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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

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No. H049920

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PIETRO FAMILY INVESTMENTS, LP,
Petitioner and Appellant,

v.

CALIFORNIA COASTAL COMMISSION,
Defendant and Respondent.

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On Appeal from the Superior Court of Monterey County
(Case No. 20CV002395, Honorable Thomas Wills, Judge)

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# APPELLANT'S OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

| COURT OF APPEAL SIXTH APPELLATE DISTRICT, DIVISION | COURT OF APPEAL CASE NUMBER: H049920 |
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| ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 311490<br>NAME: Jeremy Talcott<br>FIRM NAME: Pacific Legal Foundation<br>STREET ADDRESS: 555 Capitol Mall, Suite 1290<br>CITY: Sacramento STATE: CA ZIP CODE: 95814<br>TELEPHONE NO.: (916) 419-7111 FAX NO.: (916) 419-7747<br>E-MAIL ADDRESS: JTalcott@pacificlegal.org<br>ATTORNEY FOR (*name*): Petitioner and Appellant Pietro Family Investments, LP | SUPERIOR COURT CASE NUMBER: 20CV002395 |
| APPELLANT/ PETITIONER: Pietro Family Investments, LP<br>RESPONDENT/ REAL PARTY IN INTEREST: California Coastal Commission | |

## CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(*Check one*): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party (*name*): Petitioner and Appellant Pietro Family Investments, LP

2. a. [ ] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [X] Interested entities or persons required to be listed under rule 8.208 are as follows:

| Full name of interested entity or person | Nature of interest (*Explain*): |
|---|---|
| (1) Chris Adamski | Owns 50% of one property at issue. |
| (2) Courtney Adamski | Owns 50% of one property at issue. |
| (3) Emerson Development Group, Inc. | Owns 50% of one property at issue. |
| (4) Valley Point, LLC | Business partner with Pietro Family Investments, LP. |
| (5) | |

[ ] Continued on attachment 2.

**The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).**

Date: 12/7/2022

Jeremy Talcott
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## Introduction

Pietro Family Investments, LP (Pietro) appeals the unlawful denial by the California Coastal Commission (Commission) of two building permits[1] for single-family homes in the Carmel Point neighborhood of unincorporated Monterey County (County). Pietro applied for permits to develop two residential parcels with homes that included a basement, which was consistent with more than 100 other homes in the same neighborhood. The County reviewed and approved the requested permits, conditioned on Pietro's compliance with certain reasonable conditions designed to protect and preserve any potential archaeological resources that might be discovered in the course of developing the property. Local activist groups appealed the permit approvals to the County Board of Supervisors. The Board denied the appeal and again approved the permits, concluding that they were consistent with the Monterey County Local Coastal Program (LCP).

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[1] The case below involved three building permits. However, Petitioners Chris Adamski, Courtney Adamski, Emerson Development Group, Inc., and Valley Point, LLC do not appeal the superior court opinion. Appellant Pietro Family Investments, LP retains interest in two of the three properties, which are the subject of this appeal.

Upon conclusion of the County's proceedings, the activist groups again appealed the permit approvals to the Commission, which determined that the appeal raised a substantial issue under the Monterey County LCP. Following *de novo* review, the Commission recommended denial of the permits as submitted, and instead approved Pietro's permits subject to several new conditions on development, including Special Condition 1, which required Pietro to submit new plans for the homes, this time excluding the basements, and demanded additional limits on grading or "ground disturbing" on the properties. The Commission determined that the LCP *required* it to "*ensure* avoidance" of archeological resources that may theoretically exist, even while conceding that no actual evidence existed to establish that archeological resources existed on the subject properties. AR001085 (emphasis in original); AR000833. Pietro filed a petition for writ of administrative mandamus pursuant to Code of Civil Procedure (CCP) Section 1094.5, asserting the Commission acted in excess of its jurisdiction and failed to proceed in the manner required by law by imposing the new permit conditions. Pietro additionally asserted the Commission lacked substantial

evidence to conclude the proposed development was inconsistent with the LCP.

The Superior Court denied the writ, rejecting each of Pietro's claims. JA 135–41, Order 16–22. Despite the Commission's determination that the LCP *required* it to "avoid [all] impacts" to archeological resources, the court reasoned that the Commission's approval of the permits in order to avoid a potential takings claim revealed that the agency understood complete avoidance was not actually required. JA 136–37, Order 17–18. The court further held that substantial evidence existed for the Commission to believe that archeological resources might exist on the property merely because the properties "are located in the LCP-designated Sensitive Archeological Resource Area . . . ." JA 138, Order 19. The court noted the presence of such resources "in very close proximity to the site." JA 139, Order 20.

