No. 24-

IN THE

Supreme Court of the United States

JAMES GARY COLLINS,

Petitioner,

v.

MONTEREY COUNTY, CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Does a taking analyzed under *Lucas v. S.C. Coastal Council*[1] require that the affected property be left with no **value** even if the regulation in question deprives the property of all economically beneficial **uses**?

Does *Palazzolo v. Rhode Island*[2] leave any room for consideration of the landowners' expectations in a *Penn Central*[3] takings analysis?

Do the decisions in *Loper Bright Enters. v. Raimondo*[4], *Cedar Point Nursery v. Hassid*,[5] *Sheetz v. Cnty. of El Dorado*[6] and *Lingle v. Chevron USA, Inc.*[7], change the way courts should evaluate the "character of governmental action" factor in a Penn Central analysis?

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1. 505 U.S. 1003 (1992)

2. 53 U.S. 606 (2001)

3. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978)

4. 144 S.Ct. 2244 (2024)

5. 594 U.S. 139 (2021)

6. 601 U.S. 267 (2024)

7. 544 U.S. 528 (2005)

A LIST OF ALL PARTIES

The parties to this proceeding are James Gary Collins, Petitioner, and Monterey County, California, Respondent, both of whom are listed in the caption.

CORPORATE DISCLOSURE STATEMENT (RULE 29.6)

The Petitioner is an individual.

PROCEEDINGS DIRECTLY RELATED TO THE CASE IN THIS COURT

There are no cases "directly related" to this case as defined in Supreme Court Rule 14.1(b)(iii).

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Order of the United States District Court for the Northern District of California, filed August 18, 2023

STATEMENT OF THE BASIS OF SUPREME COURT JURISDICTION

The District Court Order Granting Defendant's Motion for Summary Judgment was entered August 18, 2023. The case was timely appealed and the Circuit Court Memorandum affirming the District Court Decision was entered June 20, 2024. Petitioner filed a motion for an En Banc Hearing which was denied by an order entered July 30, 2024. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

United States Constitution Fifth Amendment

United States Constitution Fourteenth Amendment

STATEMENT OF THE CASE

A. Introduction.

This case arises out of the Monterey County Board of Supervisors' refusal to approve Mr. Collins' request to rezone his property (21 acres in the Carmel Highlands, hereinafter referred to as the "Collins Property") to allow the construction of a home. Mr. Collins and his wife bought the property in 1994, intending to build their retirement home there.[8] (5-ER-1047)[9] At the time of his purchase, all contiguous properties were zoned for residential construction and most had homes. (3-ER-401) and (4-ER-741)

The Carmel Area Land Use Plan (CALUP) was adopted by the Monterey County Board of Supervisors in 1982 and amended several times thereafter. The most important of those amendments for this case occurred on February 16, 1994,[10] when the zoning designation on property on Spruce and Canyon Road was changed to allow residential construction. During a deposition in this case, planning staff employee, Fiona Jensen, confirmed that this property, like the Collins Property, was formerly owned by the Behavioral Science Institute (BSI). It was consequently given the benefit of the Carmel Area Land Use Plan (CALUP) special treatment designation which

8. Mrs. Collins passed away in January 2014.

9. Citations to the Circuit Court record have been maintained for some documents which do not appear in the appendix.

10. Mr. and Mrs. Collins purchased their property on February 8. 1994.

provided that all BSI properties would be zoned for residential development.

The Monterey County planning agency has twice recommended that the property be rezoned as requested by Mr. Collins—in two separate reports prepared five years apart by different planning staffers.[11] No records exist explaining why the Collins Property is zoned as it is. (4-ER-750–752) There has been no claim that the property contains wetlands, has any landmarks, or endangered plant or animal species. In short, the Collins Property has no unique characteristics when compared to the contiguous properties to justify a different zoning. (2-ER-78–79)

B. History.

In December of 1966, Mr. N. J. D'Ambrogio transferred property in the Carmel Highlands area to the Monterey County Foundation for Conservation (the "Foundation"). (3-ER-438–439) A local newspaper, the Monterey Peninsula Herald, dated December 24, 1966, described the property as consisting of 30 acres with a creek bank and a grove of redwood trees. (6-ER-1268–1270) However, the property transferred to the Foundation did not have any of these characteristics, and it was this

11. At the time of the first report (hereinafter referred to as the "2017 Agency Report") (3-ER-427–621; 4-ER-623–656) the agency was known as Resource Management Agency ("RMA"). At the time of the second report (hereinafter referred to as the "2022 Agency Report") (4-ER-657–740) the agency was known as Housing and Community Development ("HCD"). This agency is referred to hereinafter as "RMA/HCD" to avoid any confusion created by the one agency having two names at two different times.

property which ultimately became the Collins Property. A second newspaper article in the same newspaper dated February 6, 1967, quoted an official of the Foundation as indicating the intention to dedicate a property as a preserve in the memory of Major DeAmaral. (6-ER-1275–1277) That dedication never happened. Instead, the Foundation deeded a conservation and scenic easement (the "Easement"), to Monterey County. (3-ER-607–615) The property described in the Easement (the Collins Property) is not the property described in the newspaper articles. The Easement which was terminable unilaterally by the Foundation or its successor never mentions Major DeAmaral. Subsequent owners of the property, Walter and Loretta Warren, on December 21, 1990, filed a notice of termination of the Easement. (3-ER-439)

On the strength of nothing but newspaper articles in a local paper published more than fifty years ago, the DeAmaral family has vocally opposed the rezoning and converted Chairperson Adams of the Board of Supervisors to their cause.

The various transfers that took the Collins Property from the Foundation to Mr. Collins are outlined in the 2017 Agency Report of RMA/HCD. (3-ER-438–439) Properties owned by the Behavioral Science Institute, including the Collins Property (referred to hereafter as the "BSI Property"), were identified in the Carmel Area Land Use Plan as a special treatment area, developable for residential use. (4-ER-658) There are currently 12 lots that make up the BSI Property, eight of which are developed with a total of nine homes. The average elevation of these homes is 455 feet above sea level, including one home at 845 feet above sea level and one home at 260 feet above

sea level. (4-ER-666) Elevations of the Collins Property range from 450 to 860 feet above sea level. (4-ER-667)

In 2003, the California Coastal Commission did a Periodic Review of the Carmel Area Land Use Plan and prepared Map LU-12b, (4-ER-741) which shows the Collins Property as a developable parcel with one maximum allowable unit. It also shows that the contiguous properties to the north, east, and south have been zoned for residential development since 1988. The Collins Property is contiguous on its western side to the residential lots in the long-established Carmel Highlands community. (4-ER-741)

The Collins Property is zoned RC(CZ), a zoning designation which does not allow the construction of a residence. (4-ER-658) The only uses allowed (hereafter the "Allowed Uses") on RC(CZ) property are the following: (1) Resource dependent educational and scientific research facilities uses, and low intensity day use; (2) recreational uses such as trails, picnic areas and boardwalks; and (3) restoration and management programs for fish, wildlife, or other physical resources. (4-ER-666–668) Monterey County, Cal. Ordinance § 20.36.040. In other words, only public, park-like uses. However, no development permits have ever been issued for Allowed Uses on property zoned RC(CZ) in Monterey County.

Nearing retirement, in 2012 Mr. Collins began applying for the building permits and zone change necessary for his home. RMA/HCD, after an extensive review of the specific plans for the Collins home, and after requiring a number of changes in the building plans,

prepared the 2017 Agency Report recommending the necessary building permits be approved by the Monterey County Planning Commission, and that the Monterey County Board of Supervisors rezone the property.[12] (3-ER-427) This report, with exhibits, was 229 pages long. *Id.*

The Board of Supervisors' decision purportedly depended on the status of the Easement. RMA/HCD staffers expressed the opinion that the Easement had been properly terminated by Mr. and Mrs. Warren. (3-ER-474) Nonetheless, the Board of Supervisors postponed the decision on the zone change until a court could decide on the status of the Easement. (6-ER-1236) This allowed County counsel to argue that constitutional claims based on a denial of the rezone were not ripe (as the rezoning was not being denied, just delayed), substantially increasing the cost and delay of Mr. Collins' efforts to build his home.

As required by the Board of Supervisors, Mr. Collins filed an action in the United States District Court for the Northern District of California ("Collins 1"), Case Number 519-CV-01214-NC. On motion of County counsel, Mr. Collins' constitutional claims were dismissed without prejudice as unripe and the case proceeded as a quiet title action. (6-ER-1279–1291) The District Court in Collins 1, after a bench trial, determined that the Easement had been terminated, not by the Warrens, but instead by counsel for Mr. Collins. (6-ER-1288)

Having been successful in the quiet title action, Mr. Collins again applied for rezoning. RMA/HCD again

12. The report and recommendation was prepared by Anna Quenga, Associate Planner, and approved by Carl P. Holm, RMA Director. (3-ER-430)

prepared an extensive report (the "2022 Agency Report") and again recommended the rezoning. (4-ER-657) The 2022 Agency Report with exhibits was 84 pages long. (4-ER-657–740) It was prepared by planner Fionna Jensen and approved by Erik Lundquist, Director of Housing and Community Development. (4-ER-660) The RMA/HCD reported that "Staff finds that there is compelling evidence to indicate the parcel was intended to allow one residence." (4-ER-659)

The 2022 Agency Report contained Ms. Jensen's proposed resolution (the "Proposed Resolution") to be approved by the Board of Supervisors, which is thirteen pages long and contains detailed findings supporting the rezoning. (4-ER-677–690) The 2022 Agency Report and the Proposed Resolution were presented to the Board at a public hearing on March 8, 2022 (the "March 2022 Hearing"). (4-ER-826–866) The only feedback that Ms. Jensen got from any Board member after her presentation of RMA/HCD support for the zone change were comments made by Chairperson Adams centered on her support for the creation of a DeAmaral Preserve (4-ER-858–860) and comments made by Supervisor Phillips, who spoke in favor of the rezone. (4-ER-855–856)

Chairperson Adams mentioned the DeAmaral Preserve multiple times during her formal comments at the March 8, 2022 hearing. (4-ER-858 [line 25]; 4-ER-859 [lines 11-19]; 4-ER-860 [lines 11-12]) No supervisor other than Chairperson Adams and Supervisor Phillips even expressed any curiosity about the 2022 Agency Report. (4-ER-837; 4-ER-857–858; 4-ER-860)

The comments of Supervisor Phillips included the following in favor of the rezoning: (4-ER-855–856)

> I will make a motion to support staff recommendation and approve it. I don't think we've treated this man in a—fairly in the process, and I think he is entitled to do something with this property. If we deny this, all he can do is maybe can sell to the city and can raise butterflies on the property, but he has no other use. And immediately around this area are residences....
>
> And I think there is still a question of whether the De Amaral Preserve is on this land or somewhere else. But that's something we'll litigate down the road, but we're going to spend a lot of county money on it. (4-ER-856)

Only two of five supervisors said anything substantive at the March 22 Hearing—Ms. Adams and Mr. Phillips—and both made clear that the real issue was the DeAmaral Preserve claims.

At the end of the March 2022 Hearing, the Board of Supervisors determined to deny the rezone application but would not or could not say why. County counsel suggested that the Board pass a resolution indicating its intent to deny the application and directing "staff [Ms. Jensen] to return with the appropriate findings ... at a later date." (4-ER-864) This resolution was adopted on a 3-2 vote at the end of the March 2022 Hearing. (4-ER-864–865) In other words, the Board made its decision, and directed Ms. Jensen to invent excuses ("appropriate findings") for it (4-ER-863–864)—**which she did** despite later testifying that she continued to agree with her original report. Ms. Jensen prepared a three-page resolution (the "Final Resolution") listing six reasons (each referred to

hereafter as "Denial Reason No. 1," etc.) for denial of Mr. Collins' application. (4-ER-867–869) None of the six reasons invented by Ms. Jensen can be reasonably said to reflect any legitimate concerns raised by any member of the Board or the public at the March 2022 Hearing or thereafter.

The Final Resolution was adopted on April 19, 2022. (4-ER-869). The purported "reasons" given by Planner Jensen for the denial of the rezone were contradicted by the 2022 Agency Report (4-ER-657–740), she had prepared only a little over a month before. Denial Reasons 1 and 2 (4-ER-868) claimed, wrongly, that the rezone would be inconsistent with the CALUP because: (a) the entire property was visible from Highway 1 and the entire property consisted of upper steeper slopes (Denial Reason No.1) and (b) development on the property had the potential to harm Environmentally Sensitive Habitat Areas (Denial Reason No. 2).

This action ("Collins 2") was filed shortly after the adoption of the Final Resolution denying the zone change (5-ER-1048–1219; 6-ER-1221–1424). Jurisdiction in the District Court to hear Mr. Collins' claims exists under 28 U.S.C. §1331, under the Civil Rights Act, 42 U.S.C. 1983, "its jurisdictional counterpart," 28 U.S.C. §1343, 28 U.S.C. §2201 et seq., and, as to the state law claims, 28 U.S.C. §1367 (supplemental jurisdiction), and 28 U.S.C.§1332 (diversity jurisdiction).

C. Proceedings Below.

On February 21, 2023, before the expiration of discovery deadlines, the County filed its motion for

summary judgment. (4-ER-898–919) Mr. Collins responded but also pointed out that summary judgment was not appropriate because discovery deadlines had not passed and discovery was not complete. (4-ER-880–884) The District Court deferred a decision on the County's motion and ordered that the parties file supplemental briefs at the close of discovery.

Counsel for Mr. Collins then took a second deposition of Ms. Jensen (4-ER-742–807) and obtained the reports of three experts: Dr. Jeff Froke, Joel Panzer, and Susan Layne.

Dr. Froke has an extensive, relevant resume. (2-ER-73–77) and rendered the opinions that: (1) "It is unreasonable to expect development of any of the Allowed Uses [on the Collins Property] to yield revenue in excess of cost" (2-ER-78); and (2) "[T]here are, or at least were, no significant differences in the flora and fauna, or sensitive resource areas, or historical values of the Collins Property when compared to the surrounding—and now developed properties, to justify the disparate treatment of Collins with the more restrictive RC(CZ) zoning." (2-ER-90)

Mr. Panzer has a master's degree in Geography with an emphasis in rural and regional planning and environmental review from California State University (2-ER-93) and has worked as a planner or planning consultant in Monterey County for almost 40 years. (2-ER-94)

Mr. Panzer confirmed that the County has never issued a permit for the development of Allowed Uses on any property zoned RC(CZ). (2-ER-95) Mr. Panzer also reports that he is unaware of any outright denial of a

coastal development permit due to a development's: (a) visibility from Highway 1; or (b) its location on slopes in excess of 30%. (2-ER-96–97) Mr. Panzer's report points out that the Monterey County Coastal Implementation Plan ("CIP") development standards are not absolute. For example, viewshed development options include: (i) developing the portion of the parcel least visible within the public viewshed (CIP § 20.146.030.C.1); and (ii) designing a structure to minimize visibility and blending into the site and site surroundings (CIP § 20.146.030.C.1.c). (2-ER-96) Moreover, a permit for development on 30% slopes may be issued with a finding, based on substantial evidence, that: " ... *there is no alternative which would allow development to occur on slopes of less than 30% ...* " CIP § 20.146.030>c.1.a. [sic] (2-ER-97)

Susan Layne is a California licensed real estate appraiser (2-ER-149) and has rendered the opinion that the Collins Property as currently zoned has a residual value of $55,000 (2-ER-194),[13] and that the Collins Property if rezoned as requested by Mr. Collins would have a value of $1,510,000. (2-ER-170).

The District Court entered its judgment in favor of the County on all of Mr. Collins' claims on August 18, 2023. (1-ER-2–21).

Mr. Collins timely appealed and on June 30, 2024, eight days after oral argument, the Circuit Court issued a three-page Memorandum, affirming the District Court, without reference to the record and without addressing any arguments made by Mr. Collins.

13. Mr. Collins paid $129,000 for the property in 1994.

Mr. Collins' Petition for Rehearing En Banc, filed July 5, 2024, was denied by the Court of Appeals on July 30, 2024.

The Due Process claim.

There is no evidence that members of the Board of Supervisors were concerned about public health, safety, or general welfare when considering the Collins' request, and, their action bears no substantial relation to those values. *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 548 (2005) (Justice Kennedy, concurring: "This separate writing is to note that today's decision does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process.")

Ms. Jensen followed instructions to invent reasons for denial of the Collins application and did so without any further research or any further contact with any member of the Board of Supervisors. (4-ER-764; 4-ER-782) The 2022 Agency Report (prepared by Ms. Jensen) says that the rezoning of this property would be **consistent** with the BSI standards established by the Carmel Area Land Use Plan. (4-ER-686) The Final Resolution (also prepared by Ms. Jensen) says that rezoning would be **inconsistent** with the BSI standards. (4-ER-868) In addition, the Final Resolution contains a number of factual statements directly contradicted by the 2022 Agency Report. For example, the first reason given to justify the decision includes a finding that the entire property is visible from Highway 1 and that consequently the rezone is "inconsistent with the BSI development standards." (4-ER-868) However, the entire property is not visible from Highway 1 (which Ms. Jensen confirmed during her deposition). (3-ER-409) Moreover, the BSI development

standards do not require that the property not be visible from Highway 1, they require only that the units (homes) not be visible from Highway 1. (4-ER-770–771)

The *Lucas* Takings Claim.

The District Court ignored overwhelming evidence that the Collins Property as currently zoned has no economically viable use.

