing. (See AR 7176-7178, 7169.) Accordingly, 600 Foothill does not prove its seventh and eighth causes of action are ripe for judicial review or that the issues have been exhausted. Further, to the extent 600 Foothill seeks a writ directing the City to "approve" the Project in full, it does not demonstrate it is entitled to that remedy, as discussed earlier.

600 Foothill's seventh and eighth causes of action are DENIED.

600 Foothill's Ninth Cause of Action is Stayed

Respondents specially moved to strike 600 Foothill's ninth cause of action (right to fair hearing) pursuant to Code of Civil Procedure section 425.16. The court denied the motion, and Respondents appealed. Given the appeal, the ninth cause of action is stayed. (See Code Civ. Proc., §§ 425.16, subd. (i), 916, subd. (a); *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 195.)<sup>31</sup>

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<sup>31</sup> Respondents conceded at the time the court heard the special motion to strike that an appeal would stay only the ninth cause of action.

### Causes of Action for Declaratory Relief by All Petitioners

Issuance of a declaratory judgment is discretionary. (Code Civ. Proc., § 1060.) Further, “it is settled that declaratory relief is not an appropriate method for judicial review of administrative decisions.” (*Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 127; accord *Sheetz v. County of El Dorado* (2022) 84 Cal.App.5th 394, 414 [“administrative mandamus is ‘the proper and sole remedy’ to challenge a local agency’s application of the law (e.g., application of a zoning ordinance to a particular property)”].)

Although the petitions include various requests for declaratory relief, all such requests pertain to the validity of City Council’s May 1, 2023 Decision, including the City Council’s determination the October 2022 Housing Element substantially complied with state law and the Project did not qualify as a Builder’s Remedy. None of the Petitioners have developed a legal argument that declaratory relief is an appropriate, *or necessary*, form of judicial review of the administrative decisions at issue. Accordingly, Petitioners have not demonstrated they are entitled to declaratory relief.

600 Foothill’s eleventh cause of action for declaratory relief, CHDF’s second cause of action for declaratory relief, and Intervenors’ second cause of action for declaratory relief are DENIED as unnecessary given the court’s decision on the HAA causes of action.

### Retention of Jurisdiction

The court found Respondents, “in violation of subdivision (d), disapproved a housing development project . . . without making findings supported by a preponderance of the evidence.”<sup>32</sup> (§ 65589.5, subd. (k)(1)(A)(i).) Accordingly, the court is required to “retain jurisdiction to ensure that its . . . judgment is carried out . . .” (*Id.* at subd. (k)(1)(A)(ii).)

### **CONCLUSION**

The petitions of 600 Foothill, CHDF, and Intervenors to enforce the HAA are GRANTED IN PART. The court finds the City Council prejudicially abused its discretion when it found in its May 1, 2023 Decision that the Builder’s Remedy does not apply to the Project. The court will grant a writ directing Respondents to set aside the City Council’s decision, dated May 1, 2023, finding 600 Foothill’s application does not qualify as a Builder’s Remedy and to process the application in accordance with the HAA and state law. The HAA claims are denied in all other respects. 600 Foothill’s first, second, seventh, and eighth causes of action are DENIED.

<sup>32</sup> The City’s finding its October 2022 Housing Element was in substantial compliance with the Housing Element Law was not supported by substantial evidence. As discussed *supra*, HCD had advised the City why the October 2022 Housing Element was not in substantial compliance. Moreover, Director Koleda on January 11, 12 and February 9, 2023 appeared to accept HCD’s evaluation that the City could not achieve substantial compliance with the Housing Element Law without “additional changes” and “clarifications.” (AR 12894, 13011.)

600 Foothill's sixth cause of action is GRANTED IN PART. The court finds the City violated the PSA in the manner it processed 600 Foothill's application and, as a remedy, the May 1, 2023 Decision finding the application was incomplete because the Project does not qualify as a Builder's Remedy must be set aside. In all others respect, the sixth cause of action is DENIED.

600 Foothill's ninth cause of action is stayed pending Respondents' appeal of denial of its anti-SLAPP motion. (See Code Civ. Proc. §§ 425.16, subd. (i), 916, subd. (a).)

600 Foothill's eleventh cause of action for declaratory relief, CHDF's second cause of action for declaratory relief, and Intervenor's second cause of action for declaratory relief are DENIED.

