



CITY OF MORRO BAY
CITY ATTORNEY DEPARTMENT
955 SHASTA AVE. ♦ MORRO BAY, CA 93442
805-772-6568

MEMORANDUM

TO: CITY COUNCIL AND PLANNING COMMISSION

FROM: ROB SCHULTZ

SUBJECT: COMPLAINT FILED BY NORTHERN CHUMASH TRIBAL COUNCIL

DATE: JANUARY 30, 2007

As you are aware, last month the City of Morro Bay received a 12-page complaint from the Northern Chumash Tribal Council (NCTC) alleging violations of the California Environmental Quality Act, California Coastal Act, and SB 18. City Staff takes the concerns of the NCTC very seriously and has reviewed and researched the NCTC complaint and submits this report to the City Council and Planning Commission in response to the allegations made by NCTC.

SUMMARY OF CEQA

The California Legislature enacted the California Environmental Quality Act (“CEQA”), Public Resources Code §21000, *et seq.*, as a means of requiring public agency decision-makers such as the City of Morro Bay to document and consider the environmental implications of their actions.

CEQA’s fundamental goal is to fully inform the public and the decision makers as to the environmental consequences of a project’s actions and to assure members of the public that their elected officials are making informed decisions. CEQA requires governmental authorities, such as the City of Morro Bay, to seek feasible means to reduce or avoid significant environmental damage that otherwise could result from their actions.

The cornerstone of the CEQA process is the preparation of an Environmental Impact Report (EIR) or Negative Declaration (ND) that discloses the adverse environmental impacts that may result from the proposal or approval by a public agency. The primary function of the EIR or ND is to discuss the important environmental consequences and to provide decision-makers, responsible agencies and the general public with mitigations and alternatives to the project that would have less serious environmental consequences. The Lead Agency, such as the City of Morro Bay, is responsible for determining whether a significant adverse environmental impact may occur and whether it can be mitigated to a level of insignificance. Where substantial evidence indicates that a significant adverse effect may occur, the lead decision-making agency is required to prepare an EIR which discusses in detail the potential impact and feasible means of avoiding or reducing it. Where such an effect may be mitigated to a level of insignificance through changes in the project or other requirements, a mitigated Negative Declaration is prepared rather than an

EIR. After the lead agency prepares either an EIR or Negative Declaration, it is then filed with the State Clearing House and/or the County of San Luis Obispo and legal notice is given for review and comment from any concerned members of the public.

In regard to cultural resources, CEQA indicates that only “significant” cultural resources need be considered during the CEQA process (PRC § 21084.1 and CEQA Guidelines § 15064.5). CEQA Guidelines for determining the significance of a cultural resource have been codified by both the Federal and State government. The State guidelines [Title 14, PRC, Sec. 4852 (b and c)] list the criteria that must be met for a historic or prehistoric resource to be deemed “significant” or “unique” enough to be included in the California Register of Historic Resources and to come under the protection of CEQA.

In regard to CA-SLO-165, the City acknowledges that CA-SLO-165 has great importance for Native Americans, archaeological researchers and the general public alike. There is also no question that it is a highly significant sensitive resource since it has been listed on the National Register of Historic Places. This designation effectively requires preparation of an EIR or a Mitigated Negative Declaration for all projects within CA-SLO-165.

Under CEQA, when significant archaeological resources are involved, the Lead Agency “may require reasonable efforts to be made to permit any and all of these resources to be preserved in place or left in an undisturbed state. PRC § 21083.2 provides the following examples that a Lead Agency may include:

1. Planning construction to avoid archaeological sites.
2. Deeding archaeological sites into permanent conservation easements.
3. Capping or covering sites with a layer of soil before building on the sites.
4. Planning parks, greenspace, or other open space to incorporate archaeological sites.

PRC § 21083.2 then states that to the extent that unique archaeological resources are not preserved in place or not left in an undistributed state, mitigation measures shall be required by the Lead Agency.

