

**CALIFORNIA COASTAL COMMISSION**

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# Th15b

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 Staff: KK/MF/KV - SC  
 Staff Report: 3/22/2024  
 Hearing Date: 4/11/2024

## STAFF REPORT SUBSTANTIAL ISSUE & CDP DETERMINATIONS

**Appeal Number:** A-3-PGR-22-0004

**Applicant:** Foursome Development Company

**Appellants:** Commissioners Linda Escalante and Caryl Hart, Pacific Grove Coast Watch, Kim Akeman, Thom Akeman, Anthony Ciani, Jane Haines, and Michelle Raine

**Local Government:** City of Pacific Grove

**Local Decision:** Approved by the City of Pacific Grove City Council on January 12, 2022 (City Coastal Development Permit Application Number 19-0363)

**Project Location:** Roughly 6-acre site just inland of Ocean View Boulevard between Dewey and Eardley Avenues and extending inland to Central Avenue, including the Sloat Avenue public right-of-way, currently mostly occupied by the American Tin Cannery commercial building just downcoast of the Monterey Bay Aquarium and Cannery Row, and just inland of Stanford University's Hopkins Marine Station, in the City of Pacific Grove near the border with the City of Monterey in Monterey County

**Project Description:** Partial demolition and a complete redevelopment and expansion of the existing American Tin Cannery and nearby buildings to create a new 225-room hotel resort with related development (e.g., two pools, a spa and fitness center, restaurants, banquet/meeting rooms, underground and surface parking (some 290 spaces, including 255 valet parking spaces), and approximately 11,000 square feet of retail uses), totaling some roughly 350,000 square feet of total floor area; vacation of portions of the Sloat Avenue

public street and portions of Ocean View Boulevard for private hotel use; and related development.

**Staff Recommendation:** Substantial Issue Exists; Approval with Conditions

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### IMPORTANT HEARING PROCEDURAL NOTE

Please note that at the hearing for this item the Commission will not take testimony on staff's substantial issue recommendation unless at least three Commissioners request it. Commissioners may ask questions of the Applicant, aggrieved persons (i.e., generally persons who participated in some way in the local permitting process), the Attorney General, the Executive Director, and their proxies/representatives prior to determining whether or not to take such testimony. If the Commission does decide to take such testimony, then it is generally limited to three minutes total per side (although the Commission's Chair has the discretion to modify those time limits). Only the Applicant, aggrieved persons, the local government, and their proxies/representatives are allowed to testify during this substantial issue phase of the hearing. Other interested parties may submit comments in writing. If the Commission finds that the appeal raises a substantial issue, then the Commission takes jurisdiction over the underlying coastal development permit (CDP) application, and it will then review that application immediately following that determination (unless that portion of the hearing is postponed), at which time all persons are invited to testify. If the Commission finds that the appeal does not raise a substantial issue, then the local government CDP decision stands, and is thus final and effective.

### SUMMARY OF STAFF RECOMMENDATION

On January 12, 2022, the City of Pacific Grove City Council, overturning the City Planning Commission's denial, approved a CDP for the development of a 225-room hotel-resort facility with over 350,000 square feet of total floor area at the roughly six-acre American Tin Cannery (ATC) site and on portions of public street rights-of-way near the shoreline of the Monterey Bay in Pacific Grove. The appeals contend that the City's approval of the CDP raises questions regarding its consistency with City Local Coastal Program (LCP) provisions and Coastal Act public access provisions related to water supply, lower-cost accommodations, public access, public views and community character, habitat protection, and historic resources.

After thoroughly reviewing the local record in light of applicable Coastal Act and LCP provisions and the substantive issues raised, staff recommends that the Commission find that the appeals raise substantial issues with respect to such Coastal Act/LCP requirements, and thus that the Commission take jurisdiction over the CDP application for the proposed project. Staff further recommends that the Commission, after public hearing, approve a conditioned CDP for the hotel resort project that appropriately addresses the Coastal Act and LCP requirements applicable here.

To be clear, this proposed project is the culmination of over a decade of visioning and planning, with some start and stop moments along the way. Over the years, Commission staff had welcomed the concept of a new hotel at the ATC site, including to better activate it over the existing retail/commercial mix. In fact, when the LCP was

certified for the first time in 2020, this particular CDP application proposal was in its infancy, and thus part of City and Commission staff collaborations at that time focused on provisions specific to the ATC site and a potential project here. The site's large size, and its conspicuous location adjacent to the Monterey Bay Aquarium, the Monterey Bay Coastal Recreation Trail, and the City limits themselves, all serve to define it as a true 'gateway' site of immense importance to the City. It was therefore key to ensure that the LCP clearly circumscribed the goals, objectives, and requirements for this site to ensure that any proposed development here respects and responds to those needs.

However, as the Applicant unveiled the proposed project's parameters, it became readily apparent to staff that the proposal was missing key components necessary for an approvable project consistent with applicable Coastal Act and LCP provisions. At a broad level, this was because the proposal appeared to oversubscribe the site, with issues emanating thereto (including related to water supply, public views and access, and lower-cost accommodations) unaddressed. Staff opined at various junctures to the City and Applicant on these points, including even ultimately advising the City Council prior to its CDP hearing in January 2022 not to take a CDP action at that time as the project did not appear Coastal Act and LCP consistent, and suggesting that it would be prudent to hold off on an action until relevant supporting materials and data could be developed in support of approving a project. The City Council ultimately did not heed that advice, and approved the CDP anyways, after which it was promptly appealed to the Commission.