As to Case No. 23STCP02614 brought by CDHF, the court will enter judgment on the first cause of action in favor of CDHF and Intervenor on the first cause of action.

As to Case No. 23STPC02575 brought by 600 Foothill, the court does not enter judgment at this time given the pending appeal on 600 Foothill's ninth cause of action and Respondents' special motion to strike. The matter is continued to December 4, 2024 at 9:30 a.m. for a hearing on the status of Respondents' appeal.

The court will retain jurisdiction over this matter (in both cases) as required by section 65589.5, subd. (k)(1)(A)(ii).

**IT IS SO ORDERED.**

March 4, 2024

  
Hon. Mitchell Beckloff  
Judge of the Superior Court



**Sep 30, 2024**

**City of Carmel-by-the-Sea  
P.O. Box CC  
Carmel-by-the-Sea, CA 93921**

**Re: Proposed Amendment to Housing Element**

**By email: [dpotter@ci.carmel.ca.us](mailto:dpotter@ci.carmel.ca.us); [kferlito@ci.carmel.ca.us](mailto:kferlito@ci.carmel.ca.us);  
[adramov@ci.carmel.ca.us](mailto:adramov@ci.carmel.ca.us); [letsgocarmel@gmail.com](mailto:letsgocarmel@gmail.com); [jbaron@ci.carmel.ca.us](mailto:jbaron@ci.carmel.ca.us)**

**Cc: [cityclerk@ci.carmel.ca.us](mailto:cityclerk@ci.carmel.ca.us); [planning@ci.carmel.ca.us](mailto:planning@ci.carmel.ca.us); [crerig@ci.carmel.ca.us](mailto:crerig@ci.carmel.ca.us);  
[bpierik@ci.carmel.ca.us](mailto:bpierik@ci.carmel.ca.us); [bswanson@ci.carmel.ca.us](mailto:bswanson@ci.carmel.ca.us)**

Dear Carmel-by-the-Sea City Council and Community Planning & Building Department,

This letter is a public comment on agenda item 5, "[Update on City Council Resolution 2024-062](#) ..." for the October 1, 2024 City Council meeting.

The California Housing Defense Fund ("CalHDF") submits this letter to remind the City of its obligation to abide by all relevant state housing laws when considering an amendment to the City's Housing Element, as contemplated by Resolution 2024-062, which calls for removing the City-owned sites known as Vista Lobos, Sunset Center North, and Sunset Center South.

### **Housing Element Site Inventory**

The City's Housing Element of its General Plan must provide an inventory of sites where housing is likely to be built in the upcoming cycle for each income level in its Regional Housing Needs Allocation ("RHNA"). (Gov. Code § 65583, subd. (a)(3).)

The City's RHNA includes the construction of 113 very low-income units, 74 low-income units, 58 moderate-income units, and 118 above moderate income units. The City's Housing Element Site Inventory allocates 78 very low-income units to the three City-owned sites, along with 46 low-income units and 25 moderate-income units. Together, these sites account for the vast majority of lower-income units in the City's Housing Element. Additionally, these are the three best sites for potential funding as Low-Income Housing Tax Credit ("LIHTC") projects, given their size, potential unit yield, and land cost.

**360 Grand Ave #323, Oakland 94610  
[www.calhdf.org](http://www.calhdf.org)**

Were these three sites to be removed from the Housing Element, the Site Inventory would have a serious deficit, falling well short of both the Housing Element's target production of 410 units, including 201 lower-income units, and the RHNA of 349 units, including 187 lower-income units. Because removing these sites would cause a deficit of lower-income units in the City's Site Inventory, the City's Housing Element would no longer be in substantial compliance with state law.

Given the timelines necessary for housing development, the fact that we are already a year into the planning period, and the comparative lack of vacant land in the City, it is highly doubtful that any alternative sites or strategies would meet the requirements of state law. Government Code Section 65583, subdivision (a)(3) requires that the Housing Element include (emphasis added) "An inventory of land suitable and available for residential development, including vacant sites and sites having realistic and **demonstrated potential for redevelopment during the planning period** to meet the locality's housing need for a designated income level, and an analysis of the relationship of zoning and public facilities and services to these sites, and an analysis of the relationship of the sites identified in the land inventory to the jurisdiction's duty to affirmatively further fair housing."