If the entire Collins Property constitutes the upper-steeper portion of the BSI Property as provided in the Final Resolution (it does not) and if the entire Collins property is visible from Highway 1 as provided in the Final Resolution (it is not), then the Carmel Area Land Use Plan requires the property to remain as "open space" (i.e., undeveloped). Policy 4.4.3.E.6 of the Carmel Area Land Use Plan specifies that the BSI Property may be developed for residential use, provided the units are outside of the view from Highway 1 and that the "upper steeper portion" remain in open space. (4-ER-658)

The District Court found incorrectly that Dr. Froke's report was the exclusive basis for Mr. Collins' claim that his property as currently zoned has no viable economic use. (1-ER-11) The issues discussed above regarding the reach of the Final Resolution provide all of the necessary support for Mr. Collins' claim here. However, it is hard to imagine another person who is more qualified to address this question. Dr. Froke after extensive analysis reported that "it is unreasonable to expect development of any of the Allowed Uses to yield revenues in excess of cost." (2-ER-78)

The *Penn Central* Takings Claim.

The consideration of the *Penn Central* factors should have resulted in a determination that the Board of Supervisors' action was an unconstitutional taking of the Collins Property.

Adverse Impact on Mr. Collins.

The District Court found that because the appraisals of Ms. Layne relied on the opinion of Dr. Froke and because the District Court discounted Dr. Froke's opinion in this regard, Mr. Collins did not present evidence sufficient to create a genuine controversy about the adverse impact of the regulation. (1-ER-13) This finding was mistaken in many ways, and also ignored the obvious—that the property has less value as currently zoned than it would if rezoned to allow residential development. Even the appraiser engaged by the County determined that there was a significant difference between the value of the property as currently zoned ($158,000.00) and the value of the property if rezoned ($950,000.00). (2-ER-200)

Interference With Investment-Backed Expectations.

In discussing this element, the District Court ignored most of the evidence which makes Mr. Collins' expectations of obtaining a rezone objectively reasonable. Instead, the District Court concluded:

> Given the multiple levels of uncertainty inherent in the zoning and construction process, no objectively reasonable person would have

> believed they had a reasonable probability of obtaining Collins' desired outcome [a rezoning of the property]."[14]

The District Court listed general factors which will likely be present in any case in which notice of the restriction at the time of purchase is an issue.[15] (1-ER-13) These factors are resolved favorably to Mr. Collins by the holding of the United States Supreme Court in *Palazzolo v. Rhode Island, supra,*[16] which was that the *Penn Central* claim is not barred by the fact that an owner's title was acquired after the effective date of the particular regulation. *Id.* at 627.

The lower court decisions do not account for the multitude of people who did think there was a "reasonable probability" that the property would be rezoned—including: (a) the staff and management of the RMA/HCD who in 2017 did an extensive evaluation of the property and Mr. Collins' building plans and produced a 229-page report recommending not only that the property be rezoned, but that the necessary building permits be issued for the Collins' Property; (b) the architects, engineers, biologists, lawyers, and the like, that Mr. Collins had to employ to

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14. Order at p. 12 (1-ER-14)

15. The general seriousness of zoning laws, the uncertainty of political processes, and knowledge of restriction at the time of purchase.

16. While the District Court cites to *Palazzolo* in its discussion of ripeness (1-ER-10), it does not mention the holding in *Palazzolo* that a buyer's notice of the restriction does not eliminate a *Penn Central* claim.

satisfy the RMA/HCD permitting requirements.[17] (c) the staff and management of RMA/HCD who in 2022 produced an 84-page report recommending that the property be rezoned.[18] For that matter if there was no reasonable probability of success, why should the Board of Supervisors insist Mr. Collins undertake the quiet title action of Collins 1, rather than deny rezoning from the outset?

Neither the County nor the District Court nor the Circuit Court offered any explanation as to why it was not objectively reasonable for Mr. Collins to expect to obtain rezoning. It is not patently obvious that a person buying property surrounded by residential properties could not reasonably think that he could get whatever zoning needed to build a home on his property. Nor was there any claim that it is harder to get a property rezoned in Monterey County than in other counties. Should the decision be different in the City of Yuma where over a three-year period, 75 out of 76 rezoning requests were granted?[19]

The lower courts' decisions relegate the holding in *Palazzolo* to an insignificant and ultimately nonsensical standing decision. A pre-acquisition restriction will not prevent a takings claim by the new owner, but the existence of the restriction will surely count against his takings claim and in some cases in some jurisdictions will be dispositive on the takings issue.

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17. All as described in the 2017 Report.

18. In 2022, after his success in the quiet title action (Collins 1) Mr. Collins applied only for the rezone.

19. See, *Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 497 (9th Cir. 2015).

We know that Mr. Collins' expectations were "investment-backed". He purchased the property in 1994 for $129,000 intending to build his retirement home there. He has continued to pay property taxes even though he has received no income from the property. In 2012 he began to apply for the building permits necessary to construct his home. He has not itemized his costs in those efforts, but even a cursory glance at the 2017 Agency Report will make it clear that those costs were considerable because that report details the work of Mr. Collins' architects, lawyers, biologist, etc, that led ultimately to the planning agency's decision to recommend the necessary building permits be granted and that the property be rezoned. Since that time, Mr. Collins has incurred the enormous costs of prosecuting two Federal lawsuits (Collins 1 and 2) and the costs of appeal of this case.

The Equal Protection Claim.

The reason for the District Court's decision on the Collins Equal Protection claim was as follows:

> Collins fails to provide any identifying information regarding these properties. Most importantly, Collins doesn't specify the zoning information, history of rezoning (if any) or treatment by the relevant authorities. In doing so, Collins puts the cart before the horse and deprives the Court of the necessary context by which to adjudge the Board's allegedly pretextual reasoning. (1-ER-20–21)

Neither the Board, nor RMA/HCD, nor counsel for the County, nor the District Court explained how

characteristics of the contiguous properties not identified by Mr. Collins might impact the equal protection analysis. No one has claimed, for example, that the Collins Property is unique historically, archeologically, or geologically when compared to contiguous properties.

THE REASONS THIS PETITION SHOULD BE GRANTED:

This case presents an opportunity for the resolution of exceptionally important and controversial issues in the law of takings under the Fifth and Fourteenth Amendments to the Constitution.

This case raises the question of whether in *Lucas*-type takings claims the key is loss of value or loss of economically viable use. There was a split of authority even in this case. The District Court here took the "uses" road and the Circuit Court took the "value" road.

This case presents the opportunity to finally reconcile the holding in *Palazzolo* with the holdings in *Penn Central*. The logic of *Palazzolo* dictates an abandonment of the owner's expectations factor in the *Penn Central* analysis. Yet many courts view *Palazzolo* as only a standing case, having no substantive effect on the takings analysis. See, Gregory M. Stein, The Modest Impact of *Palazzolo v. Rhode Island*, 36 Vermont Law Review 675 (2012). The Circuit Court in this case ruled that the existence of the restrictive zoning prior to Mr. Collins' acquisition of the property meant that in the opinions of the lower courts he could not establish **any** of the three *Penn Central* factors.

Recent decisions in this Court should significantly change the evaluation of the "character of government action" factor in *Penn Central*—making clear that property rights are not poor relations to other constitutional rights and by making clear that local government interpretations of their own regulations are not entitled to particular deference. Recent decisions in this court overrule cases like *Halverson v. Skagit County*,[20] a case relied upon by both the District Court and the Circuit Court in this case.

ARGUMENT

Introduction:

The decisions of the District Court and the Ninth Circuit Court of Appeals on all the Collins claims are remarkable for their deference to the claims made by the County and the disregard of the claims made by Mr. Collins.

This extreme deference to local government infects substantive Due Process claims, Takings Clause claims and, at least in this case, Equal Protection claims alike. It is symptomatic of the hesitancy of courts to appear to second guess legislative decisions about the need for, and potential effectiveness of legislation. For example, with respect to Mr. Collins' substantive Due Process claim, the courts below relied on the holding in *Halverson v. Skagit County*,[21] for the proposition that in property-related due process cases there is no requirement that the government's action actually advances its stated purpose:

20. 42 F. 3rd 1257 (9th Cir. 1994)

21. 42 F. 3rd 1257 (9th Cir. 1994)

> "[W]here, as here, the plaintiffs rely on substantive due process to challenge governmental action that does not impinge on fundamental rights, we do not require that the government's action actually advance its stated purposes, but merely look to see whether the government *could* have had a legitimate reason for acting as it did."

Id. at 1262.

It will be a rare local government that cannot come up with a land use decision which *could* have a legitimate reason. If courts will "merely look to see whether the government *could* have had a legitimate reason for acting as it did," that is the end of the inquiry. If a government is creative enough with its statement of its purposes, the Court will not permit the affected landowner to rebut that claim.

But some evaluation of regulations is necessary. If courts cannot take a hard look at the real purposes and likely outcome of land use decisions, they cannot determine whether the restriction is arbitrary and irrational (for Due Process purposes), or that a land use restriction goes too far (for Takings Clause purposes) if they do not take a hard look at how far the restriction actually goes.

This is not a case in which deference is owed to the District Court's review of the evidence because the County presented no evidence.

DOES A TAKING AS ANALYZED UNDER *LUCAS*[22] REQUIRE THAT THE AFFECTED PROPERTY BE LEFT WITH NO VALUE EVEN IF THE REGULATION IN QUESTION DEPRIVES THE PROPERTY OF ALL ECONOMICALLY BENEFICIAL USES?

Answer: This is still very much an open question, but elimination of all economically viable uses seems more like the functional equivalent of a government occupation of the property than does the elimination of value, and is consistent with the actual language used by the Court in *Lucas*.

The Circuit Court took the "value" road and found that "[T]he complete elimination of a property's value is the determinative factor" for the application of a *Lucas* taking. Circuit Court Memorandum filed June 20, 2024 at page 2. The District Court took the "economically viable uses" road. The District Court discounted the detailed opinion of Collins' expert, Dr. Froke, who concluded that the Allowed Uses would be unlikely to ever generate income in excess of costs. The District Court completely ignored the Collins argument that the six reasons the County gave in its Final Resolution will, although illegitimate, require the property to remain undeveloped.

On the other hand, the District Court accepted at face value the County's assertion that the Allowed Uses gave the property economically viable uses even though the County presented no evidence on this point and did not rebut the claims made by Mr. Collins.

22. 505 U.S. 1003 (1992).

In *Lucas* this Court ruled that:

> We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

Lucas, supra, at 1019.

However, the Court in *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*,[23] emphasized value over economic viability. The dissenters described the decision of the majority as follows:

> The Court also reads *Lucas* as being fundamentally concerned with value, *ante*, at 25-27, rather than with the denial of "all economically beneficial or productive use of land," 505 U.S. at 1015. But *Lucas* repeatedly discusses its holding as applying where "*no* productive or economically beneficial use of land is permitted." ....

Id. at 350. (Rehnquist dissent, joined by Scalia and Thomas).

Recently, this Court has adopted the position of the dissenting justices in *Tahoe-Sierra*, and put the emphasis back on the denial of economic uses rather than denial of all value as the touchstone of a *Lucas* taking:

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23. 535 U.S. 302 (2002).

> ("[T]he Fifth Amendment is violated when land-use regulation does not substantially advance legitimate state interests[24] or denies an owner economically viable **use** of his land" (internal quotation marks omitted))

Sheetz v. County of El Dorado[25] (Emphasis supplied.)

Where, as here, the government requires property to remain idle that is the functional equivalent of an actual occupation of the land by the government. While the land may have some residual value, the value is entirely speculative, having significant value only to a person who believes he can one day get the restriction lifted[26]. The law should not, in that case, put the risk that the property can be sold on the landowner and ignore the value lost because of the government restriction. The speculative risks will not be placed on the government in any event because, the compensation to be paid by the government will presumably be measured by the loss caused by the regulation less the value (if any) of the property retained by the landowner.

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24. But, see the discussion below regarding *Lingle v. Chevron U.S.A, Inc.* and the "substantially advances" part of this takings formulation.

25. 601 U.S. 207, 274 (2024)

26. All the more troubling given the district court below would find such a buyer's belief was not objectively reasonable despite *Palazzolo*

DOES *PALAZZOLO V. RHODE ISLAND*[27] LEAVE ANY ROOM FOR CONSIDERATION OF THE LANDOWNER'S EXPECTATIONS IN A *PENN CENTRAL* TAKINGS ANALYSIS?

Answer: No.

Palazzolo's basic premise is that if a land use restriction constitutes a taking, the transfer of the affected property does not prevent the transferee from pursuing compensation for the taking:

> Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the *Takings Clause*. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

533 U.S. 627.

This holding is not qualified by reference to the identity of any subsequent purchaser or by reference to when the transfer occurs or what the expectations of the subsequent purchaser are at the time of the transfer. But if this is so, the expectations of some unknown future buyer have nothing to do with whether a taking has occurred.

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27. 533 U.S. 606 (2001).

If, on the other hand, the claimant/landowner buys the property before the land use restriction is adopted, why would his expectations be relevant to the question of whether a taking has occurred? Suppose for example, a speculator expects the county to adopt a limit on wetlands development and suppose the idea of such a limit has been batted around for a long time and is well known. If the wetlands development limit would have been a taking before the speculator bought the property, why should his buying the property change that calculus? If the speculator sells the property before resolution of the takings issue, is it the transferee's expectation that is relevant to the takings determination?

On its face the Takings Clause requires an answer to two basic questions: (a) was the claimant's property taken by the government, and (b) if so, what constitutes just compensation for what was taken? The landowner's expectations and investments are relevant to the issue of the value of what was taken only if the concern is (as was Justice O'Connor's concern in *Palazzolo*) that the claimant not receive a windfall. But if that is a concern, surely there are better ways to address windfall profits than by illogical engineering of the definition of takings.

Suppose Mr. Collins spent nothing on the property and had no expectations at the time he acquired the property (for example by gift or inheritance) and later filed a motion for an application to rezone his property. And suppose the County is found to have taken his property. Is just compensation determined by a reasonable appraisal of the property or is just compensation determined to be $0 because Mr. Collins had no expectations and made no investments in the property?

Justice O'Connor justified the "owner expectations" factor in *Penn Central* as a way to prevent windfall profits to real estate speculators. Justice Scalia's response to Justice O'Connor included the following analysis:

> The principle that underlies her separate concurrence is that it may in some (unspecified) circumstances be "[un]- fai[r]," and produce unacceptable "windfalls," to allow a subsequent purchaser to nullify an unconstitutional partial taking (though, inexplicably, not an unconstitutional total taking) by the government. Ante, at 635. The polar horrible, presumably, is the situation in which a sharp real estate developer, realizing (or indeed, simply gambling on) the unconstitutional excessiveness of a development restriction that a naïve landowner assumes to be valid, purchases property at what it would be worth subject to the restriction, and then develops it to its full value (or resells it at its full value) after getting the unconstitutional restriction invalidated.
>
> This can, I suppose, be called a windfall—though it is not much different from the windfalls that occur every day at stock exchanges or antique auctions, where the knowledgeable (or the venturesome) profit at the expense of the ignorant (or the risk averse). There is something to be said (though in my view not much) for pursuing abstract "fairness" by requiring part or all of that windfall to be returned to the naïve original owner, who

> presumably is the "rightful" owner of it. But there is nothing to be said for giving it instead to the government—which not only did not lose something it owned, but is both the cause of the miscarriage of "fairness" and the only one of the three parties involved in the miscarriage (government, naïve original owner, and sharp real estate developer) which acted unlawfully—indeed unconstitutionally.

533 U.S. at 636.

Apart from concerns about windfalls to speculators (which Justice Scalia has so clearly dispensed with in his *Palazzolo* concurring opinion), there is no logical connection between the expectations of the property owner and the question of whether a takings has occurred.

Moreover, there is no good reason to suspect that speculators are standing in line to purchase properties which have regulatory restrictions which may lead to a successful takings claim. See, *Lost Tree Vill. Corp. v United States*[28] *(*"In the real world, real estate investors do not commit capital either to undevelopable property or to long, drawn-out, expensive and uncertain takings lawsuits.")

The Circuit Court held (again without citation to authority or to the record):

> The County's decision merely maintained the existing designation and was not at all

28. 787 F.3d 1111, 1118 (Fed Cir., 2015), *cert. denied* 137 S. Ct. 2325 (2017).

> comparable to a physical invasion of his property.

Taken literally, this would mean that government agencies have no obligation to compensate property owners for, or correct past takings deemed to have occurred prior to, the acquisition of the property. In other words, this logic renders the decision of this Court in *Palazzolo* toothless. In the Ninth Circuit the landowner who acquires property after the effective date of a land use restriction has standing to bring a takings claim, but will fail all three *Penn Cen*tral factors—(a) the "character of government action," because the government need take no action, (b) the owner expectations factor, because the owner had notice of the land use restriction before he purchased the property, and (c) the adverse impact on the owner factor, because the owner knew what he was getting into.

Any reasonable weighing of the benefits to the public as against the losses to Mr. Collins comes out decidedly in favor of Mr. Collins. The Collins Property has no historic buildings, no wetlands, no archeological sites, it has no endangered plants or animals. Even if it did have any of these characteristics, they could not be enjoyed by the community because the property is still owned by Mr. Collins who will retain at least the ability to exclude the public from his property.

DO THE DECISIONS IN *LOPER BRIGHT ENTERS. V. RAIMONDO, CEDAR POINT NURSERY V. HASSID, SHEETZ V. CNTY. OF EL DORADO* AND *LINGLE V. CHEVRON USA, INC.* CHANGE THE WAY COURTS SHOULD EVALUATE THE "CHARACTER OF GOVERNMENTAL ACTION" FACTOR IN A *PENN CENTRAL* ANALYSIS?

Answer: Yes as to *Loper, Cedar Point*, and *Sheetz*; No as to *Lingle*.