The Commission and the trial court are both incorrect. The Monterey County LCP requires mitigation only for developments on "parcels where archaeological or other cultural sites *are located* . . . ." AR 906 (emphasis added). Here, there is no evidence the Pietro properties contain any archeological resources. Yet the Commission required Pietro to resubmit development plans that

omitted basements and limited grading to *ensure* avoidance of *unidentified* resources. Under the certified LCP, for the Commission to require that development mitigate or avoid impacts to archeological resources, evidence must exist that such resources are *actually located* on the property. Since the Commission put forward *no evidence* whatsoever that archeological resources existed on the property, and merely speculated that they may exist, it could not impose an arbitrary condition designed to avoid those (nonexistent) resources. Accordingly, the determinations of the Commission and the superior court should be reversed, and this Court should grant a writ ordering the Commission to reinstate the County's approval of Pietro's permits, absent Special Condition 1.

## Statement of the Case

This is an administrative mandamus action arising under Code of Civil Procedure Section 1094.5. The Commission reached a final decision on July 9, 2020, denying Pietro's permits as approved by the County, and instead approved the permits subject to several additional conditions. On September 8, 2020, Pietro filed a Verified Petition for Writ of Administrative Mandate, asserting that the Commission's decision was (1) not

supported by substantial evidence, and (2) inconsistent with the LCP, and therefore the Commission failed to act in the manner required by law, abused its discretion, and/or acted without, or in excess of, its jurisdiction.[2]

The Superior Court for the County of Monterey denied Pietro's petition on January 24, 2022. JA 120. The decision disposed of all Pietro's claims, and Pietro timely appealed on March 25, 2022. JA 148.

## Statement of Appealability

This is an appeal from a final judgment (*see* JA 146–47) resolving all issues between the parties, pursuant to Code of Civil Procedure section 904.1(a)(1).

## Legal and Factual Background

### *The general Coastal Act permitting scheme*

The Coastal Act requires all local governments within the coastal zone to prepare a Local Coastal Program. Pub. Res. Code § 30500(a). The LCP comprises a Land Use Plan (LUP), zoning ordinances, zoning district maps, and other implementing

[2] Pietro also alleged that the Commission lacked jurisdiction to take appeal of the permits, and that the special conditions constituted an unconstitutional condition, but does not appeal the Superior Court's denial of those claims.

actions. *Id.* §§ 30512, 30513. The Commission reviews each proposed LUP, but *only* for conformance with the Act. *Id.* § 30512. So long as the LUP meets the requirements of the Act and is in conformance with it, the Commission "shall certify" the LUP. *Id.* The Commission is also required to certify the zoning ordinances, zoning district maps, and other implementing actions. *Id.* § 30513. It may reject them only if they do not conform with, or are inadequate to carry out, the provisions of the certified LUP. *Id.*

Once the Commission certifies an LCP, the Coastal Act "emphasizes local control." *City of Malibu v. Cal. Coastal Comm'n*, 206 Cal. App. 4th 549, 563 (2012). Parties that seek to undertake development[3] in the coastal zone must first obtain a Coastal Development Permit (CDP). But for any area located within a certified LCP, CDPs "shall be obtained from the local government." Pub. Res. Code § 30600(d). Because Monterey County has a certified LCP, CDP applications such as Pietro's

[3] "Development" is defined in Public Resources Code § 30106. Pietro does not dispute that its project constitutes development, and thus requires a CDP.

must be submitted to the County, and the County makes the initial decision.

In certain circumstances, approved permits may be appealed to the Commission. When this occurs, the Commission must first make a "substantial issue" determination—the Commission decides whether to accept appellate jurisdiction. If the Commission accepts jurisdiction, the agency then reviews the underlying permit application de novo, applying the applicable Coastal Act and LCP rules. *See generally McAllister v. County of Monterey*, 147 Cal. App. 4th 253, 273–74 (2007).

***Monterey County's LCP***

A local coastal program "includes a land use plan, which functions as the general plan for property in the coastal zone; and a local implementation plan, which includes the zoning, zoning maps, and other implementing actions for the coastal zone." *McAllister v. Cal. Coastal Comm'n*, 169 Cal. App. 4th 912, 922 (2008), *as modified* (Jan. 20, 2009). Monterey County's certified LCP consists of multiple LUPs, as well as Coastal Implementation Plans (CIP) for each LUP. This includes the Carmel Area LUP, which has been certified since April 14, 1983, and the Carmel Area CIP, which was adopted January 5, 1988,

both of which encompass Pietro's properties. AR000844, 000965. Pietro's properties fall within the medium density residential (MDR) district of the coastal zone. AR001095. Within the MDR District, the "first single family dwelling per legal lot of record" is considered a principal use. Monterey County Zoning Coastal Implementation Plan § 20.12.040(A), AR001069. The two permits at issue are for a "single-family dwelling" on each of the two vacant lots. AR000438–39.