As explained in detail in the Substantial Issue section of this report, that City CDP approval, in staff's view, suffers from some key analytic problems related to a host of important coastal resource issues, leading to Coastal Act and LCP inconsistencies. For example, issues related to the Monterey Peninsula's chronic water supply inadequacies were inadequately addressed by rote reliance on the Monterey Peninsula Water Management District's water allocation procedures, lower-cost accommodations were deemed infeasible until the very last City Council meeting when some amount were then found to be feasible subject to a completely insufficient additional in-lieu mitigation fee, public access impacts were left unmitigated when the LCP requires such access to be maximized for additional public benefit, public views and community character did not appear to have been appropriately evaluated, and issues related to potential offsite construction impacts, including on adjacent sensitive offshore environments, were not sufficiently detailed nor protective, to name the main, but not all of the issues. To be sure, these are very detailed and complex issues on a host of core LCP and Coastal Act resource topics and concerns, and they were all insufficiently addressed. That fact, combined with the scope, magnitude, and overall importance of this site/project to the City, all necessarily took staff time to work through the issues, meet with various stakeholders, and ultimately work with the Applicant on project changes that respond to and respect the Coastal Act and LCP prescriptions for the site and a project of this nature. The end result of this process is the revised project as proposed, and as proposed to be conditioned, on de novo review.

The revised project generally maintains the overarching premise of the City-approved version, including that it is comprised of a resort hotel facility, but is generally smaller at some 206 units (down from 225, and a reduction of some 85,000 square feet of hotel

development) and it has abandoned certain elements (e.g., a reduction in retail space). In its place, the project now includes new public access elements, including a new public park and plaza at the corner of Ocean View Boulevard, which also provides direct access to new a 'living roof' garden space open and available for public use and enjoyment with sweeping Monterey Bay views. These and other new access elements, including a new public restroom directly accessible from Dewey Avenue, along with the Commission's typical suite of special conditions requiring such elements to be open and available for public use and enjoyment, and to do so in a visually compatible manner, all meet key Coastal Act and LCP requirements for this site. The reduced scope of the project also helps to better address public view and character concerns, as well as to more clearly align the project with the LCP's water supply requirements, including ensuring that the project uses no more water than what the existing ATC site is currently physically equipped to use. On this point, water is a key limiting factor and constraint to new development on the Monterey Peninsula, where new development remains subject to significant restrictions largely emanating from a State Water Resources Control Board Cease and Desist Order that severely limits water withdrawals and what such water is allowed to be used for. Thus, necessarily, a large part of staff's evaluation efforts focused on these water supply questions, including working directly with the numerous State and local entities involved in Peninsula water regulation to understand their perspectives and requirements. Ultimately, staff believes that the project herein, including as it is conditioned, best applies those understandings through a Coastal Act/LCP lens. Similarly, the project includes less grading and site disturbance, and now includes a much more robust set of biological monitoring protocols, including incorporating recommendations from local harbor seal groups as well from fellow resource agencies and scientific experts, to ensure that impacts are either avoided or promptly addressed, up to and including a stop-work order should specific adverse impacts be identified, where staff believes that such habitat precautions appropriately address potential habitat and related species concerns.

And, lastly, after much discussion and deliberation, the Applicant has proposed a significant lower-cost overnight accommodations mitigation package, all of which would be accommodated on-site and without the need for in-lieu mitigation fees. The package includes providing 18 lower-cost standard hotel rooms within the hotel itself, where the cost would be no more than \$184 per night (inclusive of parking, resort fees, and any other hotel charges), where \$184 is the current lower cost threshold as applied by the LCP. The package also includes a 16-unit/64-bed group wing providing for shared accommodations (with 4 beds per room that would share a bathroom between every two rooms), where the rates would be set at \$85 per bed, which can serve as a lower-cost option for single travelers and couples. And finally, the package also includes a commitment to group programming, whereby the Applicant proposes to bring lower-income youth, school groups, and other underrepresented communities to the group wing for at least 300 bed-nights (i.e., one guest per bed per night) per year, 150 of which would be free and the remainder would be capped at lower cost rates. As explained in detail in this report, given the difficulty in building new overnight accommodation units of any kind in Pacific Grove, let alone lower cost units, it is important to take full advantage of these limited opportunities when such lower cost units and opportunities can be accommodated – and accommodated here on-site – including when the LCP explicitly identifies on-site lower cost accommodations as the

first priority. And this project also provides an important opportunity to provide for a mix of on-site accommodations to serve various users, including families, singles/couples, and groups, and should help to further public coastal access, lower-cost accommodation, and environmental justice objectives, and to help to truly work towards 'access for all'.