Pursuant to PRC § 21083.2, one way to preserve archaeological resources is simply to avoid the adverse effects altogether by changing the project in such a way that the cultural resources are no longer subject to impact. Whether a project proponent is able to redesign the project so as to avoid impacts to the site(s) is another matter. It may be impossible, given constraints of topography, available land, etc. Or it may not be prudent and feasible from a financial perspective if the cost of redesign is excessive, or from a scheduling standpoint, for example if the realignment itself needs to be surveyed for cultural and environmental impacts, which would result in substantial delays of the project. In addition, actual preservation measures may vary, depending upon the specific situation. For instance, capping or covering sites with soil may not be a practical solution where it might interfere with later carbon-14 or pollen dating procedures. When avoidance is not possible, excavation may be the only feasible alternative or mitigation measure.

It is important to realize that the City does not have an archaeologist on staff. Therefore, whenever there is a project that will impact “significant” cultural resources, the City must rely on consultants to determine whether alternatives exist, and if not, proper mitigation. Once it is determined that alternatives do not exist, proper mitigation is divided into three Phases for discussion and management purposes. The initial resource identification study is referred to as a Phase I reconnaissance survey. This is followed by a Phase II resource evaluation study and Phase III impact mitigation. A discussion of each phase follows.

Archaeological Inventory Survey (Phase I): Also known as Phase I archaeological investigation, archaeological inventory survey is the first step in most projects where cultural resources must be addressed. It is literally the process of walking the ground (or occasionally conducting limited subsurface probes) to look for signs of prehistoric or historic occupation. Results of the Archaeological Inventory Survey are used to suggest further investigation or mitigation measures, if necessary. If a survey is negative (meaning nothing is found), often no further cultural resources work is required. If the survey produces positive results, then further work such as archaeological excavation or construction monitoring may be required.

Archaeological Excavation (Phases II and III): Archaeological excavation often involves two separate phases of investigation: Phase II Testing and Phase III Data Recovery. A Phase II or test excavation is designed to determine the significance and condition of an archaeological site. A testing program provides detailed information necessary to plan further investigations or mitigation measures to protect the site. A Phase III or data recovery excavation, as its name suggests, is designed to recover data from a significant archaeological site when damage to the site cannot be avoided.

Archaeological Monitoring During Construction: Archaeological monitoring is frequently recommended to mitigate adverse effects to an archaeological site. Archaeological monitors observe ground-disturbing activities during construction and identify and evaluate potentially significant finds.

ARCHAEOLOGIST REPORTS ON CA-SLO-165

In regard to CA-SLO-165, the following comments have been made by archaeologists in regard to projects within CA-SLO-165. The City has attempted to implement these recommendations during the permitting process for projects within CA-SLO-165:

*Laurence W. Spanne, M.A., Archeological Consultant
April 12, 1999*

The project is located within the ethnographically and ethnohistorically defined territory of the Chumash Indians, but also very near, and possibly within the territory of Salinan Indians. The boundary between these groups is somewhat loosely defined and may have shifted over the thousands of years of occupation. Therefore, a qualified consultant representing local families and organizations, or those with ties to the local Native American community, must be present during

the Phase II field investigation and should have access to the archaeological laboratory at all times work is in progress there.

Clay A. Singer, Archaeologist
May 7, 1999

Mr. Spanne's review contained some historical information about the archaeological site, a basic protocol for Native American participation in a project, and procedural guidelines and criteria drawn primarily from CEQA and sections of the PRC. We are in perfect harmony here.

Laurence W. Spanne, M.A., Archeological Consultant
July 10, 1999

I would recommend that the Phase II testing plan contained in my letter of April 12, 1999 be applied to the Rockview Residences Project. This would serve to evaluate the "significant" deposits described by Singer, and identify the potential impacts of the proposed project on these deposits.

Nancy Farrell, President, Cultural Resources Management
December 10, 1999

An alternative to this approach is controlled monitoring during construction grading. The advantage of this approach would be that large areas could be examined, which would increase the chances of finding intact features such as hearths.