The City-owned sites were scheduled for an RFP by December 2025, and it is highly unlikely that any private organizations, such as churches, would be able to come to an agreement regarding potential development plans on the same schedule as the City had committed to. Furthermore, any plans by such organizations to develop affordable housing using LIHTC would likely run into equivalent community opposition, given that their scale would likely have to be similar to what has been proposed for the City-owned lots given the realities of affordable housing finance.

### **Fair Housing Implications**

The public record makes it clear that an antipathy towards housing for low-income households underlies this sudden decision to amend the Housing Element.

A local news [article](#) has documented how the City Council directed City staff to work with a group of local activists to amend the housing element to exclude the City sites, a group that evidently includes former Council Member Victoria Beach, who is quoted as saying, "The idea of clumping people who are lower-income together is a discredited housing strategy."

On the contrary, basic affordable housing finance dictates that the most effective way to develop affordable housing is via projects of sufficient size and composition to qualify for LIHTC funding. This typically means 100% affordable projects of 40-80 units for 9% LIHTC and more than 100 units for 4% LIHTC. Furthermore, this scale ensures efficient delivery of



services for residents. This is exactly why state law dictates minimum densities on sites for low-income households (See Gov. Code, § 65583.2, subd. (h).)

Amending the City's Housing Element to exclude these City-owned sites is transparently discriminatory towards lower-income households.

For purposes of state fair housing law (See Gov. Code, § 8899.50, *inter alia.*), residents of low-income are a protected class. (Gov. Code § 65008, subs. (a)(1)(B)(3), (b)(1)(C), and (b)(2)(B).) The City is obligated by state law (Gov. Code, § 8899.50) not to discriminate against such residents based on protected characteristics.

Additionally, the City has a duty to affirmatively further fair housing ("AFFH") in preparing its Housing Element. (See Gov. Code § 8899.50 and § 65583 (c)(5).) The Housing Element itself, moreover, must assess fair housing within the City. (Gov. Code § 65583, subd. (c)(10)(A).)

Under Government Code section 8899.50, all public agencies must affirmatively further fair housing through their housing and community development programs. Government Code section 8899.50, subdivision (a)(1), defines "affirmatively furthering fair housing" as taking meaningful actions, in addition to combatting discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics.

The duty to affirmatively further fair housing extends to all of a public agency's activities and programs relating to housing and community development. Public agencies are required to take meaningful actions to AFFH and take no action that is materially inconsistent with its obligation to AFFH. (*Id.* at subd. (b).)

Amending its Housing Element to exclude these City-owned sites would be disparate treatment based on a protected characteristic and it would also fail to affirmatively further fair housing.

The City's potential options for revising its Housing Element, such as a greater reliance on ADUs, are also problematic. A recent [survey](#) of ADUs in Los Altos Hills found that less than half of ADUs in the city were used as dwelling units - the majority were used as guest houses, as office spaces, or as other extra space for the primary dwelling unit. Like Los Altos Hills, Carmel-by-the-Sea is entirely in a high/highest resource area, with high median home values and household incomes. In such areas, ADU occupancy will quite likely be lower than in other communities as households have less need for the extra income. This means that a given number of ADUs will house many fewer low-income households due to the potential low occupancy rate.

Additionally, the federal Fair Housing Act does not apply to ADUs, and state fair housing law is unclear on the issue. The aforementioned survey in Los Altos Hills showed that 44% of the occupied ADUs were inhabited by family members. Both of these factors mean that historically excluded groups, such as Black or Latino-headed households, will have much greater challenges living in a Carmel-by-the-Sea ADU. Furthermore, ADUs are significantly smaller than other types of housing. While this makes them naturally more affordable, it also reduces housing opportunities for families with children, which is also a protected characteristic under state fair housing law. (Gov. Code, § 12955, subd. (a).)

State law also obligates the City's Housing Element to affirmatively further fair housing, with protected categories including familial status, as mandated by Government Code section 65583, subdivision (c)(5) (emphasis added):

Promote and affirmatively further fair housing opportunities and promote housing throughout the community or communities for all persons regardless of race, religion, sex, marital status, ancestry, national origin, color, **familial status**, or disability, and other characteristics protected by the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2), Section 65008, and any other state and federal fair housing and planning law.