The Fifth Amendment just compensation requirement is "designed to bar the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." The Court's decision in *Penn Central, supra*, has for more than 50 years provided the standards for the evaluation of claims of regulatory takings, but those standards have proven to be very difficult to apply. Mr. Justice Thomas has described the problem this way:

> The Court has "generally eschewed any set formula for determining how far is too far," requiring lower courts instead "to engage in essentially ad hoc, factual inquiries." .... " But courts must also "'weig[h] ... all the relevant circumstances.'" As one might imagine, nobody—not States, not property owners, not courts, nor juries—has any idea how to apply this standardless standard.

Bridge Aina Le'a, LLC v. Haw. Land Use Comm'n. [29] J. Thomas dissent to denial of petition for certiorari. Accord,

29. 141 S.Ct. 731 (2021).

Pomeroy, 22 Fed. Cir. B.J. 677, *Penn Central* after 35 years: A Three Part Balancing Test or a One Strike Rule (2012-2013). Given the "ad hoc, factual inquiries" involved, it is distressing to see the district court make no findings of fact.

If the property owner's expectations are not a factor to be considered for the reasons discussed above, then a takings analysis requires only a balancing of public and private interests. A simple balancing of public and private interests was suggested, in fact, by Justice O'Connor in her concurring opinion in *Palazzolo v. Rhode Island*:

> We have "identified several factors that have particular significance in these "essentially ad hoc, factual inquiries. Two such factors are the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations. **Another is "the character of the governmental action. The purposes served, as well as the effects produced, by a particular regulation inform the takings analysis.** [A] **use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose, or perhaps if it has an unduly harsh impact upon the owner's use of the property"**);

Id. at 633-634 (O'Connor concurring) (Internal citations and quotation marks eliminated. Emphasis supplied.) The highlighted language from Justice O'Connor points to a balancing in which a taking may be found even when

some public purpose is served by the restriction if the impact of the restriction on the landowner is "unduly harsh." There is no mention of the expectations of the landowner in this example. This balancing addresses the two *Penn Central* factors necessary for a fairness and justice determination—the impact to the landowner and the public purpose served. Although the *Penn Central* decision does not mention balancing, and although Justice O'Connor does not expressly advocate a balancing of the factors, her description of the "character of governmental action" factor—"**[t]he purposes served, as well as the effects produced, by a particular regulation"—**certainly invites a balancing with the effect of the regulation on the rights of the landowner. It does not remotely justify any deference to governmental explanations of the purposes or effect of the regulation.[30]

In its decision affirming the District Court's summary judgment on the Collins due process claim, the court of appeals echoed the District Court and ruled that:

> [T]the county's decision explained that rezoning the property would be inconsistent with the broader use plan for the area that preserved its natural character.

Circuit Court Memorandum at p.2.

The "broader use plan for the area"—the Carmel Area Land Use Plan ("CALUP")—of course designates

30. The Court's rejection of the similar "substantially advance legitimate state interests" test in *Lingle v. Chevron* (in an opinion authored, ironically, by Justice O'Connor) is addressed below.

certain areas to be preserved. However, the CALUP also identifies areas in which housing development is allowed and expected. In its briefs below, Mr. Collins showed that the decision of the Board to deny the Collins zone change request was inconsistent with the CALUP. The "findings" of the Board were also inconsistent with the findings of the County's planning agencies and they were inconsistent with the development which has already occurred on other parts of the BSI property.

This deference shown to the Board of Supervisors' interpretation of the CALUP was never appropriate and is certainly not supportable after *Loper, and Cedar Point*.

Nothing in the language of the Constitution suggests that property rights are of less importance than the other rights addressed in the Bill of Rights. Indeed, property rights are the only rights mentioned repeatedly in the first ten amendments (See the 3rd, 4th, and 5th Amendments).

In *Cedar Point Nursery, supra*, this Court reversed the Ninth Circuit Court of Appeals and held that a California Statute that required land owners to give access to their property to union organizers was a taking under the Fifth Amendment. This Court described the Fifth Amendment and the importance of property rights in this way:

> The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides: [N]or shall private property be taken for public use, without just compensation." The Founders recognized that the protection of private property is

> indispensable to the promotion of individual freedom. As John Adams tersely put it, [p]roperty must be secured, or liberty cannot exist." Discourses on Davila, in 6 Works of John Adams 280 (C. Adams ed. 1851). This Court agrees, having noted that protection of property rights is necessary to preserve freedom and empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them....

594 U.S. 139, 147. (Internal citations and quotation marks omitted.).

Sheetz v. County of Eldorado involved this Court in review of a traffic impact fee adopted by the County Board of Supervisors and imposed as a condition to the issuance of a building permit for the construction of a modest home. Mr. Sheetz paid the fee under protest and then brought suit in California on the theory that the fee was an improper exaction and, consequently, a takings prescribed by this Court's holdings in *Nollan v. California Coastal Commn.*[31] and *Dolan v. City of Tigard.*[32] The County argued successfully in the lower courts that *Nollan* and *Dolan* applied only to permit conditions set by administrators, not to fees imposed by Board-enacted legislation. This Court reversed and held that the Takings Clause does not distinguish between legislative and administrative imposed permit conditions. In the course of its opinion the Court said this about the Takings Clause:

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31. 483 U.S. 825 (1987).

32. 512 U.S. 374 (1994).

> Failing to give like treatment to legislative conditions on building permits would thus relegate the just compensation requirement] to the status of a poor relation to other constitutional rights. In sum, there is no basis for affording property rights less protection in the hands of legislators than administrators. The Takings Clause applies equally to both—which means that it prohibits legislatures and agencies alike from imposing unconstitutional conditions on land-use permits.

Sheetz, 601 U.S. 679 (2024)(Internal citations and quotation marks omitted. Emphasis supplied.)

Responding to claims in dissent that the *Cedar Point* ruling would involve the Court in legislating, the Court said:

> With regard to the complexities of modern society, we think they only reinforce the importance of safeguarding the basic property rights that help preserve individual liberty, as the Founders explained. In the end, the dissent's permissive approach to property rights hearkens back to views expressed (in dissent) for decades. See, e.g., *Nollan*, 483 U. S., at 864 (Brennan, J., dissenting) ("[The Court's] reasoning is hardly suited to the complex reality of natural resource protection in the 20th century."); *Loretto*, 458 U. S., at 455 (Blackmun, J., dissenting) ("[T]oday's decision ... represents an archaic judicial response to a modern social problem."); *Causby*, 328 U. S., at

> 275 (Black, J., dissenting) ("Today's opinion is, I fear, an opening wedge for an unwarranted judicial interference with the power of Congress to develop solutions for new and vital national problems."). As for today's considered dissent, it concludes with "Better the devil we know ... ," post, at 16, but its objections, to borrow from then-Justice Rehnquist's invocation of Wordsworth, "bear[ ] the sound of 'Old, unhappy, far-off things, and battles long ago,'" Kaiser Aetna, 444 U. S., at 177.

594 U.S. 139, 158-59.

Loper, supra, involved a challenge to a rule promulgated by the Marine Fisheries Service (MFS) which required some fishing boats to allow government observers to travel with the boats and required boat owners to pay the salaries of those observers. Faced with the claim that the relevant statute did not authorize such a regulation, the lower courts cited *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc*[33] for the proposition that courts are required to defer to "permissible" agency interpretations of the statutes those agencies administer—even when a reviewing court reads the statute differently. The *Loper* Court overruled *Chevron*. The Court relied, in part, on the Administrative Procedure Act provisions expressly granting to the courts the responsibility to interpret the law, 5 U. S. C. §706, but made clear that court's powers in that regard stretches back to *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177, 2 L. Ed. 60 (1803). ("It is emphatically the province

33. 467 U. S. 837 (1984)

and duty of the judicial department to say what the law is."). The *Loper* Court's reasoning is summarized in the following passage:

> [A]gencies have no special competence in resolving statutory ambiguities. Courts do. The Framers anticipated that courts would often confront statutory ambiguities and expected that courts would resolve them by exercising independent legal judgment. Pp. 21–23.

144 S. Ct. 2244, 2251. This reasoning is equally applicable to interpretation of state and local regulations., like CALUP.

The County's incorrect and unsubstantiated claim that the requested rezone would be inconsistent with the CALUP is entitled to no greater deference than are the claims of the planning agencies and Mr. Collins that the rezone would be consistent with the CALUP.

Lingle purports to severely limit the following tried and true definition of a takings requiring compensation:

> T]he Fifth Amendment is violated <u>when land-use regulation does not substantially advance legitimate state interests</u> or denies an owner economically viable use of his land" (internal quotation marks omitted)).

This Court ruled that the "substantially advances" formula is not a valid method of identifying regulatory takings for which the <u>*Fifth Amendment*</u> requires just compensation".

However, this changes little or nothing in a proper understanding of the requirements of *Penn Central*. Justice O'Connor[34] in her concurring opinion in *Palazzolo*, defined the "character of governmental action" factor to require an examination of "[t]he purposes served, as well as the effects produced, by a particular regulation." This does not require a different analysis of governmental action than does an examination of whether "a regulation substantially advances legitimate state interests."

The *Lingle* opinion included the following reasoning:

> In stark contrast to the three regulatory takings tests discussed above, the "substantially advances" inquiry reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is *distributed* among property owners. In consequence, this test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property; it is tethered neither to the text of the *Takings Clause* nor to the basic justification for allowing regulatory actions to be challenged under the Clause.

544 U.S. 528, 542.

There is nothing in the three *Penn Central* factors explicitly requiring the revelation of the "*magnitude or*

34. Who, ironically, was the author of the opinion in Lingle.

character of the burden a particular regulation imposes upon private property rights" nor is there anything in *Penn Central* that specifically requires a finding about how any regulatory burden is *distributed* among property owners. So, in that sense the "substantially advances" test is no different than what we have now.

> Finally, the "substantially advances" formula is not only *doctrinally* untenable as a takings test—its application as such would also present serious practical difficulties. The *Agins* formula can be read to demand heightened means-ends review of virtually any regulation of private property. If so interpreted, it would require courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which courts are not well suited. Moreover, it would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies.

Id. at 544.

This is really the heart of the problem of *Penn Central* standards—the reluctance of courts to evaluate the efficacy of legislation and regulations which has led to cases like *Halverson, supra*. Moreover, the *Penn Central* "character of governmental action" factor as described by Justice O'Connor in her concurring opinion in *Palazzolo* requires an examination of "the purposes served, as well as the effects produced, by a particular regulation." This requires no less an evaluation of legislation than does the "substantially advances test." Constitutional cases impose unique burdens on courts. The Collins case should have

been easy because the Board's decision created no public benefits while it prevents the construction of one modest home on the Collins Property. Other cases will be harder. But the *Cedar Point* decision and common sense make clear that the effort is required.

More than this, the Court in *Sheetz* has revived the "substantially advance legitimate state interests" test verbatim:

> "[T]he Fifth Amendment is violated when land-use regulation does not substantially advance legitimate state interests or denies an owner economically viable use of his land" Quoting from *Lucas v. South Carolina Coastal Council*, 505 U. S. 1003, 1016, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).

601 U.S. 267, 274 (2024).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 28, 2024

APPENDIX

TABLE OF APPENDICES

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JUNE 20, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-16153

JAMES G. COLLINS,

Plaintiff-Appellant,

v.

COUNTY OF MONTEREY,
A GOVERNMENT ENTITY,

Defendant-Appellee.

June 12, 2024, Argued and Submitted,
San Francisco, California; June 20, 2024, Filed

Appeal from the United States District Court
for the Northern District of California. D.C.
No. 5:22-cv-02560-NC. Nathanael M. Cousins,
Magistrate Judge, Presiding.

Before: SCHROEDER, GOULD, and R. NELSON, Circuit Judges.

Appendix A

MEMORANDUM*

James Collins appeals the district court's grant of summary judgment in favor of the County of Monterey in his 42 U.S.C. § 1983 action challenging the County's refusal to approve his request for rezoning. Collins sought to construct a home on property he had purchased that was designated a resource conservation zone. That designation prohibits residential construction.

Collins first contends that the County's decision denied him substantive due process because it lacked any substantial relation to the public health, safety, or general welfare. Yet, the County's decision explained that rezoning the property would be inconsistent with the broader use plan for the area that preserved its natural character. Collins has thus failed to show the government could have had no legitimate reasons for its decision. *See Halverson v. Skagit County*, 42 F.3d 1257, 1262 (9th Cir. 1994).

Collins also argues that the County's decision deprived his property of any economically viable use. His own expert appraised the property as having significant economic value, so there was no taking within the meaning of *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 332, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002) (A *Lucas*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

taking occurs only in the "'extraordinary case' in which a regulation permanently deprives property of all value.").

Collins's alternative takings claim also fails because he did not proffer evidence showing that any of the *Penn Central* factors weigh in his favor. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978) (setting forth three factors for determining whether a taking has occurred). It was not objectively reasonable for Collins to expect to build a residence on the property because he purchased it knowing that the zoning designation did not permit him to do so. The County's decision merely maintained the existing designation and was not at all comparable to a physical invasion of his property. Moreover, the economic impact of the County's decision cannot be assessed because Collins failed to offer an appraisal of the property's value before the decision.

To establish an equal protection violation, Collins had to provide evidence of similarly situated owners of property that the County treated differently than he was. *See Gerhart v. Lake County*, 637 F.3d 1013, 1022 (9th Cir. 2011). Collins showed only that other properties in the surrounding area had homes constructed on them. He did not establish the properties were similarly situated in all material respects.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FILED AUGUST 18, 2023

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

Case No. 22-cv-02560-NC

JAMES G. COLLINS,

Plaintiff,

v.

COUNTY OF MONTEREY,

Defendant.

Filed August 18, 2023

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Re: ECF 44

After years of sparring, Plaintiff James Collins' claim of unconstitutional conduct by elected officials of Defendant County of Monterey (the "County") reaches an inflection point. This case concerns the decision by the County Board of Supervisors (the "Board") to deny Collins' application to rezone his property to a less-restrictive

designation. Collins asserts the Board's decision not only deprived him of his chance to build his retirement home without compensation, but also constituted impermissible machinations by elected officials. The central issue boils down to whether the Board's actions represent unconstitutional transgressions or mere byproducts of the democratic process. After consideration of the briefings, Collins' claims decisively lie with the latter. Therefore, the Court GRANTS the County's motion for summary judgment.

BACKGROUND

A. Property Overview

This dispute concerns an undeveloped 21-acre property located on Mt. Devon Road in Monterey County, California (the "Property"). ECF 56, Ex. D at 1. The Property is located on a forested hillside in Carmel Highlands. *Id.* Prior to Collins' ownership, the Property was part of a larger tract. In 1966, the land was donated to the Monterey County Foundation for Conservation. *Id.* at 7. The Foundation subsequently granted a Conservation and Scenic Easement Deed (the "Easement") to the County. *Id.* The Foundation later granted the land to the Behavioral Sciences Institute ("BSI"). *Id.*

In 1983, the County adopted the Carmel Area Land Use Plan ("CAR LUP"). At that same time, the Collins' Property was rezoned to Resource Conservation Coastal Zone ("RC(CZ)"). *Id.* at 8. The RC(CZ) zoning ordinance requires a coastal administrative permit, unless exempt, for the following principal uses: "Resource dependent

educational and scientific research facilities uses, and low intensity day use recreation uses such as trails, picnic areas and boardwalks; Restoration and management programs for fish, wildlife, and other physical resources." *Id.* at 12. The RC(CZ) zoning designation does not allow residential development. *Id.* at 11. The CAR LUP also listed the broader BSI lands as Special Treatment Areas. *Id.* at 9. In pertinent part, this stated "the BSI lands may be developed for residential use . . . The upper steeper portions shall remain in open space." *Id.*

In 1994, Collins and his wife purchased the Property. *Id.* at 8. Twenty years later, Collins filed an application requesting approval for construction of a single-family dwelling and rezoning. *Id.* Collins sought to rezone the Property from RC(CZ) to Watershed and Scenic Conservation, Special Treatment, Coastal Zone, which permits residential development. ECF 44, Ex. D at 1. The Board denied Collins' application without prejudice pending judicial determination concerning the status of the Easement. *Id.*

B. Collins I

Collins filed suit before this Court seeking a declaratory judgment of quiet title on his property as to the Easement (*Collins I*). In *Collins I*, Plaintiff asserted the Easement had been terminated. Alternatively, Collins claimed the County should be equitably estopped from enforcing the Easement because he was a good faith purchaser for value without notice of the encumbrance. This Court presided over a three-day bench trial on these issues.

Appendix B

The Court issued its Findings of Fact and Conclusions of Law. *See Collins v. County of Monterey*, No. 19-cv-01214-NC, 2021 U.S. Dist. LEXIS 77733, 2021 WL 1561511, at *1-2 (N.D. Cal. Apr. 21, 2021). The Court held the Easement was terminated in 2019. 2021 U.S. Dist. LEXIS 77733, [WL] at *6. The Court also concluded that Collins was aware of the Easement and zoning designation when he purchased the property. *Id.* Thus, he was not a good faith purchaser for value. *Id.*

C. The Present Dispute

Following the Court's decision, Collins again submitted an application to rezone the Property from RC(CZ) to Watershed and Scenic Conservation. ECF 56, Ex. D at 3. Members of the County's Housing and Community Development ("HCD") staff prepared a report on Collins' Property for the Board. The report outlined the historical background and allowed uses of the Property, as well as environmental considerations under the California Environmental Quality Act. The HCD staff also submitted a Draft Board Resolution. *See* ECF 56, Ex. G. The Draft Resolution recommended adopting " a resolution of intent to approve the Local Coastal Program Amendment to rezone the property from Resource Conservation, Coastal Zone ["RC(CZ)"] to Watershed and Scenic Conservation." *Id.* at 13.