Laurence W. Spanne, M.A., Archeological Consultant
July 29, 2000

Because this portion of SLO-165 obviously has the potential to yield important information about local and California prehistory, I am essentially in agreement with the conclusions and recommendations of the authors calling for a program of data recovery during monitoring of controlled grading.

David F. Stone, Archaeologist
July 3, 2001

I agree that controlled archaeological monitoring by a qualified archaeologist and Native American observer would be capable of identifying any unknown features that exist in this peripheral portion of CA-SLO-165. If a feature were encountered, work would need to be temporarily suspended until it could be subject to a Phase 3 hand excavation data recovery program.

*Clay A. Singer, Archaeologist
February 25, 2002*

With regard to the present project, we believe that impacts to remaining archaeological resources can be mitigated to an acceptable level by implementing a plan with two objectives: (1) to identify, sample, and fully document any resources encountered during the construction, and (2) to obtain a set of (two) radiocarbon dates from samples of marine shell recovered from Test Unit #2, located on Lot 2.

A two-person team composed of an archaeologist and a local Native American consultant, will monitor all excavation work, record stratigraphic and other information, and collect samples and/or specimens if they are relevant. Upon completion of the excavation monitoring all notes, drawings, and collected samples will be processed and analyzed. These data will then be described in a technical report. Additionally, samples collected in 2000 have been reexamined and will be thoroughly described and illustrated along with anything encountered during construction. Implementation of the plan outlined above should sufficiently mitigate any and all impacts to the resources on the subject property.

PROJECTS APPROVED WITHIN CA-SLO-165

In response to these archaeologist reports, the City has implemented the following Conditions of Approval with respect to the project within CA-SLO-165 and in order to comply with the CEQA process:

Mimosa Street

As required by the California Environmental Quality Act (CEQA), staff conducted an environmental review of the proposed project. Environmental review began with preparation of an Initial Study. Based on the Initial Study, it was determined that the proposed project had the potential to have significant adverse effects on the environment but that mitigation measures agreed to by the applicant would effectively reduce that potential to less than significant levels. Potentially significant impacts to cultural resources resulted in a Phase I cultural resource evaluation report for the site prepared by Parker & Associates (dated December 9, 1994). The report identified mitigation measures that were necessary to avoid a potential Class 1 (i.e., significant adverse) impact, and the following language was added to the Conditions of Approval:

- All construction on the site shall be consistent with recommendations contained in the Phase I Archaeological Survey prepared by Parker & Associates. Prior to the issuance of a building or grading permit, plans shall be reviewed and approved by the project archaeologist. All grading activities shall then be field monitored and supervised by the project archaeologist. Prior to the final building inspection, the project archaeologist shall submit a report to the Public Services Department confirming that all construction activities were performed and monitored

consistent with mitigation measures related to cultural resources and that the project did not have a significant impact on archaeological resources.

- In the event of the unforeseen encounter of subsurface materials suspected to be of an archaeological or paleontological nature, all grading or excavation shall immediately cease in the immediate area, and the find should be left untouched until a qualified professional archaeologist or paleontologist, whichever is appropriate, is contacted and called in to evaluate and make recommendations as to disposition, mitigation and/or salvage. The developer shall be liable for costs associated with the professional investigation and implementation of any protective measures required by the Public Services Director.

Hill Street Project

As required by CEQA, staff conducted an environmental review of the proposed project. Environmental review began with preparation of an Initial Study. Based on the Initial Study, it was determined that the project had the potential to have significant adverse effects on the environment but that mitigation measures agreed to by the applicant would effectively reduce that potential to less than significant levels. Potentially significant impacts to cultural resources resulted in an extensive review of the potential impacts on the site, including peer review of the archaeological report.