In conclusion, staff acknowledges that this project has been controversial, with many supporters and opponents on either side for a variety of reasons, and further acknowledges that all such interested parties' input to date has made for a much improved project in relation to the Coastal Act and the LCP compared to when it was approved locally. Staff also acknowledges the Applicant's patience and willingness to thoughtfully engage on the issues, and notes that the Applicant is in full agreement with the staff recommendation. Ultimately, staff believes that the end result is a project that appropriately addresses Coastal Act and LCP requirements in a way that should provide a welcome and important addition to the City. As such, staff recommends the Commission approve a conditioned CDP for the revised project, for which the motions and resolutions to do so are found on page 7.

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**EXHIBITS**

- Exhibit 1: Project Location
- Exhibit 2: Project Area Photos
- Exhibit 3: City of Pacific Grove Final CDP Approval
- Exhibit 4: Project Plans
- Exhibit 5: Appeals of City CDP Action
- Exhibit 6: Lower-Cost Accommodations In-Lieu Fee Assumptions/Calculations
- Exhibit 7: Coastal Commission Staff Comments on Local CDP Process/Action

**PUBLIC CORRESPONDENCE RECEIVED**

**EX PARTE COMMUNICATIONS**

## MOTIONS AND RESOLUTIONS

### **A. Substantial Issue Determination**

Staff recommends that the Commission determine that a **substantial issue** exists with respect to the grounds on which the appeals were filed. A finding of substantial issue would bring the CDP application for the proposed development under the jurisdiction of the Commission for a de novo hearing and action. To implement this recommendation, staff recommends a **NO** vote on the following motion. Failure of this motion will result in a de novo hearing on the CDP application, and adoption of the following resolution and findings. Passage of this motion will result in a finding of no substantial issue and the local action will become final and effective. The motion passes only by affirmative vote of a majority of the Commissioners present.

***Motion:** I move that the Commission determine that Appeal Number A-3-PGR-22-0004 raises no substantial issue with respect to the grounds on which the appeals have been filed under Section 30603 of the Coastal Act, and I recommend a no vote.*

***Resolution to Find Substantial Issue:** The Commission hereby finds that Appeal Number A-3-PGR-22-0004 presents a substantial issue with respect to the grounds on which the appeals have been filed under Section 30603 of the Coastal Act regarding consistency with the certified City of Pacific Grove Local Coastal Program and/or the public access provisions of the Coastal Act.*

### **B. CDP Determination**

Staff recommends that the Commission, after public hearing, **approve** a coastal development permit for the proposed development. To implement this recommendation, staff recommends a **YES** vote on the following motion. Passage of this motion will result in approval of the CDP as conditioned and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

***Motion:** I move that the Commission approve Coastal Development Permit Number A-3-PGR-22-0004 pursuant to the staff recommendation, and I recommend a yes vote.*

***Resolution to Approve CDP:** The Commission hereby approves Coastal Development Permit Number A-3-PGR-22-0004 and adopts the findings set forth below on grounds that the development as conditioned will be in conformity to with the City of Pacific Grove Local Coastal Program. Approval of the permit complies with the California Environmental Quality Act because either 1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the development on the environment, or 2) there are no further feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the development on the environment.*

## 1. STANDARD CONDITIONS

This permit is granted subject to the following standard conditions:

- 1. Notice of Receipt and Acknowledgment.** The permit is not valid, and development shall not commence, until a copy of the permit, signed by the Permittee or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
- 2. Expiration.** If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
- 3. Interpretation.** Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.
- 4. Assignment.** The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
- 5. Terms and Conditions Run with the Land.** These terms and conditions shall be perpetual, and it is the intention of the Commission and the Permittee to bind all future owners and possessors of the subject property to the terms and conditions.

## 2. SPECIAL CONDITIONS

This CDP is granted subject to the following special conditions:

- 1. Revised Final Plans.** PRIOR TO ISSUANCE OF THE CDP, the Permittee shall submit two full size sets of Revised Final Plans to the Executive Director for review and written approval. Such Plans shall be prepared by a licensed professional or professionals (i.e., architect, surveyor, geotechnical engineer, etc.), shall be based on current professionally surveyed topographic elevations for the entire site, shall include a graphic scale, and shall be accompanied by documentation clearly demonstrating compliance with all aspects of this condition (e.g., plant provenance, lighting and glazing specifications, etc.). Such Plans shall be substantially in conformance with the proposed plans (titled American Tin Cannery (ATC) Hotel & Commercial Project, prepared September 8, 2021 and updated December 8, 2021, by Hart Howerton and John C. Hill, A.I.A., dated received in the Coastal Commission's Central Coast District Office on January 20, 2022 as part of the City's Final Local Action Notice, and with such proposed modifications, all as identified in Exhibit 4), but shall be modified to achieve compliance with this condition, including that such Plans shall include the following:
  - a. Ocean View Boulevard Frontage.** The public sidewalk along Ocean View Boulevard, including the elevated portion adjacent to the hotel structure, shall be open and available for public use and enjoyment.
  - b. Parking.** At least 18 spaces in the underground parking garage and 5 spaces



reserved for ATC guests in the Central Avenue lot shall have EV charging stations, and 45 spaces in the underground parking garage and 12 spaces reserved for ATC guests in the Central Avenue lot shall be EV-ready, or as otherwise required under the California Building Code. Two spaces in the Central Avenue lot and 6 in the underground lot shall be ADA accessible, or as otherwise required under the ADA.