On March 8, 2022, the Board held a public hearing on Collins' rezoning application. *See* ECF 56, Ex. H. The hearing included testimony from HCD staff member, Fionna Jensen, members of the public, Collins'

representative, and Collins himself. At the conclusion of the hearing, the Board adopted a resolution of intent to deny the application for the rezone. *Id.* at 39:14-40:3. On April 19, 2022, the Board adopted the Resolution denying Collins' application. ECF 56, Ex. I. In the Resolution, the Board concluded that the rezoning was inconsistent with the BSI development standards because the Property "contains slopes exceeding 30%, has the highest elevation of all BSI properties, and is visible from Highway 1 and Point Lobos." *Id.* at 2 Additionally, the Board found the rezoning had the potential to impact sensitive biological resources, and that the RC(CZ) zoning is consistent with the original intent of the easement and requirements of properties designated Forest and Upland Habitat. *Id.* at 2-3. Overall, the Board concluded, "[p]ublic policy supports preservation of the subject property." *Id.* at 3.

The present litigation shortly followed. The County filed this motion for summary judgment. ECF 44 ("Mot."). Collins filed an opposition, wherein he requested additional briefing and discovery. ECF 47 ("Opp'n"). The Court granted Collins' request. ECF 51. Following the County's reply brief (ECF 48), Collins timely filed his supplemental briefing with expert reports. ECF 56 ("Pl.' Suppl."). The County also filed a supplemental reply. ECF 63.

LEGAL STANDARD

Summary judgment may be granted only when, drawing all inferences and resolving all doubts in favor of the nonmoving party, there is no genuine dispute as to any material fact. Fed. R. Civ. P. 56(a); *Tolan v. Cotton*,

572 U.S. 650, 651, 134 S. Ct. 1861, 188 L. Ed. 2d 895 (2014); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). A fact is material when, under governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* Bald assertions that genuine issues of material fact exist are insufficient. *Galen v. Cnty. of L.A.*, 477 F.3d 652, 658 (9th Cir. 2007).

The moving party bears the burden of identifying those portions of the pleadings, discovery, and affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Once the moving party meets its initial burden, the nonmoving party must go beyond the pleadings, and, by its own affidavits or discovery, set forth specific facts showing that a genuine issue of fact exists for trial. Fed. R. Civ. P. 56(c); *Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1004 (9th Cir. 1990) (citing *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983)). All justifiable inferences, however, must be drawn in the light most favorable to the nonmoving party. *Tolan*, 572 U.S. 651 (citing *Liberty Lobby*, 477 U.S. at 255).

DISCUSSION

Although styled as a partial motion for summary judgment, the County's motion attacks each of Collins' three causes of action. Consistent with the County's request, the Court addresses the briefings as a motion

for summary judgment of all of Collins' claims. *See* Reply at 1 n.1.

I. Preliminary Considerations[1]

The County requests the Court take judicial notice of the following documents in support of its motion for summary judgment: (1) Monterey County Board of Supervisors Resolution No. 22-125; (2) Findings of Fact and Conclusions of Law, *Collins v. County of Monterey*, No. 19-cv-01214-NC, 2021 U.S. Dist. LEXIS 77733, 2021 WL 1561511 (N.D. Cal. Apr. 21, 2021); (3) Order Amending Findings of Fact and Conclusions of Law, *Collins v. County of Monterey*, No. 19-cv-01214-NC (N.D. Cal. June 7, 2021); and (4) Monterey County Board of Supervisors Order, dated September 25, 2018. ECF 44-2 at 1-2. Plaintiff did not oppose the County's requests.

The requested documents can be readily grouped into two categories: (1) the Court's prior orders in *Collins I*, and (2) Monterey County government records. First, the Court will take judicial notice of its prior orders as they are publicly filed documents. *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006). However, the Court does not take judicial notice of such orders to supply facts or conclusions of law to the present

1. The County asserts in its motion for summary judgment that collateral estoppel prevents Collins from re-litigating certain issues decided in *Collins I*. The Court declines to address collateral estoppel because Collins does not appear to contest the issues as the County suggests; nor are they necessary to the resolution of the present dispute.

matter. *See Wyatt v. Terhune*, 315 F.3d 1114 (9th Cir. 2003). Second, and relatedly, the Court will also take notice of the existence (but not the truth of) the Board's documents as they are matters of the public record. *See City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, No. 92-cv-20002-SW, 1994 U.S. Dist. LEXIS 6823, 1994 WL 190839, at *4 (N.D. Cal. May 12, 1994) (overruled on other grounds).

II. Fifth Amendment Takings Claims

The Takings Clause of the Fifth Amendment provides that private property cannot "be taken for public use, without just compensation." "The Clause is made applicable to the States through the Fourteenth Amendment." *Murr v. Wisconsin*, 582 U.S. 383, 392, 137 S. Ct. 1933, 198 L. Ed. 2d 497 (2017). Historically, courts applied the Takings Clause to " 'direct appropriation' of property . . . or the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992) (citations omitted). Takings jurisprudence expanded beyond these confines to include "regulatory takings," where governmental regulation of private property was "so onerous that its effect is tantamount to a direct appropriation or ouster." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005), 125 S. Ct. 2074, 161 L. Ed. 2d 876.

A tripartite system emerged for the assessment of regulatory takings. First, a regulation that requires a property owner to suffer a permanent physical occupation, regardless of the size of the intrusion, warrants

compensation. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982). Second, a property owner who is deprived of "*all* economically beneficial uses" of his property has suffered a taking. *Lucas*, 505 U.S. at 1019. Third, the court engages in a multi-factor "essentially ad hoc, factual inquir[y]" set forth in *Penn Central Transportation Co. v. New York City* to determine if a taking occurred. 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

Collins alleges the County's denial of his rezoning application made it "legally and practically impossible . . . to obtain any economically beneficial or productive use of the Property." Compl. ¶ 70. While Collins asserts this denial is "best seen as a categorical taking," the Court analyzes his claim under both *Lucas* and *Penn Central*. Opp'n at 8.

A. Plaintiff's Takings Claim is Ripe

The County presents a threshold issue that Collins' takings claim is not ripe because, despite attempts to obtain authorization to build a home on the Property, he hasn't attempted to develop it according to its entitled uses. Mot. at 8.

A regulatory takings claim is not ripe for adjudication until the government regulatory entity has reached a "final" decision. *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725, 735, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997). The ripeness inquiry previously required the plaintiff to show the government entity reached a final decision *and* that the

property owner exhausted state law procedures to obtain compensation. *Williamson County Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186-94, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985). The Supreme Court excised the latter state exhaustion requirement, holding that a property owner may assert a Fifth Amendment claim at the time of the taking without the need to pursue subsequent state action. *Knick v. Township of Scott*, 139 S. Ct. 2162, 2177, 204 L. Ed. 2d 558 (2019). However, the finality requirement remained intact, requiring plaintiffs to show "there [is] no question . . . about how the 'regulations at issue apply to the particular land in question.'" *Pakdel v. City & County of San Francisco*, 141 S. Ct. 2226, 2230, 210 L. Ed. 2d 617 (2021) (quoting *Suitum*, 520 U.S. at 739). This leaves a "relatively modest" finality requirement that assesses whether the government has committed to a position that causes actual, as opposed to hypothetical, harm to the plaintiff. *Pakdel*, 141 S. Ct. at 2230.

The County argues that Collins' takings claim is not ripe because he hasn't attempted to develop the Property according to its "entitled uses." Mot. at 8. As presently zoned, the Property permits the development of "resource dependent education and scientific research facilities, low intensity day use recreation uses, and restoration and management programs for physical resources." Pl.'s Suppl., Ex. 9 at 3. According to the County, Collins' failure to explore such alternative development options precludes a finding of a "final and authoritative determination of the type and intensity of development" permitted on the Property. Reply at 3 (quoting *Kinzli v. City of Santa*

Cruz, 818 F.2d 1449, 1453 (9th Cir. 1987)). However, the *Kinzli* court affirmed the claim was not ripe, in part, because the plaintiffs didn't submit a development plan or apply for a land use permit at all. 818 F.2d at 1453. Several recent cases where the court found the plaintiff's claims to be unripe follow this general distinction. *See e.g.*, *Ralston v. County of San Mateo*, No. 21-cv-01880-EMC, 2021 U.S. Dist. LEXIS 161988, 2021 WL 3810269, at *9 (N.D. Cal. Aug. 26, 2021) (dismissing plaintiffs' case as unripe because they did not apply for required coastal development permit); *Mendelson v. San Mateo Cnty.*, No. 20-cv-05696-AGT, 2023 U.S. Dist. LEXIS 38008, 2023 WL 2396328, at *3 (N.D. Cal. Mar. 7, 2023).

The Board's denial of Collins' request to rezone his Property satisfies the "*de facto* finality" requirement set forth in *Pakdel*. 141 S. Ct. at 2230. Unlike the plaintiffs in *Kinzli*, Collins has submitted applications to the requisite governmental body, and received final adjudication. Based on the Board's Resolution, it is clear that Collins cannot develop a single-family home on the Property based on the RC(CZ) zoning. *See* Pl.'s Suppl., Ex. 9 at 3. This is a final decision because no avenues of appeal exist. As to the County's claim regarding the Property's allowed uses, the Court does not believe the ripeness doctrine requires "a landowner to submit applications for their own sake," particularly for land uses they do not desire. *Palazzolo v. Rhode Island*, 533 U.S. 606, 622, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001). Therefore, Collins' takings claim is ripe for adjudication.

B. Lucas Claim

As noted above, "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas*, 505 U.S. at 1019. "[T]he complete elimination of a property's value is the determinative factor." *Lingle*, 544 U.S. at 539. As such, a *Lucas* taking is reserved for the "extraordinary case." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 303, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002); *see also Lingle*, 544 U.S. at 538 (describing *Lucas* claims as a "relatively narrow" category of regulatory takings challenges).

Collins claims the County effectuated a *Lucas* taking by denying his rezoning request "to prevent any development . . . and preserve [the Property] as an open space in perpetuity for the public." Compl. ¶ 66. However, Collins overstates this position. The RC(CZ) zoning designation permits *some* development, including "educational and scientific research facilities uses, and low intensity day use recreation uses." Opp'n at 8. Despite this, Collins alleges these uses are unlikely to generate income because the size and characteristics of the Property are unsuited for use by academic or conservation groups. *Id.* at 11.

Collins relies exclusively on the opinions of his expert, Jeff Froke, to support the claim that the Property has no economically viable uses. Pl.'s Suppl. at 4. On summary judgment, the Court draws all reasonable factual

inferences in favor of Collins. *See Anderson*, 477 U.S. at 255. However, the nonmoving party cannot establish the basis to deny a motion for summary judgment by proffering conclusory opinions from an expert. *See, e.g., Soremekun v. Thriffty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007) ("Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact to defeat summary judgment."); *San Francisco Baykeeper v. City of Sunnyvale*, 627 F. Supp. 3d 1102, 1128 (N.D. Cal. 2022) (noting defendants' expert's "conclusory statements . . . is insufficient to raise a triable issue of fact").

Here, Froke's report is replete with the same conclusory claims found throughout the pleadings and opposition papers. Critical to Collins' *Lucas* claim is Froke's conclusion that "[i]t is unreasonable to expect development of any of the Allowed Uses to yield revenue in excess of costs." Pl.'s Suppl., Ex. B at 1. The support for this claim is at best conclusory, and at worst illusory. Turning to the analysis, Froke lists various cost deductions associated with running a nature center or scientific field station. For the nature center, Froke states a "conservative estimate of cost would amount to ~ $751,000" based on an itemized list of expenses. *Id.* at 6. However, Froke fails to supply any support or rationale underlying how each of the expenses was calculated. For instance, he broadly lists "Nature Center building" at $210,000, but fails to explain what this cost pertains to (e.g., costs associated with constructing the structure) or whether it is a recurring expense (e.g., maintaining the structure) or both. *Id.*

Froke's field station cost analysis fares no better. Froke estimates the total cost as $856,000 simply by adding $105,000 to the nature center costs. *Id.* at 9. As with the nature center expenses, Froke fails to provide any explanation as to how he arrived at such figures or even how each expense contributes to the additional $105,000. Moreover, Froke fails to provide any concrete basis for his conclusion that environmental groups or academic institutions would not be interested in the Property.

Perhaps most damaging to Froke's conclusions is the complete lack of any revenue projections. The Court strains to understand how Froke can assert that development of the Property according to its allowed uses won't produce sufficient revenue without any mention of said revenue. As such, Froke's conclusory opinions fail to create a triable issue of fact concerning the economic viability of Collins' Property. Because the *Lucas* claim is entirely reliant on Froke's conclusions, Collins has failed to raise an issue of material fact that he has been deprived of "*all* economically beneficial uses" of his Property. Therefore, the County is entitled to summary judgment on Collins' *Lucas* claim.

C. Penn Central Claim

In the alternative, Collins alleges the rezoning denial constitutes a taking under the *Penn Central* factors. Compl. ¶ 72. Under *Penn Central*, courts assess three factors: (1) "[t]he economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations,"

and (3) "the character of the governmental action." *Penn Cent.*, 438 U.S. at 124. "The first and second factors are the primary factors." *Bridge Aina Le'a, LLC v. Land Use Comm'n*, 950 F.3d 610, 630 (9th Cir. 2020). Collins fails to proffer sufficient evidence for any of these factors.

1. Economic Impact

The economic impact of a regulation "compare[s] the value that has been taken from the property with the value that remains in the property." *Colony Cove Properties, LLC v. City of Carson*, 888 F.3d 445, 450 (9th Cir. 2018) (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987)). To do so, courts focus "both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole." *Penn Cent.*, 438 U.S. at 130-31. "[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Andrus v. Allard*, 444 U.S. 51, 65-66, 100 S. Ct. 318, 62 L. Ed. 2d 210 (1979). Even the denial of a property's most profitable use is not dispositive of a taking. *Id.* at 66; *see also Killgore v. City of S. El Monte*, No. 19-cv-00442-SVW (JEM), 2020 U.S. Dist. LEXIS 133110, 2020 WL 4258584, at *6 (C.D. Cal. Apr. 24, 2020) (finding plaintiff failed to satisfy the economic impact prong because the city's revocation of a permit to operate a massage parlor didn't prevent the plaintiff from other uses of the property).

Collins alleges the Property suffered a 96% reduction in value after the Board's decision. Pl.'s Suppl. at 6. Collins supports this conclusion through the comparison of two appraisal reports. The first report appraises the Property as an undeveloped parcel at $55,000. *See* ECF 58, Ex. K at 3. Whereas the second report appraises the Property at $1,510,000 based on the condition that the land was rezoned to allow development. *See* ECF 58, Ex. L at 3. However, such appraisals are flawed because Plaintiff has failed to incorporate full consideration of the "value that *remains* in the property." *Colony Cove*, 888 F.3d at 451 (emphasis added). Instead, Collins has conceived a scenario where the Property lies vacant, despite the fact the RC(CZ) zoning designation allows some forms of development. As noted in the preceding section, Collins failed to expound on the economic potential of the Property's allowed uses. As such, Collins has failed to present sufficient evidence to create a triable issue of fact as to the economic impact of the County's rezoning denial.

2. Investment-Backed Expectations

The second *Penn Central* factor considers "the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Cent.*, 438 U.S. at 124. "To form the basis for a taking claim, a purported distinct investment-backed expectation must be objectively reasonable." *Colony Cove*, 888 F.3d at 452. A property owner's "unilateral expectation[s]" or "abstract needs" are not reasonable, and thus "cannot form the basis of a claim that the government has interfered with property rights." *Bridge Aina Le'a*, 950 F.3d at 634 (quoting *Ruckelshaus*

v. Monsanto Co., 467 U.S. 986, 1005, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984)); *see also Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120 (9th Cir. 2010) (noting this expectation "implies reasonable probability, like expecting rent to be paid, not starry eyed hope of winning the jackpot if the law changes").

In this case, Collins' hopes to rezone the Property more closely resemble assumptions, as opposed to expectations. To start, "[u]nder California law, there is no right to any particular or anticipated zoning." *Tyson v. City of Sunnyvale*, 920 F. Supp. 1054, 1060 (N.D. Cal. 1996). When Collins purchased the Property, he knew it was subject to the more-restrictive RC(CZ) zoning designation. Pl.'s Suppl., Ex. H at 23:16-18. In spite of this, Collins claims the surrounding properties containing residential developments, as well as the CAR LUP policy stating "[t]he BSI property may be developed for residential use" contributed to his expectations. Pl.'s Suppl. at 6. Beyond the permissive phrasing of the policy, Collins' references to surrounding properties is merely a unilateral assumption that his Property will also allow residential development. Even if it was reasonable to conclude the other properties engendered some expectation, Collins fails to proffer evidence that any of these properties were also once subject to the same or similar restrictive zoning requirements.

The closest Collins comes to a reasonable expectation are the recommendations to approve the rezone issued by County planning staff. However, any such expectation is quickly dispelled by the applicable regulatory backdrop

and uncertain nature of the political process. *See Evans Creek, LLC v. City of Reno*, No. 21-16620, 2022 U.S. App. LEXIS 29816, 2022 WL 14955145, at *2 (9th Cir. Oct. 26, 2022) (noting the city's discretion to annex the property under Nevada law cuts against the plaintiff's economic expectations). For one, the planning staff are not the final decision-makers, nor has Collins presented evidence that the Board is compelled to follow their recommendations. Moreover, the planning staff's recommendation did not necessarily reflect the opinions of the Planning Commission, which "adopted a resolution recommending that the Board of Supervisors not adopt the ordinance to rezone the property" from RC(CZ) to Watershed and Scenic Conservation. Mot., Ex. D at 3. Given the multiple levels of uncertainty inherent in the rezoning and construction process, no objectively reasonable person would have believed they had a reasonable probability of obtaining Collins' desired outcome. Therefore, Collins fails to present sufficient evidence supporting his investment-backed expectations claim under *Penn Central's* second prong.