In regard to cultural resources, the original archaeological report prepared for the site was for a single-family dwelling. The archaeologist in a letter dated March 9, 2004 confirmed that the report and Phase III mitigation plan were adequate for new project design. Due to the extreme cultural resource sensitivity of the area and the location of the project site within a known national register-eligible archaeological site, the city required a third party peer review of the project archaeologist's report. The archaeologist and the peer review archaeologist report identify mitigation measures that were necessary to adequately mitigate potential impacts to archaeological resources, and the following language was added as a Condition of Approval:

- Any archaeological resources discovered during construction must be protected in accordance with Morro Bay Zoning Ordinance 17.48.310 C2.
- The Phase III archaeological mitigation plan shall be implemented as described in C. A. Singer & Associates Archaeological Mitigation Plan dated April 19, 2001. The plan shall include:
 1. A two-person team composed of an archaeologist and a documented, culturally affiliated indigenous individual recognized by the Native American Heritage Commission, to monitor all excavations record stratigraphic and other data and collect samples.
 2. Process and analyze samples and data.
 3. Review grading plan and earlier reports to identify previously sample areas.

4. Monitor excavations, record stratigraphic information, recover sample if cultural deposits are encountered.
 5. Analyze field data and samples collected.
 6. Process samples for radiocarbon dating.
 7. Prepare mitigation report.
- Archaeological deposits exposed during construction should not be removed from the site area. If possible, displaced cultural deposits should be re-deposited on the property.
 - If human remains are unearthed, all work in the find area must cease and the County Sheriff/Coroner must be contacted immediately. If the remains are those of a Native American, the Sheriff/Coroner will notify the Native American Heritage Commission (NAHC) in Sacramento. The property owner, City of Morro Bay staff and the monitoring team will work with the most likely descendent (MLD) designated by the NAHC as to the disposition of the remains.
 - A monitoring report shall be prepared by the archaeologist and shall incorporate a thorough analysis of cultural materials, particularly tools, that were recovered during the Phase II investigation, together with any tools or diagnostic (time sensitive) artifacts recovered during monitoring. The analysis will relate these remains and the activities they represent to other excavations previously undertaken within CA-SLO-165, to illustrate the spatial relationship of activities and occupation that characterize this extensive site. Two copies of the report shall be sent to the Public Services Department before final building inspection.

Main Street Project

As required by CEQA, staff conducted environmental review of the proposed project. Environmental review began with preparation of an Initial Study. Based on the Initial Study, it was determined that the project does have the potential to have significant adverse effects on the environment but that mitigation measures agreed to by the applicant would effectively reduce that potential to less than significant levels.

In regard to cultural resources, a Phase I cultural resource evaluation was prepared for the project site by Parker & Associates. Parker concludes: "several isolated pieces of marine shell, stone tool, and possibly a hammerstone were discovered but do not constitute a significant cultural resource." Archaeological monitoring is recommended during grubbing and trenching given the sensitivity of the area for archaeological resources. Below are the mitigation measures related to cultural issues that implemented the Conditions of Approval to reduce the potential impacts to less than significant:

- Monitoring by a qualified archeologist during initial grubbing and trenching. In the event of the unforeseen encounter of subsurface materials suspected to be of an archaeological or paleontological nature, all grading or excavation shall immediately cease in the immediate area, and the find shall be left untouched until

a City approved cultural resource professional evaluates and makes recommendations as to disposition, mitigation and/or salvage of the discovery. Work shall only resume upon approval by the Director of Public Services subject to the procedures of MBMC Sec. 17.48.310, Protection of Archaeological Resources. The developer shall be liable for costs associated with the professional investigation and implementation of any protective measures as determined by the Director of Public Services.