Carmel-by-the-Sea is much, much wealthier than the rest of Monterey County and has a vastly higher proportion of White residents. According to the 2020 decennial census, Carmel-by-the-Sea is 87% White and only 6% Latino, whereas Monterey County is 27% White and 60% Latino. Furthermore, the median household income in Carmel-by-the-Sea is \$126,406 per year, according to the 2022 5-year American Community Survey, whereas the Monterey County median household income is \$91,043, according to the same dataset.

The City has also permitted zero new homes for very low, low or even moderate income families according to its annual progress reports dating back to 2018. Eliminating the main program in its housing plan to produce housing for low income families would be a clear violation of fair housing laws.

### **Housing Element Substantial Compliance and the Builder's Remedy**

Amending the City's Housing Element to exclude the three City-owned sites would expose the City to a potential determination of substantial non-compliance by the California Department of Housing and Community Development ("HCD"). Pursuant to Gov. Code § 65585, subdivision (i), HCD "shall review any action or failure to act by [the City] that it determines is inconsistent with an adopted housing element..., including any failure to implement any program actions included in the housing element..." Moreover, if HCD "finds that the action or failure to act by [the City] does not substantially comply with this article,"

HCD may revoke its findings that the City's housing element is in compliance with Housing Element Law until it determines that the City has come into compliance with state law.

Additionally, an interested party may bring an action under Code of Civil Procedure Section 1085 to determine whether a housing element conforms to the statutory requirements and to compel a city to adopt a compliant housing element. (Gov. Code, §§ 65587, 65751.) CalHDF regularly brings such lawsuits as part of its mission to expand the state's housing supply to mitigate the crushing impact of the housing crisis.

The Housing Accountability Act (Gov. Code, § 65589.5; the "HAA") requires approval of certain affordable housing projects that are submitted during periods of local housing element noncompliance. (Gov. Code, § 65589.5, subd. (d)(5).) Under the HAA, a city may not disapprove a qualifying affordable housing project (i.e., a housing development project that provides at least 20 percent of the total units to lower income households, as defined by Health and Safety Code Section 50079.5) on the grounds it does not comply with the city's zoning and general plan if the developer submitted either a statutorily defined "preliminary application" or a "complete development application" while the city's housing element was not in substantial compliance with state law. (See Gov. Code, § 65589.5, subds. (d)(5), (h)(5), (o)(1).) This statutory provision temporarily suspends the power of non-compliant municipalities to enforce their zoning rules against qualifying affordable housing projects. See *California Housing Defense Fund v. City of La Cañada Flintridge*, Case Number: 23STCP02614 (attached), for a recent court decision affirming the plain language of the statute in this regard.

In other words, if the City amends its Housing Element and HCD or a court determines that the Housing Element is no longer in substantial compliance with state law, developers will be able to propose any residential project, no matter how tall or large, as long as it is 20% affordable. And the City will be bound to approve all such projects even if the City later comes back into compliance with housing element law, as long as the applicants submitted an SB 330 application during the period of non-compliance. For instance, in Santa Monica, a single developer proposed [4,260 housing units](#), including several 18-story buildings, when Santa Monica's housing element fell out of compliance. If the City wrongfully denies such builder's remedy applications, not only may the applicant seek judicial remedies, but the HAA specifically empowers housing organizations, such as CalHDF to enforce the act via litigation. (Gov. Code, § 65589.5, subd. (k)(1)(A)(i).)

And if the City contests such Builder's Remedy applications, it may be liable for costs. For example, the HAA authorizes courts to award attorney's fees and costs both to applicants and to housing organizations if they prevail in litigation to enforce the HAA. (*Id.* at subd. (k).) As an example, recently the City of Berkeley was fined \$2.6 million and forced to pay \$1.4

million in attorneys' fees after incorrectly denying a housing development project in violation of the HAA.



In sum, if the City amends its housing element to exclude the three City-owned sites, it will be exposing itself to potential litigation. If the City loses such litigation, it will be exposed to a variety of remedies, potentially including the Builder's Remedy, as well as attorneys' fees and other costs. CalHDF recommends that the City drop its effort to amend the Housing Element and instead proceed with its plans to dispose of the three City-owned sites to develop 100% affordable housing, which is badly needed in Carmel-by-the-Sea.