The provisions at issue here are those governing the preservation of archaeological resources that may be at risk of destruction from development. First, the LUP establishes an overarching policy goal requiring all development to "incorporate all site planning and design features necessary to minimize or avoid impacts to archaeological resources." Carmel Area LUP § 2.8.2, AR000906. The more specific CIP then mandates "any project within 750 feet of a known archaeological resource" to be considered "development" requiring the issuance of a Coastal Development Permit. Carmel Area CIP § 20.146.020(H)(9) and 20.146.090(A)(1), AR000970, AR001017. Next, the LUP requires that any development proposed within "area[s] of high archaeological sensitivity" include a preliminary archeological

survey "to determine if an archaeological site exists." LUP. § 2.8.3(2), AR000906. Similarly, the more specific CIP states that "[a]n archaeological survey report shall be required for any development project located within . . . 750 feet of a known archaeological resource . . . ." Carmel Area CIP § 20.146.090(B)(1), AR001017. Where archeological sites are identified, both the LUP and the CIP provides options to mitigate or avoid impacts to archeological resources. For example, for "sensitive prehistoric or archaeologic sites" the County shall explore "[a]ll available measures" including the purchase of archeological easements to avoid development on such sites entirely. LUP § 2.8.3(3), AR000906; CIP § 20.146.090(D)(1), AR001018. Finally, the LUP requires all parcels "where archaeological or other cultural sites *are located*" to incorporate project design that "avoids or substantially minimizes impacts to such cultural sites." LUP § 2.8.3(4), AR000906 (emphasis added). Similarly, the CIP states that development on any site with an archeological site "as identified through an archeological report" shall be subject to various conditions, including adopting "mitigation measures contained in the archaeological survey" and granting an archeological easement over the archeological site.

CIP § 20.146.090(D)(2)(a)–(c), AR001018–19. Proposed development on parcels "where archaeological or other cultural sites are located" is required "to avoid impacts to such cultural sites." *Id.* § 20.146.090(D)(3), AR001019. Finally, where an archeological report concludes that "construction on or construction impacts" to "an identified archaeological or paleontological site cannot be avoided, . . . a mitigation plan shall be required for the project." *Id.* § 20.146.090(D)(4), AR001019.

***Pietro's attempts to develop the properties***

For over seven years, the Pietro family, through their legal entity, Pietro Family Investments, LP, along with its business partners Chris Adamski, Courtney Adamski, Emerson Development Group, Inc., and Valley Point, LLC, have been trying to build two homes in the Carmel Point neighborhood. AR000803.

Pietro created a joint venture in 2015 to purchase four lots in the Carmel area. *See* JA 008, Verified Petition ¶ 24. The venture purchased one developed lot (it slated for redevelopment) and three undeveloped lots. *Id.* For the three undeveloped lots, one would be developed for Mike Pietro as a retirement home, one would be developed for Pietro's business partners as a family

home, and the third would be sold. JA 008, Verified Petition ¶ 26. This appeal involves two of the lots: 26307 Isabella Avenue and 26338 Valley View Avenue.

To ensure that no archeological resources would be impacted by the construction of the homes, Pietro undertook far more archeological investigation than necessary or typically conducted in the area. AR003981. Prior to County approval of its permits, Pietro worked with three different archeological experts to survey the properties for any trace of cultural artifacts. *See* AR001173, AR001241. None of the three experts found substantial evidence that cultural artifacts exist on the parcels. *Id.*

Pietro submitted the development permit applications to the County (including for coastal development permits) for the three parcels and, on December 5, 2018, the Monterey County Planning Commission held a hearing and approved the three permits. AR001937; AR001988; AR002037. Two organizations, the Open Monterey Project and Save Carmel Point Cultural Resources, appealed the permit approval to the Monterey County Board of Supervisors. AR001163; AR001225. On April 23, 2019, the Monterey County Board of Supervisors denied the appeal and

approved the permits for all three properties. AR001187; AR001256. The County determined, *inter alia*, that the permits were consistent with the Monterey County LCP, because no substantial evidence existed that archeological resources existed on the properties that required avoidance. AR001173; AR001241. The County also clarified that Pietro would be required to undertake mitigation measures if any archeological resources were discovered during construction. AR000182; AR001250.