3. Character of Government Action

Penn Central lastly instructs that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Colony Cove*, 888 F.3d at 454 (quoting *Penn Cent.*,438 U.S. at 124). There is no physical invasion by the County in this case. Instead, the

alleged taking centers on the County's denial of Collins' rezoning request. The Supreme Court has upheld "land-use regulations that destroyed or adversely affected recognized real property interests" when, as here, the relevant government entity "reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land." *Penn Cent.*, 438 U.S. at 125. As discussed in greater detail below, the Board conducted public hearings, considered input from the community and reached a determination that the rezone was not within the policies set forth in the CAR LUP. The third factor does not weigh in favor of Collins' claim.

In sum, Collins has failed to raise triable issues of fact with respect to each of the *Penn Central* factors. It follows that Collins has failed to support either his *Lucas* or *Penn Central* claim. Accordingly, the County is entitled to summary judgment on Collins' federal Takings Clause claim.

III. Due Process

The Due Process Clause of the Fourteenth Amendment protects against the deprivation "of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, § 1. "The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974). The Due Process Clause has both procedural and substantive components - the latter of which "[bars] certain government actions regardless of

the fairness of the procedures used to implement them." *County of Sacramento v. Lewis*, 523 U.S. 833, 840, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).

Collins alleges the County violated his right to substantive due process by arbitrarily using its regulatory power to deny his rezoning request. Compl. ¶ 81.

A. Preemption

The County asserts a threshold challenge to Collins due process claim, alleging it is preempted by his takings claim. "[T]he Fifth Amendment does not invariably preempt a claim that land use action lacks any substantial relation to the public health, safety, or general welfare." *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 856 (9th Cir. 2007). Instead, the Fifth Amendment precludes due process claims that fall within the "three basic categories" governing takings jurisprudence - (1) physical invasion of property, (2) deprivation of all economically beneficial use, or (3)the *Penn Central* analysis. *See id.* at 855. The Ninth Circuit illustrates this distinction in *Colony Cove*. 640 F.3d at 948. The *Colony Cove* plaintiff alleged the city mobile home rent control ordinance violated both the Due Process Clause and Takings Clause. *Id.* at 954. Its due process claims were couched in terms that the ordinance not only deprived it of a fair return on investment, but also that the rental review board acted arbitrarily in applying the ordinance. *Id.* at 960. The Ninth Circuit held the former theory to be "subsumed by the Takings Clause," whereas the latter was not. *Id.*; *see also Shanks v. Dressel*, 540 F.3d 1082,

1087 (9th Cir. 2008) (concluding the plaintiffs' claim was not preempted because it sought the invalidation of an allegedly arbitrary land use action).

As in *Colony Cove*, Collins has presented separately distinct theories for his due process and takings claims. On one hand, Collins' takings claim alleges the County's actions deprived him of economically beneficial or productive use of his Property. Compl. ¶ 70. On the other hand, the locus of Collins' due process claim lies in the allegedly arbitrary acts of regulatory power by the Board. *See id.* ¶ 81. This fine distinction is laid bare by the underlying purposes of these rights. The aim of the Takings Clause is "to secure *compensation* in the event of otherwise proper interference amounting to a taking." *Lingle*, 544 U.S. at 537 (emphasis in original). The Due Process Clause, however, is concerned with vindicating the rights of individuals harmed by government actions of which can have no legitimate purpose. *See North Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 485 (9th Cir. 2008). As such, due process violations cannot be rectified by the Takings Clause because "[n]o amount of compensation can authorize such action." *Lingle*, 544 U.S. at 543.

As noted above, Collins' due process claim is grounded in the allegedly improper decision by the Board to create the DeAmaral Preserve at the expense of Collins' Property. Therefore, the Takings Clause is an improper vehicle to redress such an allegedly impermissible act of municipal tyranny because the Court would be tacitly endorsing such practices. Inasmuch as this claim lies in the arbitrary exercise of governmental power, Collins' due process claim is not preempted.

B. Due Process Analysis

The due process clause does not broadly prohibit every governmental deprivation of property. *See Halverson v. Skagit Cnty.*, 42 F.3d 1257, 1260 (9th Cir. 1994); *see also Lakeview Dev. Corp. v. City of South Lake Tahoe*, 915 F.2d 1290, 1295 (9th Cir. 1990) ("It is well established that there is no federal Constitutional right to be free from changes in land use laws."). In fact, substantive due process protection is often reserved for the vindication of fundamental rights, such as those related to bodily integrity, family, procreation, and marriage. *See Albright v. Oliver*, 510 U.S. 266, 272, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994). In cases like this that do not involve such fundamental rights, courts "do not require that the government's action actually advance its stated purposes, but merely look to see whether the government could have had a legitimate reason for acting as it did." *Halverson*, 42 F.3d at 1262.

The courts have long upheld zoning restrictions as reasonable extensions of the state's police powers. *See e.g., Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 390, 47 S. Ct. 114, 71 L. Ed. 303, 4 Ohio Law Abs. 816 (1926). Nevertheless, substantive due process ensures that property owners have the "right to be free of arbitrary or irrational zoning actions." *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977). However, the standard for determining if governmental action is constitutionally arbitrary is "exceedingly high." *Shanks*, 540 F.3d at 1088. This is because a due process claim lies when a "land use

action lacks any substantial relation to the public health, safety, or general welfare." *North Pacifica*, 526 F.3d at 484. Thus, "[t]he irreducible minimum of a substantive due process claim challenging land use regulation is failure to advance any governmental purpose." *Id.*; *see also Halverson*, 42 F.3d at 1262 (explaining this "heavy burden" requires the plaintiff demonstrate that the government "could have had no legitimate reason for its decision") (emphasis omitted).

The County has submitted sufficient evidence showing the denial of Collins' rezoning application was rationally related to legitimate government interests. By law, zoning within the Carmel area must be consistent with CAR LUP. Opp'n, Ex. 6 at 12:17-20; *see also* Cal. Gov't Code § 65860. As part of the former BSI property, CAR LUP includes certain restrictions covering Collins' Property. Among these requirements is that "[t]he upper steeper portion shall remain in open space." Pl.'s Suppl., Ex. D at 9. Similarly, the CAR LUP policy concerning the RC(CZ) zoning designation prohibits development that would threaten rare and endangered plant and animal species. The Board's Resolution found Collins' rezoning request ran afoul of both of provisions of CAR LUP. Pl.'s Suppl., Ex. I. The Board's findings were supported by the report prepared by planning staff. In particular, the report indicated that "the entire property contains slopes that exceed 30 percent slopes and has a high erosion hazard." Pl.'s Suppl., Ex. D at 16. That same report also notes the potential presence of "Oak savanna, Central Maritime Chaparral, Monterey Pine, and Smith's Blue butterfly" on Collins' Property. *Id.* at 15. These concerns were further

voiced by several members of the local community during the March 8, 2022, Board hearing. *See*, Pl.'s Suppl., Ex. H at 16:10-27:15. Such neighborly opposition "is also a legitimate factor in legislative decisionmaking." *Nelson v. City of Selma*, 881 F.2d 836, 839 (9th Cir. 1989)

Collins' opposition, however, fails to shoulder the heavy burden of demonstrating a lack of any legitimate governmental purpose. Instead, much of Collins' claims resemble a "run of the mill dispute between a developer and a planning agency." *Tyson*, 920 F. Supp. at 1064. For instance, Collins' expert, Joel Panzer, is simply "unaware of an outright denial" based on the presence of steep slopes or sensitive areas, not that they are illegitimate reasons for the County's decision. Pl.'s Suppl., Ex. J at 3-4.

Perhaps recognizing the challenge of this burden, Collins alleges the County's reasoning was mere pretext disguising the Board's true intention of creating the DeAmaral Preserve. Collins points to Supervisor Mary Adams' remarks during the 2022 Board hearing. Opp'n at 18. However, the motives of such officials are generally irrelevant to an inquiry concerning the reasonableness of their decisions. *Tyson*, 920 F. Supp. at 1064. Even assuming they were relevant, Collins fails to allege any facts demonstrating a personal motive or financial interest, as opposed to a mere policy disagreement. *See Arroyo Vista Partners v. County of Santa Barbara*, 732 F. Supp. 1046, 1054 (C.D. Cal. 1990). On a more practical level, the Board requires majority approval and Collins also fails to allege that other Supervisors were tainted by Adams' supposed improper motive, let alone were aware

of it. Accordingly, the Board's denial of Collins' rezoning application did not violate his due process rights. As such, the Court grants the County's motion for summary judgment with respect to Collins' claim under the Due Process Clause.

IV. Equal Protection Clause

Collins alleges the County violated the Equal Protection Clause by preventing the residential rezone, despite similarly situated developments surrounding the Property. Compl. ¶ 78.

The Equal Protection Clause guarantees that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Equal protection claims often concern governmental classifications that disparately affect certain groups of citizens more than others. *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 601, 128 S. Ct. 2146, 170 L. Ed. 2d 975 (2008). However, an equal protection claim may also apply if an individual "has been irrationally singled out as a so-called 'class of one.'" *Id.* To prevail on his class of one claim, Plaintiff must show the Board: (1) intentionally, (2) treated Collins differently than other similarly situated property owners, (3) without a rational basis. *Gerhart v. Lake County*, 637 F.3d 1013, 1022 (9th Cir. 2011).

A. Disparate Treatment

The equal protection analysis requires a basis of comparison by which to assess whether the government's

application of the law was improper. To do so, courts will categorize the party being discriminated against and assess how that party compares to "similarly situated" individuals. *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 945 (9th Cir. 2004). In *Squaw Valley*, the Ninth Circuit noted that plaintiff failed to present any evidence of a comparably sized discharger with similar levels of activity or regulatory scrutiny. *Id.* However, a "similarly situated" person need not be identical to the plaintiff, but must be similar "in all *relevant* respects." *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 966 (9th Cir. 2017) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992)).

Without such comparisons, the court would have no basis for determining if the plaintiff was intentionally singled out. *See Gerhart*, 637 F.3d at 1022. In *Gerhart*, the plaintiff alleged that county commissioners violated the Equal Protection Clause by denying him a permit to construct an access road and approach to his property. *Id.* The Ninth Circuit found plaintiff "presented considerable evidence" of disparate treatment based on testimony from at least ten other property owners who built approaches to the same road. *Id.* Importantly, the *Gerhart* court noted the county commissioners were aware of these constructions yet didn't require approach permits. *Id.*

Here, Collins' Equal Protection claim reads more as a critique of the Board's decisionmaking, as opposed to the required comparative analysis. Collins exhaustively details the various purported flaws in the Board's reasoning without any reference to a comparable situation.

The only reference is that Collins' Property "is completely surrounded by homes or properties surrounded by homes." Opp'n at 15. As in *Squaw Valley*, Collins fails to provide any identifying information regarding these properties. Most importantly, Collins doesn't specify the zoning information, history of rezoning (if any) or treatment by the relevant authorities. In doing so, Collins puts the cart before the horse and deprives the Court of the necessary context by which to adjudge the Board's allegedly pretextual reasoning. As a result, Collins' "class-of-one" equal protection claim premised on disparate treatment fails. *See SmileDirectClub, LLC v. Tippins*, 31 F.4th 1110, 1123 (9th Cir. 2022) (affirming district court's dismissal of plaintiffs' class-of-one claim for failure to establish they were similarly situated to other licensed dentists and orthodontists in California). The Court grants the County's motion for summary judgment on Collins' Equal Protection Clause claim.

CONCLUSION

Based on the foregoing, the County's motion for summary judgment as to all of Collins' causes of action is GRANTED.

IT IS SO ORDERED.

/s/_____
NATHANAEL M. COUSINS
United States Magistrate Judge

Dated: August 18, 2023

APPENDIX C — RESOLUTION BEFORE THE BOARD OF SUPERVISORS IN AND FOR THE COUNTY OF MONTEREY, STATE OF CALIFORNIA, FILED APRIL 19, 2022

BEFORE THE BOARD OF SUPERVISORS
IN AND FOR THE COUNTY OF MONTEREY,
STATE OF CALIFORNIA

In the matter of the application of:
COLLINS (PLN130339)
RESOLUTION NO. 22-125

Resolution by the Monterey County Board of Supervisors:

1) Find the denial of the project statutorily exempt per Section 21080(b)(5) of the Public Resources Code and Section 15270(a) of the CEQA Guidelines; and

2) Deny the applicant's request to amend the Local Coastal Program to rezone the property from Resource Conservation [RC(CZ)] to Watershed and Scenic Conservation, 40 acres per unit, Design Control, Special Treatment, Coastal Zone [WSC/40-D-SpTr(CZ)].

[PLN130339, James G. Collins, 83 Mount Devon Road, Carmel, Carmel Area Land Use Plan (APN: 241-021-007-000)]

I. RECITALS

WHEREAS, on November 21, 2021, James G. Collins and Sook Collins, hereinafter referred to as the "Applicant,"

made an application to rezone a 21-acre parcel located at 83 Mount Devon Road, Carmel (Assessor's Parcel Number: 241-021-007-000) (hereafter "the subject property") from Resource Conservation, Coastal Zone [RC(CZ)] to Watershed and Scenic Conservation, 40 acres per unit, Design Control, Special Treatment, Coastal Zone [WSC/40-D-SpTr(CZ)], (hereafter referred to as "Rezone");

WHEREAS, in 1983, the County adopted the Carmel Area Land Use Plan, which is a part of the County's certified Local Coastal Program under the Coastal Act. At that time, the property was subject to the Conservation and Scenic Easement and the Carmel Area Land Use Plan designated the property "Resource Conservation—Forest & Upland Habitat." The Carmel Area Land Use Plan notes that the designation was applied to the "Point Lobos Reserve and the DeAmaral Preserve." The County zoned the property Resource Conservation, Coastal Zone (RC (CZ)) in keeping with the Land Use Plan designation. The purpose of RC zoning is "to provide a district to protect, preserve, enhance, and restore sensitive resource areas in the County of Monterey." (Monterey County Code, Title 20 (coastal zoning), Section 20.36.010.) The Resource Conservation Zoning District of Title 20 does not allow residential development (Monterey County Code, Title 20, Chapter 20.36);

WHEREAS, in April 2021, the U.S. District 4 Court of California found that the subject property's conservation and scenic easement was effectively terminated in 2019 as a result of meeting the conditions present for unilateral termination under Article 7 of the Deed. Article 7 of

the Easement Deed allows the Grantor to terminate the Easement under specific conditions. By its terms, the Easement allows the Foundation, or its successors in interest—such as James Collins—to terminate the Easement when California or Monterey County passes conservation legislation which restricts, or would by agreement restrict, the use of the Property for "scenic and recreational uses or for the use of natural resources or for the production of food and fiber." The Court found that the rezoning from Agriculture/Residential, which allowed two residential units, to Resource Conservation, which does not allow residential units, restricts the use of the Property, and therefore triggers the condition in Article 7 of the Easement deed required for unilateral termination. As a result of the land use and zoning designations in the Carmel Land Use Plan that restrict the use of the property for scenic and recreational uses, the conservation and scenic easement is no longer in effect;

WHEREAS, on March 08, 2022, the Board of Supervisors, at a duly noticed public hearing adopted a resolution of intent to deny the proposed Rezone by a vote of 3 ayes and 2 noes and continued the hearing to a date uncertain with direction to Staff to return with a resolution containing findings for denial of the Rezone;

WHEREAS, on April 19, 2022, the Board of Supervisors held a public hearing to consider taking action on the Rezone;

WHEREAS, the Board of Supervisors reference to the following facts and findings with respect to the Rezone:

Appendix C

1. The Carmel Area Land Use Plan (CAR LUP) delineates the subject property as part of the Behavioral Science Institute lands as shown on Figure 2—Special Treatment Areas of the Land Use Plan. Policy 4.4.3.E.6 of the CAR LUP provides that "the BSI lands may be developed for residential use. A maximum of 25 units may be approved; all units shall be sited outside of the view of Highway 1… The upper steeper portion shall remain in open space." The entire property contains slopes exceeding 30%, has the highest elevation of all BSI properties, and is visible from Highway 1 and Point Lobos, and therefore the Rezone is inconsistent with the BSI development standards.

2. The CAR LUP designates the property as "Resource Conservation—Forest & Upland Habitat." Pursuant to Chapter 4.5.A of the CAR LUP, the Resource Conservation Forest and Upland Habitat designation is applied to ESHA and open space areas set aside for resource preservation. Implementation of the land use designation in April 1983 resulted in the rezoning the subject property from Agriculture/Residential, Mobile Home Exclusion, 20-acre minimum building site ["K-V-B-5 20-acre min."] to Resource Conservation, Coastal Zone ["RC (CZ"]. The purpose of the RC zoning district is "to provide a district to protect, preserve, enhance, and restore sensitive resource areas in the County of Monterey." (Monterey County Code, Title 20 (Coastal Zoning), Section

20.36.010.) Additionally, Policy 4.4.3 of the CAR LUP states, "[d]evelopment that would threaten rare and endangered plant and animal species in the Resource Conservation areas shall not be allowed." The property contains Environmentally Sensitive Habitat Areas ("ESHA") and special status species, and therefore reasonably foreseeable development resulting from the Rezone (1 main residential unit) has the potential to impact the sensitive resources.