- The site is located within a known archaeological site as identified in the Negative Declaration. Staff was aware of this circumstance and as a result required a report by a City qualified archaeologist. It was concluded that no resources were impacted as a result of those activities. However, there still remains the potential for cultural resources to be impacted during construction. Therefore, the applicant/property owner shall provide an archaeological monitoring plan prepared by a City qualified archaeologist for all construction excavations associated with grading activity. The plan shall identify that all ground disturbances shall be monitored by a City qualified archaeologist and a documented, culturally affiliated, indigenous individual recognized by the Native American Heritage Commission. If unexpected densities or features of artifacts associated with a particular activity area are encountered, excavation shall be temporarily suspended until the archaeologist can determine an appropriate data recovery strategy, to be reviewed and approved by the City to ensure their protection in accordance with Morro Bay Zoning Ordinance 17.48.310. Any isolated human remains encountered during construction shall be protected and their disposition be undertaken consistent with Public Resources Code 5097.98.

Rockview Project:

As required by CEQA, staff has conducted environmental review of the proposed project. Environmental review began with preparation of an Initial Study. Based on the Initial Study, it was determined that the proposed project does have the potential to have significant adverse effects on the environment but that mitigation measures agreed to by the applicant would effectively reduce that potential to less than significant levels. Potentially significant impacts are related to visual resources, aesthetics, cultural resources, drainage/water quality, and traffic.

In regard to cultural resources, C. A. Singer & Associates conducted a Phase III cultural resource evaluation report for Lot 1, located to the immediate east of the subject parcels (dated February 25, 2002). The study identified mitigation measures that were necessary to avoid potentially significant impacts. C. A. Singer & Associates has since confirmed that the same Phase III mitigation plan prepared for Lot 1 is appropriate and may be applied to Lots 2, 3, and 5 as well. Since 1993, two subsurface tests have been completed, one archaeological and one geological. Significant samples of prehistoric and historic materials have been recovered, analyzed, and evaluated from all three lots.

The mitigation plan contained in the Phase III cultural resource evaluation report by C. A. Singer and Associates established mitigation measures that are now included in recommended Conditions of Approval:

- Prior to the issuance of building or grading permits, the project archaeologist shall comment on the appropriateness of the proposed foundation system and whether modifications (i.e., partial raised floors supported by concrete piers) would reduce the project's impact on cultural resources. If so, such modifications shall be incorporated into construction drawings.
- Construction plans, geological and archaeological reports shall be reviewed to identify sampled areas and extant cultural deposits. An archaeological workshop shall be conducted by a qualified archaeologist at the pre-construction meeting for construction personnel to educate them about what types of cultural materials may be encountered during construction excavation. A procedure for notification of accidental discovery and a communication network shall be developed so that if any suspected cultural materials are unearthed, they can be quickly examined and evaluated by a qualified archeologist and appropriate recommendations can be made. These workshops are effective in preventing accidental damage to significant cultural resources during the construction phase of a project. They also help to reduce unnecessary delays in construction activity.
- A qualified archaeologist and a Native American shall monitor grading and excavation (including trenching) at the project site.
- During any grading or excavation associated with the project, if any cultural materials are unearthed, work in that area shall be halted or redirected until all cultural materials can be examined by a qualified archaeologist and appropriate recommendations made. All data collected on the specimens encountered shall be synthesized and a Phase III report shall be prepared. Archaeological deposits displaced during construction will be redeposited on the property.
- If human remains are unearthed, all work in the find area must cease and the County Sheriff/Coroner must be contacted immediately. If the remains are those of a Native American, the Sheriff/Coroner will notify the Native American Heritage Commission (NAHC) in Sacramento. The NAHC will then designate a "most likely descendent" who will then consult with the owner/developer and the archeological monitoring team as to the disposition of the remains.
- In the unlikely event that a buried deposit or other cultural feature is encountered during future excavations, work in the immediate vicinity of the find must be suspended until an archaeological evaluation can be completed. If something is discovered the City of Morro Bay should be contacted and an archaeologist approved by the County Department of Planning and Building should inspect the find and complete an evaluation within 24 hours. If the find is significant and further impacts cannot be avoided, then a formal mitigation plan should be prepared and implemented. After a mitigation plan is formulated and implemented, excavation work can usually be resumed.