Even after the County's approval, Pietro took additional steps to ensure that building homes would not affect cultural resources. AR003981. Based on a suggestion from the groups that appealed the permit, Pietro voluntarily invested over $100,000 to geoprobe the sites and use ground penetrating radar (GPR). AR000804. The GPR methods were sound, and the soil conditions of the lots provided "adequate and excellent potential for finding buried cultural resources and potential human burial locations" had any been located on the sites. AR000821. But the additional experts found no evidence of any of those or other resources on the site. As a result of this extra effort, the Esselen Nation Tribal Chair sent a letter of support for the proposed projects. AR000804. In short, Pietro went "above and beyond" in its

attempt to ensure that no archaeological resources would be harmed by development. AR003981.

Despite Pietro's work to ensure no impact to potential cultural resources, Save Carmel Point Cultural Resources appealed the County's approval to the Coastal Commission. *See* AR000002. On November 13, 2019, the Commission found that the appeal raised a substantial issue. AR000423. Subsequently, the Commission staff recommended that the Commission add several Special Conditions to the approval of the two permits. *See* AR000009–13. Importantly, Special Condition 1 requires Pietro to submit new plans for the homes without basements, and limits "ground disturbing" and grading of the properties. AR000027.

On July 9, 2020, the Commission held a hearing and adopted the staff's recommendations in full. AR001083. On September 8, 2020, Appellant filed its Petition for Writ of Administrative Mandate challenging the Commission's decision.[4] JA 004. On January 24, 2022, the superior court issued its opinion, denying Petitioner's writ in full. JA 120. Appellant timely filed its notice of appeal on March 25, 2022. JA 148.

[4] Monday, September 7, 2020, was Labor Day and a court holiday. *See* Cal. R. Ct. 1.10(b).

## Standard of Review

In determining whether an agency has failed to proceed according to the law, the Court exercises its independent judgment, giving no deference to the agency's interpretation of the law. *McAllister*, 169 Cal. App. 4th at 921; *Schneider v. Cal. Coastal Comm'n*, 140 Cal. App. 4th 1339, 1344 (2006) ("A court does not . . . defer to an agency's view when deciding whether a regulation lies within the scope of the authority delegated by the Legislature.") (citation omitted).

To the extent that an agency has acted within its jurisdiction and according to law, a reviewing court still "must scrutinize the record and determine whether substantial evidence supports the administrative agency's findings and whether these findings support the agency's decision," resolving doubts in favor of the agency. *Topanga Ass'n for a Scenic Cmty. v. County of Los Angeles*, 11 Cal. 3d 506, 514 (1974).[5] A determination that substantial evidence supports the agency's decision and its

[5] For "substantial evidence" review under section 1094.5, the roles of the superior court and the Court of Appeal are "precisely the same," and "the conclusions of the [lower tribunal], and its disposition of the issues in this case, are not conclusive on appeal." *Sierra Club v. Cal. Coastal Comm'n*, 19 Cal. App. 4th 547, 557 (1993) (internal citation and quotation marks omitted).

findings must be made "in light of the whole record." *JKH Enters., Inc. v. Dep't of Indus. Relations*, 142 Cal. App. 4th 1046, 1057 (2006). In its review, the Court must consider all evidence within the record, including "that which fairly detracts from the evidence supporting [the agency's] determination." *California Youth Auth. v. State Pers. Bd.*, 104 Cal. App. 4th 575, 586 (2002). Regardless of the standard of review, a court always reviews questions of law *de novo*. *Duncan v. Dep't of Pers. Admin.*, 77 Cal. App. 4th 1166, 1174 (2000).

## Argument

### I. The County properly found that there was no substantial evidence of archeological resources on Pietro's property.

After thorough review of Pietro's permit applications, the County correctly concluded that no substantial evidence existed to establish that any archeological resources existed on the parcels, such that avoidance or mitigation would be required. AR001173; AR001241. On appeal, the Commission failed to present *any* evidence rebutting that earlier evidence and that might justify the burdensome mitigation measures it imposed. The Commission engaged only in pure speculation about the potential for archeological resources on the properties and

instead required Pietro to prove beyond *all* doubt that *no* resources could *ever* be discovered on the property. AR001103. Because the Commission failed to provide substantial evidence to justify its findings, its decision should be vacated.

Section 1094.5 of the Code of Civil Procedure defines the scope of the Court's review power in administrative mandate actions. The statute provides, in relevant part, that "abuse of discretion is established if the court determines that the findings are not supported by *substantial evidence in the light of the whole record*." Civ. Proc. Code § 1094.5 (emphasis added). But substantial evidence is not just any evidence, it is "relevant evidence that a reasonable mind might accept as adequate to support a conclusion," and "must be reasonable, credible, and of solid value." *California Youth Auth.*, 104 Cal. App. 4th at 584–85. Substantial evidence must be of "ponderable legal significance." *Kuhn v. Dep't of Gen. Servs.*, 22 Cal. App. 4th 1627, 1633 (1994). But "mere speculation or conjecture cannot support a finding . . . ." *Id.* Further, the Court must consider all evidence presented, including "that which fairly detracts from the evidence supporting the [agency]'s determination." *Id.* at 576–77.