3. Although the conservation easement has been terminated, the Resource Conservation zoning district is consistent with the original intent of the easement and is consistent with requirement of properties designated Forest and Upland Habitat.

4. Public policy supports preservation of the subject property, and no public policy reasons have been advanced to support the proposed rezoning of the property.

5. The Applicant knew or should have known restrictions applicable to the property at the time the property was purchased on February 8, 1994. Potential uses of the property consistent with the CAR LUP and Zoning may be considered under separate permitting.

6. The Applicant retains economically viable use of the subject property in that the existing zoning,

Resource Conservation, allows for uses including but not limited to resource dependent education and scientific research facilities, low intensity day use recreation uses, and restoration and management programs for physical resources;

WHEREAS, pursuant to Appendix 13 of the Coastal Implementation Plan, Local Coastal Program Amendments which are denied by the Board of Supervisors are not appealable to the California Coastal Commission, making the Board of Supervisors decision final.

II. DECISION

NOW, THEREFORE, be it resolved, based on the above findings, the written and documentary evidence, the staff reports, oral testimony, and the administrative record as a whole, that the Board of Supervisors does hereby:

1. Find that the denial of the proposed rezoning is statutorily exempt under the California Environmental Quality Act pursuant to Section 21080(b)(5) of the Public Resources Code and Section 15270(a) of the CEQA Guidelines; and

2. Deny the request to amend the Local Coastal Program to rezone a 21-acre parcel located at 83 Mount Devon Road, Carmel (Assessor's Parcel Number: 241-021-007-000) from Resource Conservation, Coastal Zone [RC(CZ)] to Watershed and Scenic Conservation, 40 acres per unit, Design Control, Special Treatment, Coastal Zone [WSC/40-D- SpTr(CZ)]

Appendix C

PASSED AND ADOPTED on this 19th day of April 2022, by roll call vote:

AYES: Supervisors Alejo, Lopez, Askew and Adams
NOES: None
ABSENT: Supervisor Phillips
(Government Code 54953)

I, Valerie Ralph, Clerk of the Board of Supervisors of the County of Monterey, State of California, hereby certify that the foregoing is a true copy of an original order of said Board of Supervisors duly made and entered in the minutes thereof of Minute Book 82 for the meeting April 19, 2022.

Dated: April 21, 2021
File ID: RES 22-078
Agenda Item No.: 40

Valerie Ralph, Clerk of the Board of Supervisors
County of Monterey, State of California

/s/_____
Julian Lorenzana, Deputy

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JULY 30, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-16153

JAMES G. COLLINS,

Plaintiff-Appellant,

v.

COUNTY OF MONTEREY,
A GOVERNMENT ENTITY,

Defendant-Appellee.

D.C. No. 5:22-cv-02560-NC
Northern District of California, San Jose

ORDER

Before: SCHROEDER, GOULD, and R. NELSON, Circuit Judges.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc, Docket No. 35, is **DENIED**.

APPENDIX E — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FILED AUGUST 18, 2023

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 22-cv-02560-NC

JAMES G. COLLINS,

Plaintiff,

v.

COUNTY OF MONTEREY,

Defendant.

Filed August 18, 2023

JUDGMENT

On August 18, 2023, the Court granted Defendant County of Monterey's motion for summary judgment. Accordingly, judgment is entered in favor of Defendant. The Clerk shall close the file.

IT IS SO ORDERED.

Dated: August 18, 2023

/s/_____
NATHANAEL M. COUSINS
United States Magistrate Judge

APPENDIX F — RELEVANT CONSTITUTIONAL PROVISIONS

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix F

AMENDMENT XIV SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX G — EXCERPTS FROM CALUP AND MAP LU12B

CARMEL AREA LAND USE PLAN

LOCAL COASTAL PROGRAM CERTIFIED APRIL 14, 1983 MONTEREY COUNTY, CALIFORNIA

UPDATE INDEX

CARMEL AREA LAND USE PLAN AMENDMENTS

As certified by the California Coastal Commission for the following date, with final acceptance by the Board of Supervisors:

1. ***January 22, 1985****—AMEND TEXT—4.5.H—APN 009-131-20. Single Duplex on one lot in Carmel Woods (PC-5162, Gump, 1-84). Resolution 87-267.*

2. ***April 9, 1986****—AMEND POLICY—2.4.4.B.8*—Add language to regulate wastewater runoff (PC-5433, 1-86). Resolution 87-267.

3. ***April 9, 1991****—AMEND POLICY—2.2.5.2—and MAP CHANGE*—Change zoning designation from MDR/2(24) to MDR/2(18). Reduce height in Carmel Meadows from 24 to 18 feet (PC 6780, 1-89, 1-91). Resolution 91-348 and 91-349, Ordinance 3546.

4. ***April 9, 1991****—AMEND POLICY—2.2.5.2—and MAP CHANGE*—Change zoning designation from MDR/2(24) to MDR/2(18). Reduce height in Carmel

Point from 24 to 18 feet (PC 7299, Gushman, 1-91). Resolution 91-348 and 91-351.

5. ***June 13, 1991—****AMEND POLICY—4.4.3.F. 1.a—and CIP 20.146.120.C.1(a)(1).* Allow expansion of visitor serving facilities. (PC 7594, Mission Ranch, 2-91). Resolution 91-348 and 91-352.

6. ***June 13, 1991—****MAP CHANGE—APN 009-511-03*, fronting on and southerly of 15th and Dolores Streets—*AND AMEND POLICIES AND TEXT—4.4.3.F.1.c, 4.5.H and 4.6—AND AMEND CIP—20.146.120.1(a)(3).* Reduce number of residential units to 31 and change zoning maps from MDR/6/SpTr to MDR/4/SpTr (PC 7698, Mission Ranch, 2-91). Resolution 91-348 and 91-353; Ordinance 3547.

7. ***February 16, 1994****—MAP CHANGE—APN 241-021-13*—Fronting on and easterly of Spruce and Fern Canyon Roads. Change land use designation from RC to LDR (1.1 acre portion of property) and change the CIP zoning maps on a 9.3 acre portion from RC/SpTr and LDR/1/SpTr to Low Density Residential/3.5/SpTr (PC 92-243, Garren, 1-94). Resolution 94-122, Ordinance 3755.

8. ***March 9, 1995—****AMEND POLICIES—2.2.5.2 AND 5.3.2.4—AMEND CIP SECTIONS—20.140.070.H (now 20.70.120.H) and 20.146.130.E.5.e(3)(c)—MAP CHANGE—Yankee Point area.* Change zoning maps to reduce height to 20 and 26 feet, depending on location (PC 94134, 1-95). Ordinance 3805—April 18, 1995.

Appendix G

CARMEL AREA LAND USE PLAN
UPDATE INDEX #1
AMEND TEXT—4.5.H—APN 009-131-20
JANUARY 22, 1985

Medium-density residential development is the primary use. The density for new subdivision is 2 units per acre, except on the Mission Ranch property where a density of 2-6 units per acre may be allowed subject to section 4.4.3.F.1 and Odello (162 units) subject to section 4.4.3.F.3. Exception is also made for Block 6, Carmel Woods which has historically been zoned Duplex Residential (R-2"). On that block, one unbuilt lot of record existed as of August 8, 1984. That lot may be allowed a single duplex use. Re-use of existing developed lots on that block shall comply with the basic density requirements of this section. Minimum parcel size will be determined upon application review. This designation is applied to the City of Carmel vicinity and to Carmel Meadows. Public/quasi-public uses (5.5. 1) and densities of overnight accommodations currently in operation are permitted.

CARMEL AREA LAND USE PLAN
UPDATE INDEX #2
AMEND POLICY 2.4.4.B.8
APRIL 9, 1986

Add language to regulate wastewater runoff

8. All new and/or expanding wastewater discharges into the coastal waters of Monterey County shall require a permit from the Health Department. Applicants

for such permits shall be required to submit, at a minimum, the following information and studies:

a) Three years monitoring records identifying the existing characteristics of the proposed wastewater discharge. Particular areas of concern include toxic chemicals, inorganic heavy metals, bacteria, and other indicators prescribed as threats to the health and safety of coastal waters, or

b) Provide comprehensive projections of the proposed wastewater discharges; both quantitative and qualitative characteristics must be specifically identified. Specific figures for the indicators identified in a) must be included in the projections.

c) Provide complete information on levels of treatment proposed at the treatment facility to remove those indicators mentioned in a). This information shall also include reliability and efficiency data of the proposed treatment.

d) Provide a comprehensive monitoring plan for testing of wastewater for indicators identified in a).

e) Perform oceanographic studies to determine the most suitable location and methods for discharge into the ocean.

f) Perform tests of ocean waters at the proposed discharge site and surrounding waters to

establish baseline or background levels of toxic chemicals, heavy metals, bacteria and other water quality indicators. These tests must be performed no more than one year prior to submittal of the proposal. Historical data may not be substituted for this requirement.

g) Perform toxicity studies to determine the impacts of the proposed wastewater discharges on marine life, as well as on recreational uses of the coastal waters.

h) Identify and analyze alternative methods of wastewater disposal. This shall include hydro-geologic studies of the applicant's groundwater basin to determine the water quality problems in that area and if onsite disposal will have an adverse impact on groundwater quality.

The data and results of requirements a) through h) must be submitted to the County's Chief of Environmental Health for evaluation and approval. A wastewater discharge permit shall be issued only if the above information demonstrates that the proposed wastewater discharge will not degrade marine habitats; will not create hazardous or dangerous conditions; and will not produce levels of pollutants that exceed any applicable state or federal water quality standards.

Appendix G

CARMEL AREA LAND USE PLAN
UPDATE INDEX #3
AMEND POLICY 2.2.5.2
APRIL 9, 1991

2. In order to provide for more visually compatible structures, the County's existing height ordinance for the Carmel Point area should be retained to limit the maximum height of new structure along Scenic Road to 24 feet from the natural grade. ~~This height limit shall also apply to Carmel Meadows, including the Portola Corporation and Williams properties.~~ To ensure protection of the viewshed, the maximum height of structures located in the Carmel Meadows area, including the Portola Corporation and Williams properties, shall be limited to 18 feet measured from natural average grade.

CARMEL AREA LAND USE PLAN
UPDATE INDEX #4
AMEND POLICY 2.2.5.2
APRIL 9, 1991

2. In order to provide for more visually compatible structures, ~~the County's existing height ordinance for the Carmel Point area should be retained to limit the maximum height of new structure along Scenic Road to 24 feet from the natural grade.~~ the height limit in the Carmel Point Area should be limited to a maximum height of 18 feet from the natural average grade. ~~This height limit shall also apply to Carmel Meadows, including the Portola Corporation and Williams properties.~~ To ensure protection of the

viewshed, the maximum height of structures located in the Carmel Meadows area, including the Portola Corporation and Williams properties, shall be limited to 18 feet measured from natural average grade.

CARMEL AREA LAND USE PLAN
UPDATE INDEX #5
AMEND POLICY 4.4.3.F.1.a
JUNE 13, 1991

a. The existing commercial/visitor serving facilities (other than the dance hall), consisting of the 26 visitor serving units, restaurant, tennis club~~, may be granted a use permit which allows for the continued use, but prohibits expansion or other uses, and for their full refurbishment which shall be limited to painting and internal remodeling without change in outer structures, without enlargement of capacity, and without expansion of present use.~~ and caretaker's unit, may be allowed expansion to a maximum of 31 units subject to securing a Coastal Development Permit and meeting the goals and policies of the Carmel Area Land Use Plan and Coastal Implementation Plan.

The total area of any new Mission Ranch visitor serving unit as defined in Section 5.40.020.F of the Monterey County Code, shall not exceed 500 square feet.

A Historical Resources designation shall be added to protect the important historic buildings.

Appendix G

CARMEL AREA LAND USE PLAN
UPDATE INDEX #6
AMEND POLICIES 4.4.3. F.1. c and 4.5 H
JUNE 13, 1991

Policy 4.4.3.F. 1. c:

c. If and when the dance hall and all other existing commercial/visitor-serving uses on the property are permanently abandoned, a clustered medium-density (~~2-6~~ 4 units per net developable acre not including wetlands area, but not to exceed a maximum of ~~75~~ 31 units) residential development, which may include a restaurant and tennis club, may be allowed on the site provided that such development conforms to the policies of the plan, particularly the resource protection policies for the protection of coastal wetlands.

Conversion to residential use shall not be permitted until an equal number of new equivalently-priced visitor-serving units have been made available in the unincorporated coastal zone of Monterey County. For the purposes of this paragraph, "equivalently-priced visitor-serving units" shall mean hotel or motel units in a comparable price range, campground and RV spaces, or similar accommodations. Findings that such units have been made available shall be made by the County, based upon substantial evidence, at the time of submission of a permit application.

Appendix G

Policy 4.5.H:

H. Medium—Density Residential

Medium-density residential development is the primary use. The density for new subdivision is 2 units per acre, except on the Mission Ranch property where a density of ~~2-6~~ 4 units per acre may be allowed subject to section 4.4.3.F.1 and Odello (162 units) subject to section 4.4.3.F.3. Exception is also made for Block 6, Carmel Woods which has historically been zoned Duplex Residential (R-2"). On that block, one unbuilt lot of record existed as of August 8, 1984. That lot may be allowed a single duplex use. Re-use of existing developed lots on that block shall comply with the basic density requirements of this section. Minimum parcel size will be determined upon application review. This designation is applied to the City of Carmel vicinity and to Carmel Meadows. Public/quasi-public uses (5.5.1) and densities of overnight accommodations currently in operation are permitted.

Appendix G

CARMEL AREA LAND USE PLAN
UPDATE INDEX #6
AMEND POLICY 4.6 (CHART)
JUNE 13, 1991

Land Use Category	***Location***	***Approx. Acreage (Acres)***	***Density for New Subdivision***	***Est. Max New Res. Dev. # of units***
Watershed and Scenic Conservation				
– below the 1,000 foot elevation contour	Coastal Hills and ridges east of Highway 1	2,400	1 unit per 40 acres	60
– above the 1,000 foot elevation contour		1,740	1 unit per 80 acres	33[1]
– Palo Corona Ranch		560	1 unit per 40 acres	14
– Rancho San Carlos		600	1 unit per 40 acres	15
Agricultural Conservation	Odello property	134	3 units/ac on 54 acres	162

Appendix G

Recreation and Visitor-Serving Commercial	Lower Area of Point Lobos Ranch ("Flat-lands")	343	Riley = 12 units Hudson = 16 units	28
Low Density Residential	– Carmel High-lands	740	1 unit per acre	218[2]
Medium Density Residential	– City of Carmel Vicinity and Carmel Meadows[3]	656	2 units per acre	148
	– Mission Ranch	21	(gross) ~~2-6~~ 4 units per net developable acre (~~75~~ 31 max.)	
ESTIMATED TOTAL NEW RESIDENTIAL DEVELOPMENT:			~~753~~ 709 (units max.)[4]	

Appendix G

CARMEL AREA LAND USE PLAN
UPDATE INDEX #7
MAP CHANGE—APN 241-021-13
FEBRUARY 16, 1994

[Map omitted]

CARMEL AREA LAND USE PLAN
UPDATE INDEX #8
AMEND POLICIES 2.2.5.2 AND 5.3.2.4
MARCH 9, 1995

Policy 2.2.5.2:

2. In order to provide for more visually compatible structures, the height limit in the Carmel Point Area should be limited to a maximum height of 18 feet from the natural average grade. To ensure protection of the viewshed, the maximum height of structures located in the Carmel Meadows area, including the Portola Corporation and Williams properties, shall be limited to 18 feet measured from natural average grade.

   To ensure that new development in the Yankee Point area remains subordinate to the visual resources of the area, and to ensure that visual access from Highway 1, Yankee Point Drive, and Mal Paso Road is protected, the height limit in the Yankee Point area of Carmel Highlands-Riviera, for all properties seaward of Yankee Point Drive, and for properties with frontage along the east right of way line of Yankee Point Drive that face such properties seaward

of Yankee Point Drive, shall be 20 feet. The height limit for all other properties in the area shall be 26 feet.

In addition to such height limits, new development shall be subject to design guidelines to be adopted by the Planning Commission for the Yankee Point area. Such guidelines shall affect the visibility and design of structures in a manner so as to preserve and protect, to the maximum extent feasible, public visual resources and access described herein.

Policy 5.3.2.4:

4. Existing visual access from scenic viewing corridors (e.g., Highway 1, Scenic Road, Spindrift Road, Yankee Point Drive) and from major public viewpoints, and future opportunities for visual access from the frontal ridges east of Highway 1 should be permanently protected as an important component of shoreline access and public recreational use.

Appendix G

MONTEREY COUNTY, CALIFORNIA
CARMEL AREA LAND USE PLAN
LOCAL COASTAL PROGRAM

Approved by the Monterey County
Planning Commission March 25, 1981

Adopted by the Monterey County
Board of Supervisors October 19, 1982

Amended by the Monterey County
Board of Supervisors October 23, 1984

Certified by the California Coastal Commission*
April 14, 1983

Amended and Certified by the Coastal Commission
January 22, 1985

This document was prepared with financial assistance from the Office of Coastal Zone Management, National Oceanic and Atmospheric Administration, under the provisions of the Federal Coastal Zone Management Act of 1972 as amended, and from the California Coastal Commission, under the provisions of the California Coastal Act of 1976.

* Two small areas in Carmel Highlands were not certified by the Coastal Commission. These are shown on Figure 1A.

* * *

wetland area or established drainage patterns unless it is to significantly improve the existing drainage.