- c. Design.** All development shall incorporate architectural details and varied materials to reduce the apparent mass of the development. Building facades should be broken up by rooflines, offsets, and other such building elements in order to avoid a box-like appearance. Variations in wall planes, detailing, materials, and siding shall be used to create interest and promote as small a scale appearance as possible, where continuity for the overall development shall be assured, while also providing for some variations, including between adjacent buildings. Roof styles and roof lines shall match, unless differences better protect public views. Exterior development shall complement building development, and help to provide visual transition to taller shapes. All surfaces shall use or effectively mimic natural materials and colors sited and designed to help reduce perceived mass and scale, and to best integrate seamlessly into the coastal environment and required landscaping at maturity; garish and/or bright colors shall be prohibited.
- d. Greywater System.** All greywater system components (including collection, storage, treatment, and redistribution infrastructure) shall be clearly identified, and only minor irrigation components shall be allowed to be above-ground/visible, and only if hidden from public view. The graywater system shall be accompanied by evidence that all applicable authorities (including but not limited to the Monterey County Department of Environmental Health) have signed-off/approved the configuration and use of the system.
- e. Water Conservation.** All interior and exterior water-using fixtures, appliances, equipment, irrigation infrastructure, and other such components (e.g., faucets, toilets, showers, ice machines, dishwashers, irrigation etc.) shall be certified for low-flow (or ultra-low flow) and high-water efficiency use, and water conservation measures (e.g., easily accessible shut off valves, recirculating pumps, drip and/or micro-spray irrigation, etc.) shall be applied to the maximum feasible extent.
- f. Landscaping.** All existing landscaping shall be removed and new landscaping shall be planted and maintained in all site areas not covered in hardscape, as well as on the 'living roof' components, where such landscaping shall use species (at maturity) and topographic relief that can provide for screening and softening of all development in public views as much as possible. All such landscaping shall consist of low water-using, locally-sourced, native, non-invasive species appropriate to the Pacific Grove shoreline area, and shall be maintained in a litter-free, weed-free, and healthy growing condition (including through replanting and/or remediation to achieve consistency with this condition). No plant species listed as problematic and/or invasive by the California Native Plant Society, the California Invasive Plant Council, or as may be so identified

from time to time by the State of California, and no plant species listed as a “noxious weed” by the State of California or the U.S. Federal Government shall be planted or allowed to naturalize or persist on the site.

- g. Irrigation.** All irrigation systems shall limit potable water use to the maximum extent feasible, including via using greywater as much as possible and using irrigation measures designed to facilitate reduced water use overall (e.g., micro-spray and drip irrigation, weather-based irrigation controllers, etc.). Irrigation system components shall be hidden from view as much as possible.
- h. Lighting.** Exterior lighting shall be wildlife-friendly, shall use lamps that minimize the blue end of the visible spectrum, and shall be limited to the maximum extent feasible to the minimum lighting necessary for safe ingress, egress, and use purposes, where all trail lighting shall be mounted on bollards (or equivalent) no greater than 3 feet tall. All lighting (exterior and interior) shall be sited and designed so that it limits the amount of light or glare visible from both public viewing and natural (e.g., beaches, bluffs, offshore, etc.) areas to the maximum extent feasible (i.e., through using the lowest luminosity possible (no more than 60 watts (incandescent) or equivalent), directing lighting downward and away from public and natural areas, shielding bulbs/light sources from view, prohibiting lighting that blinks or flashes, etc.). All other lighting not meeting such parameters shall be prohibited.
- i. Windows and Other Surfaces.** All windows shall be non-glare glass, all other surfaces shall be similarly treated to avoid reflecting light, and all windows shall be bird-safe (i.e., windows shall be frosted, partially frosted, or otherwise treated with visually permeable barriers that are designed to prevent bird strikes).
- j. Utilities.** All utilities (e.g., sewer, water, stormwater, gas, electrical, telephone, data, etc.) shall be clearly identified (including and the manner in which they will connect to offsite distribution networks) and shall be located underground, including that all existing overhead utilities on the site shall be removed.
- k. Stormwater and Drainage.** All stormwater, drainage, and related water quality infrastructure (e.g., pervious pavements, etc.), with preference given to natural BMPs (e.g., bioswales, vegetated filter strips, etc.), shall be clearly identified. Such infrastructure shall provide that all project area stormwater and drainage is filtered and treated to remove expected pollutants prior to discharge and/or direction to offsite areas; shall retain runoff from the project onsite to the maximum extent feasible (e.g., through the use of pervious areas, percolation pits, engineered storm drain systems, etc.); shall be sized and designed to accommodate runoff from the site produced from each and every storm event up to and including the 85th percentile 24-hour runoff event; shall, in extreme storm situations (i.e., greater than the 85th percentile 24-hour runoff event storm) where such runoff cannot be adequately accommodated on-site through the project’s stormwater and drainage infrastructure, ensure that any excess runoff is conveyed off-site in a non-erosive manner; and shall be permanently operated and maintained (where all maintenance parameters for such infrastructure,

including based on manufacturers recommendations, shall be provided), where all such operation and maintenance activities shall be documented and shall be provided upon Executive Director request.