Put simply, the record here contains *no evidence whatsoever* as to archeological resources *on Pietro's properties*. Rather, the only evidence put forward as to the properties themselves came to a single conclusion—no evidence of either cultural or archeological resources could be found. *See* AR002701–43, 004178–004260, *and* 004279–004300. Rather than present affirmative evidence as to the existence of resources, the Commission simply presupposed the potential existence of resources and imposed on Pietro the impossible standard of *disproving* the Commission's presupposition. *See* AR001085 ("It is not possible to say with ***100% certainty*** what type of archeological and tribal cultural resources ***may*** be found in the soils of these sites . . . ." (emphasis added)).

Three different archeological experts found no evidence of cultural resources on the sites. AR001173; AR001241. Ground penetrating radar found no evidence of cultural resources on the sites. AR000821. The Commission staff speculated that perhaps the radar could not detect burial sites, AR001100, but that speculation was rejected by an archeological expert at the hearing. AR000821. Further, even if the radar could not detect bones, it can detect soil disruptions from human burial locations.

*Id.* The expert's conclusion was confirmed by the manufacturer of the radar technology. AR004041. In short, the Commission staff's speculation is not supported by the record, the science, or the facts.

Even the Commissioners themselves acknowledged the lack of evidence for their decision. Commissioner Padilla succinctly summarized the staff position: "My understanding is that there isn't any evidence of resources on the particular site that we know of." AR000833. Rather, "the staff position is that there's no way to be 100% certain that we wouldn't encounter or disrupt any as yet undiscovered resources." *Id.* The District Director, Dan Carl, responded: "I think that's accurate." *Id.* At best, the Commission's statements consist of pure speculation, which is insufficient to constitute substantial evidence. *Wise v. DLA Piper LLP (US)*, 220 Cal. App. 4th 1180, 1188 (2013) ("[S]peculation is not evidence, less still substantial evidence." (citation omitted)).

Further, such speculative evidence must be considered in light of the whole record, including the overwhelming evidence put forward by Pietro "which fairly detracts from the evidence supporting the [Commission's] determination." *California Youth Auth.*, 104 Cal. App. 4th at 576–77. While the Commission is

entitled to "weigh conflicting evidence," it must be reversed if no reasonable person could reach its conclusions based on the evidence presented. *Ross v. Cal. Coastal Comm'n*, 199 Cal. App. 4th 900, 922 (2011), *as modified on denial of reh'g* (Oct. 11, 2011).

In light of the whole record, there was no credible evidence—let alone substantial evidence—to support the Commission's findings that Pietro's permits raised a substantial issue as to archeological or cultural resources under the certified LCP. Rather, as noted above, all evidence presented instead fairly *detracts* from the Commission's determination, because that evidence uniformly shows that there are no archeological resources on Pietro's properties. *See* AR002701–43, 004178–004260, *and* 004279–004300. The only evidence relied upon by the Commission consisted of speculation or conjecture, which is not evidence. *Wise*, 220 Cal. App. at 1180. In short, there was no conflicting evidence for the Commission to weigh, and no reasonable person could conclude that archeological resources existed on the subject properties such that avoidance or mitigation was required. *Ross*, 199 Cal. App. 4th at 922.

Finally, the Commission fails to "bridge the analytic gap" between the evidence and its ultimate decision. *See Topanga Ass'n for a Scenic Cmty.*, 11 Cal. 3d at 515. The ultimate consideration for the Commission under the certified LCP was whether Pietro's permits could be considered compatible with a requirement that they "incorporate all site planning and design features necessary to minimize or avoid impacts to archaeological resources." AR000906. But as detailed *infra*, Part II, the Carmel Area LCP requires substantial evidence of identified archeological resources to trigger avoidance or mitigation of such archeological sites. After all, the purpose of the archeological survey requirement under the LCP is "to determine if an archelogical site exists." LUP § 2.8.3(s), AR000906.