5. Low-density residential development shall generally be located in rural areas where an essentially residential character exists—i.e., the Carmel Highlands-Riviera. Vacant lots in this area should continue to be developed to the extent that site and resource protection constraints allow. Housing densities and lot sizes shall be consistent with the ability of septic systems to dispose of waste without contamination of coastal streams or creation of hazards to public health. Accordingly, with the exception of Behavioral Science Institute property, the density and minimum parcel size for new land divisions shall be one acre unless waste disposal constraints dictate otherwise.

6. The BSI property may be developed for residential use. A maximum of 25 units may be approved; all units shall be sited outside of the view from Highway 1. These units may be used in conjunction with the institutional use. The upper steeper portion shall remain in open space.

7. Residential development is permitted on the portion of the Rancho San Carlos within the Coastal Zone, comprising approximately 600 acres, with the allowable density for new subdivision to be based on one unit per 40 acres.

8. Rural residential development is appropriate for the "Flatlands" area, the lower area of Point Lobos

Ranch presently characterized by rural residential use. New land divisions within this area shall result in a maximum of 28 additional units permissible if conversion of visitor serving commercial to residential units is carried out pursuant to the provisions of policy 4.4.3.F.4.C. Preference should also be given to transferring 8 units of residential development for the Riley holdings to the Flatlands pursuant to policies 2.2.4.10.b and 4.4.3.G.3. New development in this area shall be located within the forest cover and shall not be allowed on the open, scenic pasturelands.

9. Residential development of Point Lobos Ranch shall only be considered within the context of an overall development and management plan(s) for the entire ranch that provide for recreation and visitor-serving uses provided, however, that no individual owner shall be prevented from making and proceeding with a separate application for residential development, if full notice is given to other owners of such proceeding so that overall development and management may be discussed during the consideration of any such application.

   Also required is residential (if any) clustering and substantial open space available for on-site recreational use by hotel patrons and the public and to require protection of adjacent State Parks land.

10. To protect the rural character and scenic natural resources of the coastal hills and ridges east of Highway 1 designated as Watershed and Scenic

Conservation, parcels shall be retained in the largest possible size. With the exception of the Sawyer property and the frontal slopes of the Palo Corona Ranch, the density for new land divisions shall be 1 unit per 40 acres below the 1,000-foot elevation contour and 1 unit per 80 acres above the 1,000-foot contour, clustering

* * *

2.3 ENVIRONMENTALLY SENSITIVE HABITATS

2.3.1 Overview

Environmentally sensitive habitat areas are areas in which plant or animal life or their habitats are rare or especially valuable due to their special role in an ecosystem. These include rare, endangered, or threatened species and their habitats; other "sensitive" species and habitats such as species of restricted occurrence and unique or especially valuable examples of coastal habitats; all coastal wetlands and lagoons; riparian corridors; rocky intertidal areas; near shore reefs and offshore rocks and islets; kelp beds; rookeries and haul-out sites; important roosting sites; Areas of Special Biological Significance (ASBS) as identified by the State Water Resources Control Board. The California Coastal Act provides unprecedented protection for environmentally sensitive habitat areas and, within such areas, permits only resource-dependent uses (e.g., nature education and research, hunting, fishing, and aquaculture). The Coastal Act also requires that any development adjacent to environmentally sensitive areas

be properly sited and designed to avoid impacts which would degrade these habitats.

The Carmel Coastal Segment supports a variety of rare, endangered, or sensitive terrestrial species and habitats: riparian corridors, Monterey cypress forest, Gowen cypress woodland, significant stands of Monterey pine, coast redwood forest, north coastal prairie, and dwarf coastal chaparral. These environmentally sensitive habitats should be protected for a variety of reasons: their high scientific and educational values, their scenic values, their high wildlife values ‘ and/or their importance in watershed protection. Several are in public ownership and are thereby afforded a high degree of protection, though even these may be threatened by overuse or potential development on surrounding lands. Other habitats must be protected from the damaging effects of development activities or inappropriate activities such as off-road vehicle use. Protection of the Carmel River riparian corridor is a particular concern. Sections of the river, both within and outside of the planning area, have experienced extensive modification and damage as a result of continued urban development and related flood control measures and water supply development.

The Carmel area also supports a remarkable abundance and diversity of marine life. Rocky intertidal areas, kelp beds, offshore rocks, bluffs, and cliffs are prominent plant and wildlife habitats along the Carmel coast. A number of species of pelagic birds, shorebirds, and marine animals, including the threatened sea otter, utilize and, to various degrees, depend upon these marine habitats. certain

sensitive marine resources already receive protection under policies and laws guiding local, state, and federal agencies. Both the Carmel Bay and the marine waters surrounding Point Lobos Reserve are legally protected through their designation as Areas of Special Biological Significance and Ecologic Reserves.

The only major wetland in the Carmel area is the brackish lagoon and marsh located at the mouth of the Carmel River. Though most of this wetland is in State ownership, it is subject to degradation from water pollution, sedimentation, and recreational use.

2.3.2 Key Policy

The environmentally sensitive habitats of the Carmel Coastal Segment are unique, limited and fragile resources of statewide significance, important to the enrichment of present and future generations of County residents-and visitors; accordingly, they shall be protected, maintained and, where possible, enhanced and restored. All categories of land use, both public and private shall be subordinate to the protection of these critical areas (see Map B).

Plant communities considered as sensitive are categorized as follows:

Rare, endangered and sensitive plants
Northern coastal prairie
Chamise-Monterey Manzanita dwarf coastal chaparral
Gowen cypress woodland
Monterey cypress and pine forests
Redwood forest

Appendix G

Since not all Monterey Pine Forest areas are environmentally sensitive habitat, the restrictions of these policies shall only apply where such forests are determined to be sensitive on a case by case basis.

Rare and Endangered Species are those identified as rare, endangered and/or threatened by the State Department of Fish and Game, United States Department of Interior Fish and Wildlife Service, the California Native Plant Society, IUCN list, and/or pursuant to the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora. Sensitive species are those locally rare or unique plants defined as endemic, relict, or distinct. In the Carmel Area, rare, endangered, and sensitive species include Hickman's Onion, Sandmat Manzanita, Monterey Ceanothus, Hutchinson's Delphinium, California Dichondra, Point Lobos Eriogonum, Gardener's Tampah, Rhododendrons and other species that from time to time may be added or deleted from this list.

Only small-scale development necessary to support the resource-dependent uses may be located in sensitive habitat areas if they can not feasibly be located elsewhere.

2.3.3 General Policies

1. Development, including vegetation removal, excavation, grading, filling, and the construction of roads and structures, shall be avoided in critical and sensitive habitat areas, riparian corridors, wetlands, sites of known rare and endangered species of plants and animals, rookeries and major roosting and haul-

out sites, and other wildlife breeding or nursery areas identified as critical. Resource-dependent uses, including nature education and research, hunting, fishing, and aquaculture, shall be allowed within environmentally sensitive habitats and only if such uses will not cause significant disruption of habitat values. Only small-scale development necessary to support the resource-dependent uses may be located in sensitive habitat areas if they can not feasibly be located elsewhere.

Wetlands are defined as lands which may be covered periodically or permanently with shallow water and include saltwater marshes, fresh water marshes, open or closed brackish water marshes, swamps, mudflats and fens.

2. Land uses adjacent to locations of environmentally sensitive habitats shall be compatible with the long-term maintenance of the resource. New land uses shall be considered compatible only where they incorporate all site planning and design features needed to prevent habitat impacts and where they do not establish a precedent for continued land development which, on a cumulative basis, could degrade the resource.

3. New development adjacent to environmentally sensitive habitat areas shall be allowed only at densities compatible with the protection and maintenance of the adjoining resources. New subdivisions shall be approved only where potential

impacts to environmentally sensitive habitats from development of proposed parcels can be avoided.

4. To protect environmentally sensitive habitats and the high wildlife values associated with large areas of undisturbed habitat, the County shall retain significant and, where possible, contiguous areas of undisturbed land in open space use. To this end, parcels of land totally within sensitive habitat areas shall not be further subdivided. On parcels adjacent to sensitive habitats, or containing sensitive habitats as part of their acreage, development shall be clustered to avoid habitat impacts.

5. Where private or public development is proposed in documented or expected locations of environmentally sensitive habitats—particularly those habitats identified in General Policy No. I—field surveys by qualified individuals or agency shall be required in order to determine precise locations of the habitat and to recommend mitigating measures to ensure its protection. This policy applies to the entire segment except the internal portions of Carmel Woods, Hatton Fields, Carmel Point (Night heron site excluded), Odello, Carmel Meadows, and Carmel Riviera. If any habitats are found on the site or within 100 feet from the site, the required survey shall document how the proposed development complies with all the applicable habitat policies.

6. The County shall require deed restrictions or dedications of permanent conservation easements

in environmentally sensitive habitat areas where development is proposed on parcels containing such habitats. Where development has already occurred in areas supporting sensitive habitat, property owners should be encouraged to voluntarily establish conservation easements or deed restrictions.

7. Where development is permitted in or adjacent to environmentally sensitive habitat areas, the County, through the development review process, shall restrict the removal of indigenous vegetation and land disturbance (grading, excavation, paving, etc.) to that needed for the structural improvements themselves.

8. The County shall require the use of appropriate native species in proposed landscaping.

9. Where public access occurs or has been introduced in areas of environmentally sensitive habitats, it shall be limited to low-intensity recreational, scientific, or educational uses such as nature study and observation, education programs in which collecting is restricted, photography, and hiking. Access in such areas shall be controlled and confined to designated trails and paths. No access shall be approved which results in significant disruption of habitat.

10. The County should request advice and guidance from the California Department of Fish and Game in evaluating proposals for new or intensified land uses—including public access, recreation, and associated facilities—in or adjacent to environmentally sensitive habitat areas.

11. The Department of Fish and Game, which has responsibility for listing rare and endangered plants, should provide Monterey County with updated information on plants, locations, and habitat requirements.

2.3.4 Specific Policies

Terrestrial Plant Habitats

1. To afford long-term protection from the impacts of existing or potential development, public or private acquisition of sites of rare, endangered, and sensitive plants shall be encouraged by the County.

2. Public access to areas of rare, endangered, and sensitive plants should be actively discouraged and directed to less sensitive areas. Where allowed, public access should be strictly managed. Otherwise, the area should be closed.

3. If existing livestock operations are intensified and concentrated in or near riparian corridors, a management program to protect the riparian resource should be developed.

4. The State Department of Parks and Recreation should restrict uses of northern coastal prairie habitat to educational and scientific activities. Recreational uses and development of structures and trails should be avoided on prairie habitat areas.

5. Development proposed near Gowen cypress habitat shall be set back a minimum of 100 feet to protect this sensitive resource. No development should be allowed in this buffer area, and the natural vegetation should be retained. A maintenance program should be established for the Gowen cypress habitat.

6. The County, in coordination with the State Department of Parks and Recreation, should ensure long-term protection of the remaining Gowen cypress habitat occurring on private land.

7. Recreational access and associated facilities within Monterey cypress habitat in Point Lobos State Reserve should be restricted to existing trails.

MAP B

[Map omitted]

8. The County should work with landowners or other public agencies (such as the Coastal Conservancy), as the need arises, to protect both significant stands of Monterey pine and coast redwood forest through permanent conservation easements, deed restrictions, or, where necessary, fee acquisition.

9. In recognition of its function as riparian habitat and of its important role in watershed protection, redwood forest habitat in the Carmel coastal segment should be retained as open space through encouragement of conservation easement, or, where necessary, fee acquisition.

10. Redwood forest and chaparral habitat on land exceeding 30 percent slope should remain undisturbed due to potential erosion impacts and loss of visual amenities.

Riparian Corridors and Other Terrestrial Wildlife Habitats

1. Riparian plant communities shall be protected by establishing setbacks consisting of a 150-foot open space buffer zone on each side of the bank of perennial streams and 50 feet on each side of the bank of intermittent streams, or the extent of riparian vegetation, whichever is greater. No new development, including structural flood control projects, shall be allowed within the riparian corridor. However, improvements to existing dikes and levees shall be allowed if riparian vegetation damage can be minimized and at least an equivalent amount and quality of replacement vegetation is planted. In addition, exceptions may be made for carefully sited recreational trails. The setback requirement may be modified if it can be demonstrated that a narrower corridor is sufficient to protect existing riparian vegetation. Riparian vegetation is an association of plant species which typically grows adjacent to freshwater courses and needs or tolerates a higher level of soil moisture than dryer upland vegetation.

2. The State Water Quality Control Board and the California Department of Fish and Game, in coordination with the County of Monterey, should

establish and reserve instream flows sufficient to protect and maintain riparian vegetation, fishery resources and adequate recharge levels for Protection of groundwater supplies. Maintenance of instream flows should not preclude control of water levels in the Carmel River lagoon for flood protection purposes; i.e., opening the sandbar at the river mouth shall not be precluded by this policy.

3. The County should encourage a program of riparian woodland restoration as a part of the development and environmental review process. As a condition of approval of projects adjacent to riparian corridors, the County, where appropriate, should require landscaping with native riparian species.

4. To protect important wildlife habitat, all off-road recreational vehicle activity should be discouraged within riparian corridors and public access should be limited to designated areas. Accordingly, roads and trails should be sited to avoid impacts to riparian habitat.

5. Wildlife management considerations shall be included in the evaluation of development proposals, particularly land division proposals. Large, and where possible, contiguous areas of native vegetation should be retained in order to meet the various needs of those wildlife species requiring large areas of undisturbed habitat.

6. Critical wildlife habitat areas (refer to General Policy No. 2) shall be protected through permanent easement

or fee acquisition and an adequate distance between such habitat and disturbed areas (e.g., building sites and roads) shall be maintained.

7. To allow for wildlife movement from one open space area to another, adequate corridors (greenbelts) connecting open space areas should be maintained or provided. Such a corridor shall be specifically retained for movement of wildlife to and from uplands east of Point Lobos Reserve and the Reserve itself.

8. Except where necessary to alleviate a hazardous situation, snag removal should be avoided in areas of Monterey pine, coast live oak, or coast redwood which are retained in open space use.

9. The restoration of Northern Coastal Prairie in Point Lobos State Reserve should provide for the retention of snags along the ecotone and within the area to be converted to prairie.

Wetlands and Marine Habitats

1. A setback of 100 feet from the edge of all coastal wetlands shall be provided and maintained in open space use. No new development shall be allowed in this setback area. The edge of wetlands shall be pursuant to policy 2.3.3.5, based on the wetlands definition in policy 2.3.3.1 and using the U.S. Fish and Wildlife Service's classification of Wetlands and Deep Water Habitats of the United States.

2. The County shall assist the maintenance and protection of the Carmel River lagoon and marsh by encouraging the retention of sufficient instream flows and controlling erosion and sedimentation from surrounding and upstream areas.

3. The County shall seek designation of the Carmel River lagoon and marsh as a natural preserve within the State Park Systems as recommended by the Point Lobos—Carmel River State Beach General Plan. Eventual management by the Department of Parks and Recreation shall include measures to limit public access to this natural preserve and to retain the present character of the marsh and lagoon. Particular attention should be given to the control of sedimentation and "filling-in" of this wetlands area.

4. Alteration of the shoreline, including diking, dredging, and filling, shall not be permitted except where demonstrated as essential for protection of existing residential development or necessary public facilities. Existing dikes and levees can be improved subject to these and other plan policies.

5. Concentration of recreational development or recreational activities near accessible tidepool communities shall not be permitted.

6. The County shall support the continued designation of Carmel Bay as an Area of Special Biological Significance.

7. Permits for dredging and other activities which would substantially modify the substrate of kelp forest communities should be reviewed by the Marine Resources Region of the Department of Fish and Game.

8. Commercial, industrial or recreational uses which have the potential to discharge harmful waste products into the air or water or to generate loud noises or disruptive vibrations should not be permitted in the vicinity of seabird and marine mammal colonies.

9. Development on parcels adjacent to intertidal habitat should be sited and designed to prevent percolation of septic runoff and deposition of sediment.

2.3.5 Recommended Actions

Land Use Regulation and Management

1. The County should adopt a Riparian Corridor Ordinance to provide for setbacks from the edge of both banks of perennial and intermittent streams and from the edge of the average high water line of wetlands as specified in the preceding policy section. The ordinance should restrict all new development in the setback area. Except for areas with existing dikes and levees, it should also prohibit the dumping of all spoils into riparian corridors. Enforcement of the Riparian Corridor ordinance should be coordinated with the Department of Fish and Game.

2. The County should cooperate with the Monterey Peninsula Water Management District in drafting a plan for management of the entire Carmel River with preservation and protection of a continuous riparian corridor as one of its main objectives.

3. The County should work with the State Department of Parks and Recreation and the State Coastal Conservancy to explore the reservation of significant coastal resource areas, as provided for in the State Coastal Conservancy Act.

4. The County should encourage the restoration of sensitive plant habitats on public and private lands. A program to control and eliminate noxious non-native vegetation should be developed in conjunction with the State Department of Parks and Recreation and State Department of Fish and Game.

5. The County should work in coordination with the Department of Fish and Game, federal government agencies (e.g., Fish and Wildlife Service), and local botanists to develop effective conservation easements, associated means of implementation and enforcement procedures to protect sensitive plants and critical habitat locations.

6. To provide long-term protection f or the Carmel River and marsh and lagoon, the State Department of Parks and Recreation should investigate the feasibility of State acquisition of riparian and wetland habitat remaining in private ownership.