- l. Signs.** All signs and related project components shall be identified (including details showing their location, materials, design, and text), and all such sign development shall be sited and designed: (1) to limit the number and visibility of all signs; (2) to minimize visibility in public views; (3) to seamlessly integrate into the surrounding environment to the maximum extent feasible (e.g., using natural materials, earth tone colors and graphics, etc.); (4) to limit lighting as much as possible (and be consistent with the lighting requirements specified in Special Condition 1(h) at a minimum); and (5) to be subordinate to the coastal setting.
- m. Site Access.** Any areas of the site for which specific requirements for access are necessary shall be identified (i.e., employee only, paying customers only, overnight guests only, etc.), where other areas shall be allowed general public access (see also Special Condition 4 for additional detail).
- n. Public Access Requirements.** All public access areas (including but not limited to general public access to the parking lot, restroom, rooftop garden (and access thereto), interpretive center, courtyard, paths, etc.) and amenities (e.g., bench seating, bike racks, signs, educational kiosk, bike share/rentals, etc.) associated with the approved Public Access Management Plan (see Special Condition 4) shall be identified.
- o. Construction Requirements.** All construction requirements associated with the Approved Construction Plan (see Special Condition 2) shall be identified as "Required Construction Measures".

All requirements above and all requirements of the approved Revised Final Plans shall be enforceable components of this CDP, and the Permittee shall undertake development in accordance with this condition and the approved Revised Final Plans.

- 2. Construction Plan.** PRIOR TO ISSUANCE OF THE CDP, the Permittee shall submit two copies of a Construction Plan to the Executive Director for review and written approval. Such Plan shall, at a minimum, include the following:
  - a. Construction Areas.** All construction activity, staging, storage, and access corridor areas shall be clearly identified in site plan view, where all such areas shall be minimized to the maximum extent feasible, and shall be sited and designed to have the least impact on coastal resources (including by using on-site areas for these purposes unless it is impossible to do so). Construction, including but not limited to construction activities and materials and equipment storage, shall be prohibited outside of such defined construction areas. Special attention shall be given to siting and designing construction areas in order to minimize impacts on the ambiance and aesthetic values of the public access trail opposite Ocean View Boulevard, including but not limited to public views across the site.

- b. Construction Methods.** All construction methods to be used, including all methods to be used to keep the construction areas separate from public recreational use areas as much as possible (including using unobtrusive temporary fencing or equivalent measures to delineate construction areas), and including verification that operation and storage of equipment and materials will not, to the maximum extent feasible, significantly degrade public access and public views during construction, shall be clearly identified. Special attention shall be given to using construction methods that will minimize impacts on the ambiance and aesthetic values of the public access trail opposite Ocean View Boulevard, including but not limited to public views across the site.
- c. Construction Timing/Lighting.** Construction shall be prohibited during weekends from Memorial Day weekend until Labor Day, state holidays, and non-daytime hours (i.e., from one-hour after sunset to one-hour before sunrise), and lighting of construction areas affecting public access and public view areas shall be prohibited, unless due to extenuating circumstances the Executive Director authorizes such work or lighting in writing, and subject to all measures determined by the Executive Director to be necessary to ensure maximum coastal resource protection.
- d. Construction BMPs.** All erosion control/water quality best management practices (BMPs) that will be implemented during construction to protect coastal water quality shall be clearly identified, including at a minimum all of the following:
- 1. Runoff Protection.** Silt fences, straw wattles, or equivalent apparatus shall be installed at the perimeter of the construction areas to prevent construction-related runoff and sediment from discharging from the construction areas or entering into storm drains or otherwise offsite or towards the beach and ocean. Special attention shall be given to appropriate filtering and treating of all runoff, and all drainage points, including storm drains, shall be equipped with appropriate construction-related containment, filtration, and treatment equipment.
  - 2. Equipment BMPs.** Equipment washing, refueling, and servicing shall take place at an appropriate on-site (or offsite and more inland, if more protective of coastal resources), hard-surfaced, level location where collection of materials is facilitated to help contain leaks and spills of hazardous materials to the project site.
  - 3. Good Housekeeping BMPs.** The construction site shall maintain good construction housekeeping controls and procedures at all times (e.g., clean up all leaks, drips, and other spills immediately; keep materials covered and out of the rain, including covering exposed piles of soil and wastes; dispose of all wastes properly, place trash receptacles on site for that purpose, and cover open trash receptacles during wet weather; remove all construction debris from the site; establish a hazardous materials spill response protocol, and maintain appropriate materials to address spills; etc.).
  - 4. Erosion and Sediment Controls.** All erosion and sediment controls shall be

in place prior to the commencement of construction as well as at the end of each workday.