The Commission's conclusion does not logically flow from the evidence before it. The Commission concedes that it is not relying on any evidence of archeological resources *on Pietro's properties*. *See* AR000833. At best, the Commission is relying on speculation that the properties *might* have resources because of the existence of archeological resources "around this particular site" within Carmel Point. *Id.* But the Commission findings within the staff report seek to "emphasize preservation over

excavation of *the resource*" and to "avoid or substantially minimize impacts to tribal/archaeological resources . . . ." AR001085 (emphasis added). The Commission cannot seek to preserve or excavate resources for which there's absolutely no proof of their existence. Similarly, it is impossible to avoid or substantially minimize impacts to tribal/archeological resources that do not exist. Because the Commission concedes that there "isn't any evidence of resources on the particular site[s]," AR000833, it cannot "bridge the analytic gap" to support a finding that the proposed development of Pietro's properties fails to emphasize preservation over excavation or "avoid or substantially minimize impacts." *See Topanga Ass'n for a Scenic Cmty.*, 11 Cal. 3d at 515.

The record does not contain substantial evidence sufficient to support a finding of archeological resources on Pietro's properties. Rather, all of the evidence within the record supports only a finding that there are *no such resources* on those particular properties. Because the only evidence of the existence of archeological resources within the record pertains to surrounding properties, and because the LCP requires avoidance or mitigation only once resources can be identified on subject properties, the

Commission did not—and could not—bridge the analytic gap between the evidence contained within the record and the findings of a substantial issue under the certified LCP with Pietro's permits. Accordingly, the action of the Commission should be vacated.

## II. The County properly determined that Pietro's development was consistent with the governing Land Use Plan.

The Commission acted inconsistently with the certified LCP, and therefore abused its discretion or acted in excess of its jurisdiction, when it imposed Special Condition 1 on Pietro. When reviewing a CDP for consistency with a governing LCP, the Commission is not allowed to impose additional requirements or policies not in the LCP. *See Schneider*, 140 Cal. App. 4th at 1348. In other words, once the Commission approves an LCP, it must approve or deny permit applications based solely on their consistency with the LCP and Coastal Act, and it has no power to effectively amend the LCP by adding new, inconsistent conditions. *See id.* Here, Special Condition 1 is flatly *inconsistent* with the LCP. *Compare* AR000906 (Carmel Area LUP) *and* AR001015 (Carmel Area CIP), *with* AR001098 (commission staff report). By imposing Special Condition 1, the Commission acted

in excess of jurisdiction or abused its discretion by not proceeding in the manner required by law. *Cf. Schneider*, 140 Cal. App. 4th at 1348.

In enacting the Coastal Act, "[t]he Legislature left wide discretion to local governments to formulate land use plans for the coastal zone and it also left wide discretion to local governments to determine how to implement certified LCPs." *Yost v. Thomas*, 36 Cal. 3d 561, 574 (1984). After the Commission certifies an LCP, all development review authority is delegated to the local government. Pub. Res. Code § 30519.[6] Even when the Commission has the power to hear an appeal, the Commission's review is limited. *Id.* § 30603(b)(1). Once the Commission approves an LCP it lacks "authority to create or originate any land use rules and regulations or draft any part of the coastal plan." *Schneider*, 140 Cal. App. 4th at 1348 (quotation marks and citations omitted).

[6] An LCP consists of both the local government's Land Use Plan (LUP), Pub. Res. Code § 30511, and the Local Implementation Program (LIP), which consists of "the zoning ordinances, zoning district maps, and, if required, other implementing actions . . . ." *Id.*; *see also* Pub. Res. Code § 30108.6; *Yost*, 36 Cal. 3d at 565–67.

Here, the County acted under its delegated authority and determined that the proposals for basements were consistent with the governing LUP and CIP. *See* AR001164; AR001173; AR001178–80; AR001241. The key policy for archeological resources in Monterey County's LUP states that "[n]ew land uses, both public and private, should be considered compatible with this objective only where they incorporate all site planning and design features necessary to minimize or avoid impacts to archaeological resources." AR000906. The County found that "[g]iven that all three archaeological experts found no substantial evidence to support a fair argument that cultural resources exist on the parcel, minimizing potential impacts is reasonable while avoidance is not feasible." AR001173; AR001241. In other words, development cannot be proposed that avoids resources which have not been—and likely can never be—identified. However, mitigation measures can be put in place in the event that any resources are discovered during construction. Based on the LUP's policy to "minimize or avoid impacts," AR000906, the County approved the new houses with basements. *See* AR001187; AR001255.