7. To reduce accumulated fuel loads, maintain the health and vigor of the pine and cypress forests, facilitate reproduction of the Gowen and Monterey cypress, and reduce the spread of Monterey pine into certain areas such as Northern Coastal Prairie, the State Department of Parks and Recreation should develop a fuel hazard reduction and prescribed burning program. Such a program should not be executed, however, until it is proven practical and prudent. In the meantime, the California Department of Parks and Recreation should give serious consideration to contracting for manual removal of fuel-hazardous materials.

8. A forest conservation and management program should be developed and implemented by the County and the State Department of Parks and Recreation to maintain those Monterey pine and Coast redwood forest areas retained as open space. The management program should include the following elements:

    a. The retention of snags for wildlife use

    b. Control of disease and pests

    c. Where applicable, measures to minimize alteration of drainage patterns as a result of new development

    d. Provision and regulation of public access and recreational use.

9. The State Department of Parks and Recreation should monitor disturbed areas such as trail construction sites for the presence of noxious plants and erosion, and such potential problems should be immediately controlled.

10. A fish ladder should be constructed at the diversion dam on San Jose Creek to facilitate migration of steelhead for spawning upstream. Funding for this ladder should be requested from the State Department of Water Resources through its Stream Enhancement Program.

11. To prevent damage or degradation of this sensitive habitat area, public access to the Gibson Creek Annex should be managed through ranger or docent-guided tours as recommended by the Point Lobos State Reserve-Carmel River State Beach General Plan.

12. The State Department of Parks and Recreation's interpretive program should include static displays, guided nature walks and published information which emphasize the values of environmentally sensitive habitats and which are directed toward the general public.

13. The County, in coordination with the State Department of I Parks and Recreation and other concerned agencies or organizations should promote increased public understanding of the importance and values of environmentally sensitive habitats by the following means:

a. Encouraging and supporting environmental education programs that emphasize understanding of local habitat areas in the public schools and in informal educational programs offered by community organizations.

b. Providing signs, interpretive displays and/or educational materials at appropriate locations to inform the public of the sensitivity and habitat values of selected local sites.

Monitoring and Continuing Research

1. The State Water Resources Control Board, the State Department of Fish and Game, the State Department of Parks and Recreation, the County of Monterey, the Carmel Sanitary District, and the universities and research stations should develop a coordinated water quality monitoring program for the Areas of Special Biological Significance.

2. The Department of Fish and Game should continue to evaluate the impact of kelp harvesting on other marine resources (e.g., juvenile fish, sea otters) and the uses dependent upon them (e.g., sport fishing, recreational diving, scenic driving, and picnicking). The results of its evaluation should be forwarded to the County and other concerned agencies such as the U. S. Fish and Wildlife Service and the State Department of Parks and Recreation.

3. The Department of Fish and Game should evaluate the adequacy of restrictions on kelp harvesting. The

rule which states that a maximum 50 percent of a kelp bed may be cut should be given special scrutiny.

4. The State Department of Fish and Game should work with the U.S. Fish and Wildlife Service to determine those factors currently affecting the growth rate of the otter population. The County should request the Department of Fish and Game to report annually on the status of the sea otter population.

5. The Department of Fish and Game should work with the U.S. Fish and Wildlife Service and the Point Bird Observatory to assess and report on the status of pelagic bird and marine mammal populations off the Carmel coast in relation to West Coast populations. Special attention should be given to threats to food sources and habitat integrity, particularly to potential expansion of the squid fishery which could reduce the available food supply for marine birds and mammals.

6. The County shall continue to monitor the review process of the Outer Continental Shelf (OCS) Lease Sale to express its continuing opposition to lease sales and to coordinate its actions with other affected local coastal governments.

7. The County should work with the OcS Planning Group, the U.S. Coast Guard, and the Department of Fish and Game to ensure that oil transport activities near the Monterey Carmel coast include adequate procedures to protect marine bird and mammal (particularly, sea otters) populations and to clean up oil spills.

8. The County should work with the Federal Office of Coastal Zone Management of the Bureau of Land Management (BLM) and with the National Oceanic and Atmospheric Administration (NOAA) to the Department of Commerce to assure that northbound sea lanes for tanker traffic off this coast are well outside the three-mile limit in order to protect the entire shoreline from possible spills or coincidental pumping of bilges.

2.4 WATER AND MARINE RESOURCES

2.4.1 Overview

The Carmel coasts' major streams are the Carmel River, San Jose Creek, Gibson Creek, Wildcat Creek, and Malpaso Creek. With the exception of the Carmel River, these streams are small, but all directly support riparian wildlife and plant communities. Because many of the streams are small, development of residences, agriculture, and public or private recreation and visitor-serving facilities can place excessive demands on the water available in some watersheds. When overuse is allowed, through unwise approvals of development or use applications, degradation of the natural environment results with loss of plant, wildlife, and fish habitats. Eventually, people dependent on the adequate supply of quality water will suffer too as private and community water systems fail. The drought of 1976-78 emphasized the critical need for a careful and conservative approach to planning and to recognize that drought year flows are the controlling factor for all human and natural uses.

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Deterioration of water quality poses a threat to both freshwater and marine communities. Potential point sources of pollution include the Carmel Sanitary District Sewage Treatment plant and existing package treatment plants. Secondarily-treated effluent from the sanitary district's treatment plant is discharged into the Carmel Bay ASBS, (Area of Special Biological Significance) while effluent from the two package treatment plants is discharged into the open ocean south of the Point Lobos ASBS. Nonpoint sources of pollution include: (1) the contaminants and sediments found in urban stormwater runoff entering the Carmel River and Carmel Bay ASBS, and (2) septic system and leachfield failures in the Carmel Highlands area.

In recent years, the Carmel River has experienced extensive erosion and sedimentation while the Carmel Bay has sustained a notable decline in water clarity. Preservation of the remarkable diversity of marine life found in Point Lobos and Carmel Bay ASBS's and protection of those scientific, educational, and recreational values dependent on this marine life will require that a high level of water quality be maintained. Similarly, protection of the coastal streams natural environment will necessitate that both water quality and adequate instream flows be maintained.

All decisions concerning the development of the Carmel area must ensure the protection of water quality through the use of adequate stream setbacks, grading and erosion control measures, and vegetative maintenance.

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2.4.2 Key Policy

The water quality of the Carmel area's coastal streams and of the Point Lobos and Carmel Bay Areas of Special Biological Significance shall be protected and maintained. Instream flows should be protected in order to maintain the natural plant community and fish and wildlife. In general, the County will require adherence to the best watershed planning principles, including: stream setbacks, stream flow maintenance, performance controls for development site features, maintenance of safe and good water quality, protection of natural vegetation along streams, and careful control of grading to minimize erosion and sedimentation.

2.4.3 General Policies

1. The effects of all new development proposals or intensification of land use activities or water uses on the natural character and values of the Carmel coasts streams will be specifically considered in all land use decisions. Subjects to be addressed in such evaluations include protection of water quantity and quality, wildlife and fish habitat, and recreational and scenic values. Land use proposals determined to pose unacceptable impacts to the natural integrity of the stream must be modified accordingly. The County should request technical assistance from the State Department of Fish and Game in determining effects on fish and wildlife habitat and appropriate mitigation measures.

2. New development including access roads shall be sited, designed and constructed to minimize runoff, erosion, and resulting sedimentation. Land divisions shall be designed to minimize the need to clear erodable slopes during subsequent development. Runoff volumes and rates should be maintained at pre-development levels, unless provisions to implement this result in greater environmental damage.

3. Point and non-point sources of pollution of Point Lobos and Carmel Bay ASBS's, coastal streams and the Carmel River Lagoon and Marsh shall be controlled and minimized.

4. New development shall be located and developed at densities that will not lead to health hazards on an individual or cumulative basis due to septic system failure or contamination of groundwater. On-site systems should be constructed according to standards that will facilitate long-term operation. Septic systems shall be sited to minimize adverse effects to public health and sensitive resource areas.

5. The use of on-site wastewater management systems that reduce the risk of failure or groundwater contamination and are approved by the County Health Department should be encouraged.

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2.4.4 Specific Policies

A. Water Availability

* * *

6.2.1 Zoning Ordinance Changes

A. Rezoning

Rezoning of the Carmel area will be necessary to reflect the land use plan. The uses, densities, and locations of zoning revisions must be consistent with Land Use Plan Map and policies as closely as possible in accordance with State laws. Zoning should be adequately flexible to permit. The range of uses and densities provided for in the plan.

The Monterey County Zoning Ordinance (Ord. No. 911) should be amended to delete use of the combining Coastal Zone (CZ) district, and to add general coastal zone regulations and separate coastal zone districts as set out above. The general regulations will incorporate and refer to Coastal Act (Public Resources Code Section 30000 et. seq.) policies. They will also incorporate provisions of the Monterey County Zoning Ordinance for Design Control Districts (Section 25) and Scenic Conservation Districts (Section 23.3c), for appeal (Section 32), and enforcement (Section 36), and provisions of the Subdivision Ordinance (Ord. No. 1713) for appeal and for enforcement (Section 10).

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Some suggested zoning districts include:

CZ-WSC	Coastal Zone—Watershed and Scenic Conservation District: Includes low-density residential development, low-intensity recreation, agriculture, and forest and watershed management.
CZ-SNRR	Coastal Zone—Scenic and Natural Resource Recreation District: Includes low-intensity recreational uses.
CZ-ST	Special Treatment: Includes areas where concentration of development may be permitted subject to resource protection measures of the land use plan.

B. Development Permits

All development in the coastal zone will be required to obtain a development permit from the County that will be approved based on demonstrated compliance with the plan and all its provisions. Some forms of development, similar to that exempted in the Coastal Act, may also be exempted from obtaining a coastal permit from the County. Final action on coastal permits will be taken by the Board of Supervisors for standard subdivisions; all other development will be considered by the Planning Commission subject to Board appeals.

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C. Site Plan Review

Projects applying for a coastal permit will undergo a comprehensive site plan review to determine the consistency of the proposed project with the plan. The applicant will be permitted flexibility to develop in any manner which is consistent with any of the variety of uses and densities included in the particular zoning district and which meets the performance standards set forth in the land use plan.

D. Performance Standards

* * *

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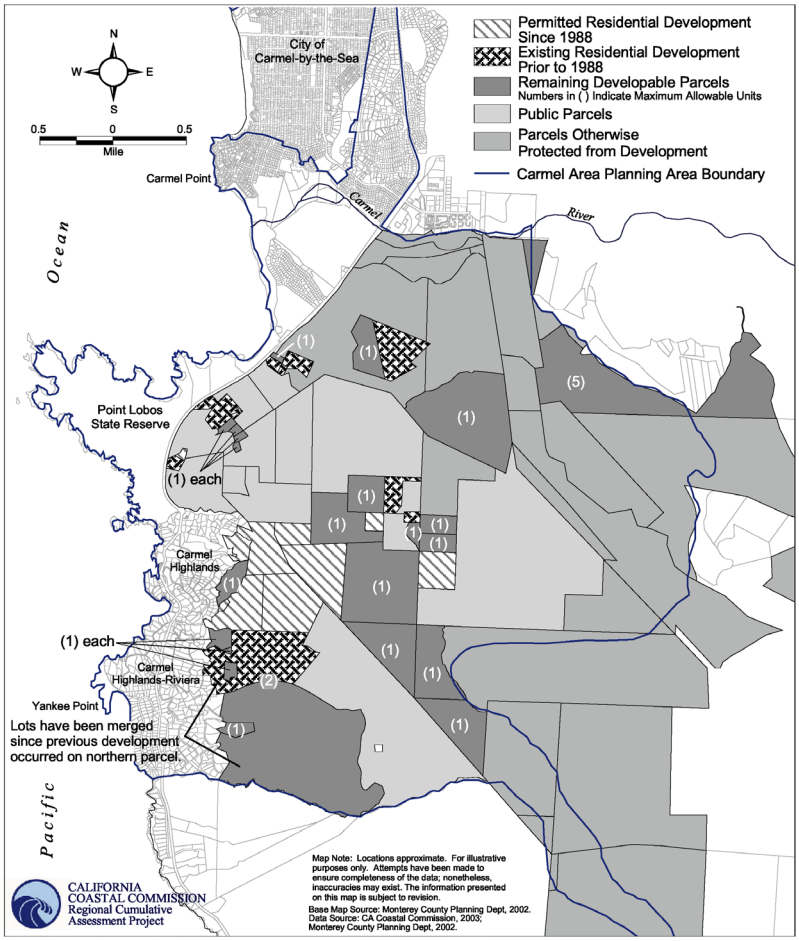
Monterey County Periodic Review
Development and Preservation
Carmel Area Uplands



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MONTEREY COUNTY ZONING COASTAL IMPLEMENTATION PLAN—TITLE 20

20.36—RC (CZ) DISTRICT

20.36.010 PURPOSE.

The purpose of this Chapter is to provide a district to protect, preserve, enhance, and restore sensitive resource areas in the County of Monterey. Of specific concern are the highly sensitive resources inherent in such areas such as viewshed, watershed, plant and wildlife habitat, streams, beaches, dunes, tidal areas, estuaries, sloughs, forests, public open space areas and riparian corridors. The purpose of this Chapter is to be carried out by allowing only such development that can be achieved without adverse effect and which will be subordinate to the resources of the particular site and area.

20.36.020 APPLICABILITY.

The regulations of this Chapter shall apply in all "RC" districts subject to Chapter 20.62 (Height and Setback Exceptions) and Chapter 20.70 (Coastal Development Permits) of this Title.

20.36.030 NONEXEMPT DEVELOPMENT

The following list shall require a coastal development permit regardless of which category of allowed uses it falls into:

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A. Development which will cause a Significant Environmental Impact;

B. Development within the Critical Viewshed as defined by Section 20.145.020.V (Big Sur);

C. Development on slopes of 30% or greater (25% in North County) except as provided for in Section 20.64.230 (C) (2) and (3);

D. Ridgeline Development;

E. Development within 100 feet of mapped or field identified environmentally sensitive habitats;

F. Development with positive archaeological reports;

G. Land divisions;

H. Development of new or expanded agricultural operations if 50% or more of the parcel has a slope of 10% or greater; or where the operation is to occur on soils with a high or very high erosion hazard potential, according to the Soil Conservation Service Soil Survey Manual.

20.36.040 PRINCIPAL USES ALLOWED, COASTAL ADMINISTRATIVE PERMIT REQUIRED IN EACH CASE. (20.70) UNLESS EXEMPT (20.70.120)

A. Resource dependent educational and scientific research facilities uses, and low intensity day use

recreation uses such as trails, picnic areas and boardwalks;

B. Restoration and management programs for fish, wildlife, or other physical resources;

20.36.050 CONDITIONAL USES ALLOWED, COASTAL DEVELOPMENT PERMIT REQUIRED IN EACH CASE. (20.70) UNLESS EXEMPT (Section 20.70.120)

A. Except in Big Sur dredging, filling, excavation, dams, flood control facilities, dikes levees, revetments, seawalls and cliff retaining walls;

B. Except in Big Sur public utility facilities such as pipe lines, underground and overhead utility extensions, and water tanks, but not including public/quasi-public uses such as schools, fire stations, or parking lots;

C. In Big Sur only hike-in and environmental campsites;

D. Legal nonconforming use of a portion of a structure extended throughout the structure (ZA);

E. Legal nonconforming use changed to a use of a similar or more restricted nature;

F. For State Parks and Fish and Game Reserves, uses subject to State-approved facilities and area management plans;

G. Lot Line Adjustments;

H. Subdivisions;

I. Conditional Certificates of Compliance;

J. Other resource conservation uses of a similar character, density and intensity to those uses listed in this Section determined by the Planning Commission to be consistent and compatible with the intent of this Chapter and the applicable land use plan.

20.36.060 SITE DEVELOPMENT STANDARDS.

A. Minimum Building Site

The minimum building site shall be one acre.

B. Structure Height and Setback Regulations

The following structure height and setback regulations apply unless superseded by a structure height limit noted on the zoning map (e.g. "RC/10(24')" would limit structure height to 24 feet), setback requirements when combined with a "B" district, setbacks shown on a recorded final or parcel map, or setback lines on a Sectional District Map.

1. Main Structures

a) Minimum Setbacks

Front: 30 feet
Side: 20 feet
Rear: 20 feet

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b) Height

Maximum Height: 30 feet

2. Accessory Structures (Habitable)

a) Minimum Setbacks

Front: 50 feet
Side: 6 feet
Rear: 6 feet

b) Height

Maximum Height: 15 feet

3. Accessory Structures (Non-habitable)

a) Minimum Setbacks

Front: 50 feet
Side: 6 feet on front one-half of property;
1 foot on rear one-half of property.
Rear: 1 foot

b) Height

Maximum Height: 35 feet

4. Accessory structures used as barns, stables or farm outbuildings shall not be less than 50 feet from the front of the property or 20 feet from

the side or rear property line or 20 feet from any residence on the property.

C. Minimum Distance Between Structures

Main Structures: 20 feet
Accessory/Main Structure: 10 feet
Accessory/Accessory: 6 feet

D. Building Site Coverage, Maximum: 5%

E. Parking Regulations

All parking shall be established pursuant to Chapter 20.58.

F. Landscaping Requirements

None, except as may be required by condition of approval of a Coastal Administrative Permit or Coastal Development Permit. Natural vegetation shall be retained or restored.

G. Lighting Plan Requirements

None, except as may be required by condition of approval of a Coastal Administrative Permit or Coastal Development Permit.

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H. Sign Regulations

Signing for all development shall be established pursuant to Chapter 20.60.

I. Building Site Area

The minimum building site area shall be one acre.

20.36.070 SPECIAL REGULATIONS.

A. Manufactured Dwelling Units

Manufactured dwelling units meeting the standards of Section 20.64.040 are permitted subject to the requirements of any conventional dwelling unit in this Chapter.