CalHDF is a 501(c)3 non-profit corporation whose mission includes advocating for increased access to housing for Californians at all income levels, including low-income households. You may learn more about CalHDF at [www.calhdf.org](http://www.calhdf.org).

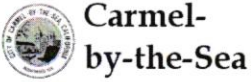
Sincerely,

A handwritten signature in blue ink, appearing to read "Dylan Casey".

Dylan Casey  
CalHDF Executive Director

A handwritten signature in black ink, appearing to read "James M. Lloyd".

James M. Lloyd  
CalHDF Director of Planning and Investigations



Nova Romero <nromero@ci.carmel.ca.us>

City of Carmel-By-The-Sea

Comments re Fiber Optic Cable Installation

2 messages

OCT 01 2024

Charles Najarian <[redacted]> Office of the City Clerk Mon, Sep 30, 2024 at 4:37 PM  
 To: cityclerk@ci.carmel.ca.us, Nova Romero <nromero@ci.carmel.ca.us>  
 Cc: Parker Logan <[redacted]>, Dale Byrne <[redacted]>, David O'Neil <[redacted]>  
 [redacted], Neal Kruse <[redacted]>, Karyl Hall <[redacted]>,  
 Melanie&Harvey Billig <[redacted]>, Arlene Ichien <[redacted]>, Judge Ardaiz  
 <[redacted]>, Jeanne McWalters <[redacted]>, Mike McWalters  
 <[redacted]>, Carolyn White <[redacted]>, Lindamarie Rosier <[redacted]>,  
 <[redacted]>, Marc Nolan <[redacted]>

Nova,  
 Please distribute these public comments to all City Council members, the City Attorney, and appropriate staff for the upcoming October 1st City Council meeting.  
 Thanks you,  
 Chuck Najarian

Dear City Council Members,  
 The purpose of the following comments is to raise issues concerning the California Environment Quality Act as associated with the Wave Fiber Optic Cable Project Encroachment Permit you will be considering on October 1st:

The City is essentially mitigating their way into a categorical exemption for the Fiber Optic Cable installation, which is expressly prohibited. The First District Court of Appeal ruled in "Salmon Protection and Watershed Network v. County of Marin, No. A105592, 05 C.D.O.S. 521, 2005 DJDAR 677. Filed December 16, 2004. Modified and ordered published January 18, 2005", that CEQA lead agencies cannot rely on mitigation measures to determine if a project is categorically exempt from the California Environmental Quality Act (CEQA). The court ruled that if a project may have a significant effect on the environment, CEQA review must occur, and only then are mitigation measures relevant, and that mitigation measures may support a negative declaration but not a categorical exemption. The staff is proposing that you impose 38 special conditions in approving the Wave Fiber Optic Cable installation. Most of these special conditions are effectively mitigation measures.

Also, the fiber optic installation construction (over a three month period of time) has potential cumulative impacts when considering it in combination with the foreseeable construction of the Hofsas House, the Pit, the JB Pastor Building, the Scenic Drive sewer line installation, and the mandated housing, to the extent any of these project's construction activities overlap with the fiber optic construction. Therefore, the potential construction related cumulative impacts should be assessed under CEQA. Specifically an Initial Study should be prepared to determine if a Negative Declaration or an EIR is required.

In addition, if a project may have significant impacts due to "unusual circumstances" exemptions do not apply and a CEQA review is required.\* The fact that some or all of the multiple projects listed above may be constructed in overlapping time frames in a one square mile village is effectively an "unusual circumstance". Other unusual circumstances include tight and compact residential neighborhoods and commercial districts that surround these projects, the narrow streets lined with houses and commercial interests that are not suitable for heavy construction vehicles and traffic, substantial visitor traffic that crowds the village, limited parking, the National Marine Sanctuary that frames the entire west side of the City, and other things that are unique to the Village.

CEQA documentation starts with an Initial Study which includes a checklist of categories of all possible environmental and public health impacts. If any of the check listed impacts are determined to be "potentially" significant, an EIR is required. If not, then a Negative Declaration concluding no potential for adverse impact is prepared, which includes the Initial Study itself.

I don't know if an EIR is required for the Wave Fiber Optic cable installation, but an Initial Study would determine if it is, or if a Mitigated Negative Declaration is appropriate.