The County's interpretation of the LUP is confirmed by a close reading of the more specific provisions contained within the Carmel Area Coastal Implementation Plan, which are intended to implement the general policies contained within the LUP. Under the CIP, development within 750 feet of a known archeological resource is required to obtain an archeological survey. CIP § 20.146.090(A)(1), AR001017. The purpose of the archeological survey is "to determine if an archaeological site exists." LUP § 2.8.3(2), AR000906. This is because it is only on parcels "where archeological or other cultural sites *are located*" that the CIP requires development "to avoid impacts *to such cultural sites*." CIP § 20.146.090(D)(3), AR001019 (emphasis added). Under the CIP, only once archeological sites are "*identified through an archaeological report*" shall development be subject to various conditions, including adopting "mitigation measures contained in the archaeological survey" and granting an archeological easement over the archeological site itself. CIP § 20.146.090(D)(2)(a)–(c), AR001018–19 (emphasis added). And where the archeological survey discovers "sensitive prehistoric or archaeologic sites", the County shall next explore "[a]ll available measures" including the purchase of archeological easements to

avoid development on such sites entirely. CIP § 20.146.090(D)(1), AR001018. But even where an archeological report identifies archeological or paleontological sites, construction may proceed subject to a mitigation plan if "construction on or construction impacts" to "cannot be avoided . . . ." *Id.* § 20.146.090(D)(4), AR001019. Taken in whole, the LCP requires permit applicants to take reasonable measures to *identify* archeological sites on their property, so that construction and design can *either* avoid resources entirely (where possible) *or* minimize impacts (where not possible).

The Commission, however, imposed a standard that is entirely inconsistent with the certified LCP. In the adopted staff report, the Commission interpreted the LCP to require that all proposed projects "*ensure* avoidance" of cultural resources. AR001085 (emphasis in original). Similarly, the Commission incorrectly stated that the LCP requires new developments to "*minimize and avoid* impacts to archeological resources. AR001098. But the LCP instead uses the disjunctive "or," acknowledging that avoidance may not be possible in all instances. AR000906. It is "commonplace for statutes to provide alternative means of satisfying a condition" by using "or" rather

than "and." *Eddie E. v. Superior Ct.*, 234 Cal. App. 4th 319, 328 (2015). The CIP confirms this, providing for the possibility that some development will be able to "avoid impacts" entirely, while others will instead require a "mitigation plan." CIP § 20.146.090(D)(3)–(4), AR001019.

But more egregiously, the Commission ignored entirely the sections of the LCP that require first the *identification* of archeological sites. The LCP speaks repeatedly in terms of avoidance or mitigation on parcels where archeological or cultural sites *are located*. LUP § 2.8.3(4), AR000906; CIP § 20.146.090(D)(3), AR001019. Such identification takes place through the required archeological survey. CIP § 20.146.090(D)(2), AR001018–19. Further, the CIP acknowledges that mitigation is acceptable when impacts to "*identified* archaeological or paleontological site cannot be avoided . . . ." CIP § 20.146.090(D)(4), AR001018 (emphasis added). But as the County properly found, no substantial evidence exists that archeological resources are located on the properties. AR001241; *supra* Part I.

In the staff report, the Commission effectively inverts the language of the certified LCP. Instead of requiring avoidance or

mitigation if resources are identified, the Commission *requires* the identification of resources as a precondition of development. Put another way, the Commission insists that a *negative* archeological survey (or, as in the Pietro's case, even five negative surveys per property) is itself sufficient evidence to require avoidance, because *no* survey could ever "say with *100% certainty* what type of archeological and tribal cultural resources *may* be found." AR001085 (emphasis added). As Commissioner Padilla accurately summarized: "My understanding is that *there isn't any evidence of resources on the particular site* that we know of." AR000833 (emphasis added). Rather, "the staff position is that there's no way to be 100% certain that we wouldn't encounter or disrupt any *as yet undiscovered* resources." *Id.* (emphasis added). The District Director, Dan Carl, responded: "I think that's accurate." *Id.*

It is only by effectively amending the LCP that the Commission could find that it required *all* proposed projects to "*ensure* avoidance", even on sites where no resources have been—or perhaps ever could be—found. AR001085 (emphasis in original). Under the Commission's theory, the *only* projects that are permissible are those where all potential resources have

already been identified with "100% certainty"—an impossible standard. Conversely, it is clear that the Commission believes *no* project could be approved where resources are not found, because "there's no way to be 100% certain that we wouldn't encounter or disrupt any *as yet undiscovered* resources." AR001085 (emphasis added). Tellingly, the Commission interpreted the LCP to conclude that the LCP "directed" the Commission to "prohibit excavation and grading" entirely. *Id.*

The only reason that the Commission allowed any development is because outright denial "could engender constitutional takings questions." AR001086. Thus, the Commission believed that the LCP requires the avoidance of all impacts to any imaginable archaeological resource in the area, and that the agency was only prevented from carrying out that strict interpretation because of potential takings issues. But that is not what the LCP requires. The LCP requires that development minimize or avoid impacts on parcels where archeological or other cultural sites are located. Carmel Area LUP § 2.8.2, AR000906. The Commission's interpretation added additional requirements not listed in the LUP. *See* AR001098.