- Prior to the issuance of building or grading permits, the project archaeologist shall comment on the appropriateness of the proposed foundation system and whether modifications (i.e., partial raised floors supported by concrete piers) would reduce the project's impact on cultural resources. If so, such modifications shall be incorporated into construction drawings.

As you can see, all of the above projects went through extensive CEQA environmental review and public hearings. All of the projects required mitigation measures according to consultants' reports. No one spoke at any of the Planning Commission meetings or City Council meetings in regard to inefficient or improper mitigation measures associated with cultural resources. None of these projects were appealed to the City Council for improper handling of cultural resources. In fact, no comments were ever even received regarding the handling of cultural resources on any of these projects.

In regard to future projects, the City will continue to require Phase III Monitoring and Data Recovery on all projects within CA-SLO-165. A Mitigation Monitoring Plan (Phase III) will be required to be prepared by an archaeologist approved by the City of Morro Bay. Furthermore, in an effort to keep the NCTC aware of all projects located in sensitive sites, the City of Morro Bay has added NCTC to our list of contacts to review the environmental documents for comments. This will improve communication between the City and NCTC on such sites and give additional input opportunity. In addition to sending the NCTC the environmental documents, the City will also start requiring projects that require mitigation monitoring to have a representative of both the Chumash and Salinan tribes on the site during required activity. The City will continue to ensure that NCTC have an opportunity to have input.

REQUIREMENTS OF SB 18

Government Code §65352.3, also known as SB 18, requires local governments to consult with tribes prior to the adoption or amendment of a general plan or specific plan, and when designating lands containing a cultural place as open space if proposed on or after March 1, 2005.

In addition to the notice and consultation requirements outlined above, SB 18 amends Government Code §65560 to allow the protection of cultural places in the open space element of the general plan. SB 18 also amends Civil Code §815.3 and adds California Native American tribes to the list of organizations that can acquire and hold conservation easements. Tribes on the contact list maintained by the NAHC now have the ability to acquire, on terms mutually satisfactory to the tribe and the landowner, conservation easements for the purpose of protecting their cultural places.

Under SB 18's definition of "consultation" (Government Code §65352.4), government agencies and tribes are required to carefully consider the views of others and are required to seek an agreement, "where feasible." For the purposes of SB 18, agreements should be considered "feasible" when an avoidance or mitigation measure exists that is capable of being accomplished and is acceptable to the needs of all parties involved in the consultation. If, after conducting consultations in good faith and within the spirit of the definition, the tribe or local government

cannot reach agreement for mitigation or avoidance of any impact to a California Native American cultural place, neither party is required to take any action under SB 18.

The City of Morro Bay understands the requirements of SB 18. The City of Morro Bay has never stated to NCTC or anyone else that SB 18 does not apply in Morro Bay. The City of Morro has stated that it is willing to execute an MOA with NCTC to implement the requirements of SB 18.

CONCLUSION

The bottom line is that the City of Morro Bay has implemented the California Environmental Quality Act and California Coastal Act in regard to cultural resources on numerous projects within the City. As Lead Agency, the City of Morro Bay relies on consultants to assist in evaluating projects. All of these projects have successfully gone through extensive environmental review and public hearings without any public comments or complaints until the recent complaint received from NCTC. The CEQA process clearly provides procedures for public input. Morro Bay has always made this process available to anyone with concerns. The CEQA process does not allow for complaints after projects have already been approved and building permits issued. If it is NCTC's opinion that the City is not providing adequate mitigation to protect cultural resources, then NCTC needs to participate during the CEQA process and public hearings. As previously stated, in an effort to keep NCTC aware of all projects located in sensitive sites, the City of Morro Bay has added NCTC to our list of contacts to review the environmental documents for comments. This will improve communication between the City and NCTC on such sites and give additional input opportunity. In addition to sending the NCTC the environmental documents, the City will also start requiring projects that have mitigation for monitoring to have a representative of both Chumash and Salinan on the site during required activity. By implementing these procedures, the City will ensure that NCTC has an opportunity to have input.

RWS

cc: B. Hendrix
Dept. Heads