- e. **Marine Wildlife Protection.** All marine wildlife protection requirements associated with the approved Marine Wildlife Protection Plan (see Special Condition 3) shall be identified as “Required Marine Wildlife Protection Measures”.
- f. **Nesting Bird Protection.** Tree removal, pruning, and/or chipping shall not occur between November 1st and July 31st to accommodate harbor seal pupping season and the majority of bird nesting season. Should tree work occur during the months of August or September, a qualified biologist, approved by the Executive Director, shall survey all trees on site for active bird nests, no sooner than one week before work begins. Should a nest be identified, a 300 foot buffer shall be delineated surrounding the nest in which no work may occur until the nest is abandoned. Should a raptor nest be identified, the buffer shall be increased to 500 feet.
- g. **Archaeological/Tribal Cultural Resource Protection.** All archaeological/tribal cultural resource protection requirements identified in Special Condition 10 shall be identified as “Required Cultural Resource Protection Measures”.
- h. **Property Owner Consent.** Clear evidence indicating that the owners of any properties on which construction activities are to take place, including properties to be crossed in accessing the site, consent to such use of their properties and subject to the terms and conditions of this CDP shall be provided.
- i. **Construction Site Documents.** Copies of the signed CDP and the approved Construction Plan shall be maintained in a conspicuous location at the construction job site at all times, and such copies shall be available for public review on request. All persons involved with the construction shall be briefed on the content and meaning of the CDP and the approved Construction Plan, as well as the public review requirements applicable to them, prior to commencement of construction.
- j. **Construction Coordinator.** A construction coordinator shall be designated to be the main point of contact during construction should questions arise regarding the construction (in case of both regular inquiries and emergencies), and the coordinator’s contact information (i.e., address, phone numbers, email address, etc.) including, at a minimum, a telephone number and an email that will be made available 24 hours a day for the duration of construction, shall be conspicuously posted at the job site where such contact information is readily visible from public viewing areas while still minimizing impacts to public views, along with indication that the construction coordinator should be contacted in the case of questions regarding the construction (in case of both regular inquiries and emergencies). The construction coordinator shall record the contact information (i.e., address, email, phone number, etc.) and nature of all complaints received regarding the construction, and shall investigate complaints and take remedial action, if necessary, within 24 hours of receipt of the complaint or inquiry. All complaints

and all actions taken in response shall be summarized and provided to the Executive Director on at least a weekly basis during construction. The construction coordinator shall have regular contact with the approved Biological Monitor specified in Special Condition 3.

- k. Construction Specifications.** All construction specifications and materials shall include appropriate penalty provisions that require remediation for any work done inconsistent with the terms and conditions of the CDP.
- l. Notification.** The Permittee shall notify planning staff of the Coastal Commission's Central Coast District Office at least 3 working days in advance of commencement of construction, and immediately upon completion of construction.

The Permittee shall undertake construction in accordance with the approved Construction Plan, and all requirements above and all requirements of the approved Construction Plan shall be enforceable components of this CDP.

- 3. Marine Wildlife Protection.** PRIOR TO ISSUANCE OF THE CDP, the Permittee shall submit two copies of a Marine Wildlife Protection Plan to the Executive Director for review and written approval. Such Plan is intended to protect marine wildlife, predominantly harbor seals and black oystercatchers, that congregate on and offshore near the approved development site via implementing protective measures during construction as well as monitoring such wildlife for signs of distress and taking action to protect such wildlife at such times. Such Plan shall, at a minimum, include the following:
  - a. Protection Areas.** The protection areas shall at a minimum include local harbor seal haul-out/rookeries at West Beach, Fisher Beach, and Fifth Street, and extending at least 10 meters offshore (see Exhibit 1).
  - b. Biological Monitor.** A qualified biological monitor or monitors (Biological Monitor), selected by the Permittee and approved by the Executive Director, shall be present during all construction activities to ensure that wildlife in the protection areas is not adversely impacted as identified in this condition. The approved Biological Monitor(s) must have significant experience with marine mammals and is expected to be a representative from the already-established community of experts in the field of California marine mammal biology, and ideally harbor seals specifically.
  - c. Disturbance Avoidance Measures.** All measures that will be applied to avoid (and where unavoidable to minimize) disturbance to birds, marine mammals, and other marine wildlife within the protection areas shall be clearly identified (e.g., visual blinds, sensitive scheduling/timing for high noise events, quiet construction methods such as sound barriers, equipment alarm dampening, etc.), where all such measures shall minimize noise and other disturbance to the protection areas as much as possible, and where construction sound remains at or below 90 decibels at the edge of the protection area nearest the construction site. At a minimum: (1) construction activity, staging, storage, and access corridor areas

shall be located as far from the protection areas as possible; (2) trucks and other heavy machinery transport shall avoid travel via Wave Street and Ocean View Boulevard as much as possible; and (3) tree removal, tree bucking, tree chipping, lot demolition, and sub-grade construction, including all major site grading and excavation, as well as the use of drones seaward of Sloat Avenue, shall be prohibited between November 1st and July 31<sup>st</sup> (with such activities potentially allowed during November and December if approved by the Executive Director and with evidence that sensitive marine wildlife are not present at nor avoiding nearby beaches and areas immediately offshore).