But the Commission does not have the power to amend an LUP on an appeal. *Schneider*, 140 Cal. App. 4th at 1348.

The Commission's interpretation of the certified LCP cannot be squared with its language. Under the CIP, mitigation and avoidance are triggered once archeological sites are *identified* through an archeological survey. CIP § 20.146.090(D)(2)–(3), AR001018–19. This makes sense—a developer can only incorporate site design that mitigates or avoids resources that are *known to exist*. Based on the evidence of multiple experts, the County determined that it was unlikely cultural resources exist on the sites and then put in place safeguards to establish mitigation measures on the remote chance that resources were discovered during development. AR001173; AR001241. The County's determination was consistent with the LUP. AR000906. The Commission's determination, on the other hand, goes beyond the requirements of, and is inconsistent with, the LUP. *See Schneider*, 140 Cal. App. 4th at 1345–48 (permit conditions imposed by Commission on appeal must not be inconsistent with the LCP).

The Commission's position that the LCP requires a proposed development to "ensure avoidance" regardless of

whether resources are *actually* located on the property is entitled to no deference. Courts exercise independent judgment regarding the construction of statutes and ordinances, and no deference is required when the meaning of the relevant provision is plain. *Lindstrom v. Cal. Coastal Comm'n*, 40 Cal. App. 5th 73, 96 (2019). Here, the plain language of the LCP contradicts the Commission's interpretation. By ignoring language within the LCP requiring mitigation or avoidance only on sites where archeological resources are identified and actually located, the Commission contradicted the plain language of the LCP and changed its meaning. *Cf. id.*

Even if the meaning of the LCP were ambiguous, then the County's interpretation, and not the Commission's interpretation, would be entitled to deference. While courts have sometimes deferred to the Commission's interpretation of an LCP, they have only deferred when the Commission's interpretation was consistent with the local government's interpretation. *See Lindstrom*, 40 Cal. App. 5th at 96. Here, there is a disagreement between the County and the Commission over the meaning of the LCP. *Compare* AR001173, *with* AR001098. If this Court must defer to a government's interpretation of the LUP, it should defer

to the County's interpretation over the Commission's interpretation because the Coastal Act grants wide discretion to local governments to determine how to implement certified LCPs. *Yost*, 36 Cal. 3d at 574.

The County exercised its delegated authority and properly approved the permits. In imposing Special Condition 1, the Commission rewrote the LUP, imposing additional requirements and policies on Pietro. In doing so, the Commission failed to act in the manner required by law, abused its discretion, or acted without, or in excess of, its jurisdiction. This Court should grant the petition for writ of administrative mandate.

## Conclusion

The Court should reverse the Superior Court's decision, grant the Petition, and issue a writ of mandate compelling the Commission to reinstate the Pietro's permit as properly approved by the County.

DATED: December 7, 2022.

Respectfully submitted,
JEREMY TALCOTT
JEFFREY W. McCOY

/s/ Jeremy Talcott
JEREMY TALCOTT
*Attorneys for Petitioner and Appellant Pietro Family Investments, LP*

## Certificate of Compliance

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing Appellant's Opening Brief is proportionately spaced, has a typeface of 13 points or more, and contains 5,920 words.

DATED: December 7, 2022.

/s/ Jeremy Talcott
JEREMY TALCOTT

**Declaration of Service**

I, Jeremy Talcott, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 555 Capitol Mall, Suite 1290, Sacramento, California 95814.

On December 7, 2022, a true copy of APPELLANT'S OPENING BRIEF was electronically filed with the Court through Truefiling.com. Notice of this filing will be sent to the following who are registered with the Court's efiling system.

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On December 7, 2022, a true copy of APPELLANT'S OPENING BRIEF was mailed to the address below via first-class U.S. Mail:

Court Clerk
Honorable Thomas W. Wills
Monterey County Superior Court
1200 Aguajito Road
Monterey, CA 93940

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 7th day of December, 2022, at Sacramento, California.

/s/ Jeremy Talcott
JEREMY TALCOTT

**From:** Tawnda Dyer
**To:** Incoming Lit
**Cc:** Jeremy Talcott; Jeffrey W. McCoy
**Subject:** Pietro Filed Opening Brief & Joint Appendix
**Date:** Thursday, December 8, 2022 3:02:48 PM
**Attachments:** FILED Pietro Joint Appendix.pdf
FILED Pietro Opening Brief.pdf

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attached

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