For your edification, a key Initial Study checklist item that is required to be answered to determine if there is potential for significant adverse impacts requiring an EIR, is as follows: Attachment 3

“Does the project have impacts that are individually limited, but cumulatively considerable? (“Cumulatively considerable” means that the incremental effects of a project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.)”

The answer to this checklist question appears to be “yes” for the Fiber Optic installation unless it can be shown that most if not all of the other foreseeable construction projects will not overlap with the fiber optic construction.

The appropriate legal process is critical to a legitimate decision. You, as the decision-maker, should seek all the relevant information in order to understand the consequences of your actions. The California Environmental Quality Act runs parallel to the approval process and is completed prior to your decision, thereby informing you and the public about potential environmental and public health effects, and any mitigation/conditions to address them. In other words, CEQA is protective of the residents and Carmel.

The City’s pattern of finding unfounded excuses to avoid CEQA via exemptions, or ignore it altogether, is concerning. The fiber optic cable installation may not be as substantial as the Hofsas House or the Pit (which you also unfortunately exempted), but it nevertheless should follow the required CEQA process and procedures. It seems as though you’ve implemented an alternative to the California Environmental Quality Act that you believe meets the intent of CEQA and is just as effective. Therefore, what you’ve done is use the process and procedures that were in place prior to the adoption of the CEQA statute.

Thank you for considering this information.

Sincerely,  
Chuck Najarian  
Carmel Resident

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\*If a project falls within any of the categorical exemption classes, the Lead Agency must next evaluate whether any exception to the exemptions apply. These exceptions to the exemptions define circumstances that override or negate the agency's ability to use a categorical exemption.

In other words, if an exception applies, then the project no longer qualifies for a categorical exemption. The exceptions are described in Public Resources Code Section 21084(c), (d), and (e) and State CEQA Guidelines Section 15300.2. These exceptions apply (and therefore a categorical exemption is not appropriate) where:

- The project is located in a sensitive environment such that the project may impact an officially mapped and designated environmental resource of hazardous or critical concern;
- **The cumulative effect of successive projects of the same type in the same place, over time, is significant;**
- **The project may have a significant environmental impact due to unusual circumstances;**
- The project may damage scenic resources (i.e. trees, historic buildings, or rock outcroppings) within an official state scenic highway;
- The project is located on a listed hazardous waste site; or
- The project may cause a substantial adverse change in the significance of a historical resource.
- If any of these exceptions apply to the project or the project site, the agency or governmental unit cannot use a categorical exemption and must instead proceed with environmental review under CEQA.
- [In the California Supreme Court case Berkeley Hillside Preservation v. City of Berkeley (2015) 60 Cal. 4th 1086, the Supreme Court held that the unusual circumstances exception applies only when it can be shown that, first, unusual circumstances are present and, second, those unusual circumstances lead to a reasonable possibility the project could result in a significant impact. The agency's determination that an unusual circumstance does not apply need only be supported by substantial evidence. However, once the agency has found that an unusual circumstance exists, if there is substantial evidence to support a fair argument that a significant impact might occur as a result of that unusual circumstance, the categorical exemption cannot be used.]

Sent from my iPad

To: Jeff Baron <jbaron@ci.carmel.ca.us>, Bobby Richards <brichards@ci.carmel.ca.us>, Alissandra Dramov <renewcarmel@outlook.com>, Karen Ferlito <kferlito@ci.carmel.ca.us>, Dave Potter <dpotter@ci.carmel.ca.us> Attachment 3  
Cc: Chip Rerig <crerig@ci.carmel.ca.us>, Brandon Swanson <bswanson@ci.carmel.ca.us>, Brian Pierik <bpierik@ci.carmel.ca.us>, Javier Hernandez <jhernandez@ci.carmel.ca.us>, "Gail Karish (Gail.Karish@bbklaw.com)" <Gail.Karish@bbklaw.com>

Please see correspondence received re: Wave Broadband item on tonight's agenda.



**Nova Romero, MMC**

**City Clerk**

City of Carmel-by-the-Sea

P.O. Box CC

Carmel-by-the-Sea, CA 93921

(831) 620-2016

[nromero@cbts.us](mailto:nromero@cbts.us)

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