- d. Harbor Seal Disturbance Definitions.** Harbor seal disturbance shall be considered to have occurred when demonstrated by behaviors including, but not limited to: (1) sustained head raises and/or alerts; (2) quick turns in the direction of sound sources; (3) rapid movement down the beach toward the water; (4) rapid movement and/or diving into the water; (5) congregation away from sound sources; (6) feeding and/or nursing disruption; (7) alarm calls; (8) pup miscarriages;<sup>1</sup> (9) avoidance of areas due to previous disturbances; and (10) any other behavior which, in the best professional opinion of the Biological Monitors, suggests adverse behavioral disturbance.
- e. Monitoring Type/Timing.** Biological Monitors shall monitor the protection areas for both behaviors and construction sound (with appropriate instrumentation) for the duration of construction, where such monitoring shall be in person (required during harbor seal pupping season (February 1st (or earlier if pregnant females and/or pups are observed earlier than February 1st) - June 30th) and during any demolition and sub-grade construction) or via remote means<sup>2</sup> (allowed during pre-pupping season (November 1st - January 31st)), or either in person or remote (during molting season (July 1st - August 31st) or the months of September and October). Monitoring may be allowed to be remote and/or of more limited frequency outside of the harbor seal pupping season (i.e., reduced) by the Executive Director (in consultation with Monterey Bay National Marine Sanctuary (MBNMS) and NOAA Fisheries staff) if monitoring demonstrates that the average numbers of seals in the protection areas are comparable to historical numbers, suggesting no active disturbance; and if there is one continuous 30-day period when construction is occurring and there has been no marine wildlife disturbance. Conversely, and subject to the same consultation parameters, the Executive Director can also return any reduced state monitoring to the prior type and frequency requirements for good cause or during sensitive seasons.
- f. Monitoring Data.** At least prior to commencement of construction, the Biological

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<sup>1</sup> Miscarriages shall be documented when an obvious indicator such as an intact placenta or fetus is observed. When it is uncertain what happened to a pup, the “disappearance” will not be counted as a miscarriage.

<sup>2</sup> If the Permittee and/or the Biological Monitors intend to use remote monitoring when it is allowed, then all such measures shall be clearly identified, including the locations and types of high-definition cameras and decibel meters to be used. In all cases, video and sound recordings shall be available to any regulatory agency by request.

Monitors shall collect data on daily site conditions, count of each species, time of observation, behaviors, disturbances, decibel levels, and any other relevant data to assess the condition of the observed animals at that time. Upon construction commencement and for all other monitoring, the Biological Monitors shall collect the same data, and shall watch for any changes in harbor seal behavior, including documenting any construction-related disturbance. Disturbances, as well as mothers actively in labor and birthing, shall be recorded on the daily/weekly log. The Biological Monitors shall inspect the protection area and identify the number of harbor seals and other marine life present and their behavior/activity at least 30 minutes prior to construction staging for the day, at midday (between 10 AM and 2 PM, when peak occupation is common), and again at the completion of construction activities for the day. If there are no seals present at the morning check, monitoring shall not be until the midday check.

- g. Reporting.** The Biological Monitors shall summarize and submit all monitoring information to the Executive Director and other appropriate resource agencies (e.g., MBNMS, NOAA Fisheries, etc.) on a weekly basis.
- h. Stop-Work Authority and Notification.** The Biological Monitors, whether observing remotely or in person, shall have the authority to stop construction activity based on their observations regarding potential adverse impacts to marine wildlife, including if: (1) construction-related noise produces measured decibel levels at or above 90 dB $rms$  while seals or other marine wildlife are present in the protection areas; and/or (2) wildlife disturbances or disturbance behaviors are observed that are attributable to project construction activities. When a work stoppage is required, construction activities shall be paused until disturbance behaviors cease and marine wildlife resumes resting along the shoreline as it was prior to disturbance. The Biological Monitors shall work with the Permittee's designee to determine the source of disturbance and take steps to immediately adjust best management practices so that future disturbance is avoided or minimized (e.g., implementing the use of sound curtains, moving work to another area of the site, etc.). If the activities that are causing the disturbance behaviors cannot be immediately mitigated, and in the best professional opinion of the Biological Monitors: 1) constitute harm and are adversely affecting harbor seal behavior/physiology; and 2) are a result of project construction activity, then the Permittee shall cease work and promptly notify the Executive Director, as well as MBNMS and NOAA Fisheries. Work may not resume until the Executive Director, in consultation with MBNMS and NOAA Fisheries, allows work to recommence, including if recommencement is subject to modified and/or new mitigation measures (e.g., re-implementation of in-person monitoring, mitigation for impacts to marine wildlife, a CDP amendment, an incidental take permit, etc.).

The Permittee shall undertake construction in accordance with the approved Marine Wildlife Protection Plan, and all requirements above and all requirements of the approved Marine Wildlife Protection Plan shall be enforceable components of this CDP.

**4. Public Access Management Plan.** PRIOR TO ISSUANCE OF THE CDP, the



Permittee shall submit two copies of a Public Access Management Plan to the Executive Director for review and written approval. Such Plan shall clearly describe the manner in which general public access associated with the approved development is to be provided and managed, with the objective of maximizing public access and recreational use of all available general public access areas (see Special Condition 1) as well as all specifically identified public access areas (including the parking lot, restroom, rooftop garden (and access thereto), interpretive center, courtyard, paths, etc.) and all related areas and public access amenities (e.g., bench seating, bike racks, signs, educational kiosk, bike share/rentals, etc.) as described in this condition. Such Plan shall be consistent with the approved Revised Final Plans, and shall at a minimum include the following:

- a. Public Access Areas and Amenities.** All public access areas and amenities, including all of the areas and amenities described above and in this condition, shall be clearly identified as such (including with hatching and closed polygons so that it is clear what areas are available for such public access use). At least one public restroom shall be provided with access directly from the street (i.e., not within the hotel's interior), and the public roof garden shall have at least one staircase provide access directly from the street. The rooftop garden and other appropriate access areas shall provide publicly-available amenities, such as picnic tables, viewing benches/sitting areas, enclosed trash and recycling receptacles, doggie mitt stations, and/or other such publicly-available amenities commensurate with expected use and in a manner that maximizes their public utility and enjoyment.
- b. Public Access Signs/Materials.** All signs and any other project elements that will be used to facilitate, manage, and provide public access to the approved development shall be clearly identified, including all public education/interpretation features that will be provided on the site (i.e., educational displays, interpretive signage, etc.). Sign details showing the location, materials, design, and text of all public access signs shall be provided. The signs shall be sited and designed so as to provide clear information without impacting public views and site character. At least two interpretive panel/installations shall be provided, where at least one shall interpret the former American Tin Cannery Building, and at least one shall interpret the nearby harbor seal rookery. Signs shall include the California Coastal Trail and California Coastal Commission emblems and recognition of the Coastal Commission's role in providing public access at this location. All signs shall be sited and designed to maximize their utility and minimize their impacts on public views.
- c. Public Access Disruption Prohibited.** No development or use of the property governed by this CDP may disrupt and/or degrade public access or recreational use of any public access areas and amenities associated with the approved development, such as by setting aside areas for private uses or installing barriers to public access (e.g., furniture, planters, temporary structures, private use signs, fences, barriers, ropes, etc.). The public use areas shall be maintained consistent with the approved Plan and in a manner that maximizes public use and enjoyment.

- d. Public Access Parking.** A minimum of 20 full-sized parking spaces located at the parking lot on 124 Central Avenue shall be provided and maintained for general public use only, where such spaces shall be clearly demarcated (i.e., via physical separation, signs, stencils, etc.) and available 24 hours a day. One such space shall be ADA accessible (or as otherwise required under the ADA), 2 spaces shall provide EV charging stations (or as otherwise required under the California Building Code), and 5 shall be EV-ready (or as otherwise required under the California Building Code). Such parking spaces shall be available free of charge between the hours of 9am and 3pm with a 3-hour limit for any one vehicle during that time (the ADA spaces shall be free of charge with no time limits), and between 3pm and 9am, the hourly rate shall be no more than the rates of the on-street metered parking spaces along Ocean View Boulevard, Eardley Avenue, and Dewey Avenue. Employee and guest parking, including via valet parking, is prohibited in such parking spaces.
- e. Public Access Use Hours.** All public access areas and amenities shall be available to the general public 24 hours a day, with the exception of the living roof and public restroom, which can be closed to general public use at night (i.e., one hour after sunset to one hour before sunrise). All public access areas shall be free of charge (other than the allowed parking fees identified above).
- f. Public Access Provided.** All public access areas and amenities associated with the approved development shall be constructed and available for public use as soon as possible, but no later than concurrently with the certificate of hotel occupancy.
- g. Public Access Areas and Amenities Maintained.** All of the public access areas and amenities shall be constructed in a structurally sound manner and maintained consistent with the terms and conditions of this CDP, including through ongoing repair and maintenance of all public access improvements. The public use areas shall be maintained consistent with the approved Public Access Enhancement Plan and in a manner that maximizes public use and enjoyment.

All requirements above and all requirements of the approved Public Access Management Plan shall be enforceable components of this CDP, and the Permittee shall undertake development in accordance with this condition and the approved Public Access Management Plan.

- 5. Water Use Limits.** Potable water use at the site shall be limited to no more than 18.53 acre-feet per year (AFY), where the water that is used to support the site from off-site (i.e., laundry services, etc.) shall be considered on-site use. PRIOR TO OCCUPANCY, the Permittee shall submit clear evidence (including at a minimum written evidence of concurrence from the Monterey Peninsula Water Management District (MPWMD)) to the Executive Director for review and written approval demonstrating that all of the uses and facilities on the site, including everything provided for in the approved Revised Final Plans (see Special Condition 1) will be under this potable water use threshold. In addition, each year for the first five years after occupancy, and once again 10 years after occupancy, the Permittee shall

submit to the Executive Director evidence of the site's actual potable water usage. Such reporting shall include monthly breakdowns and shall confirm that the actual potable water usage is within the site's maximum allocation of 18.53 AFY. If any such report indicates that actual potable water usage is greater than 18.53 AFY, then the Permittee shall coordinate with the Executive Director, as well as the MPWMD, the City of Pacific Grove, and other relevant entities to develop a potable water use compliance plan designed to reduce potable water use to no more than 18.53 AFY. In such a case, annual reporting shall continue for at least three additional years (i.e., in addition to the five-years of annual reports and the ten-year report) or until the project's water usage is within the 18.53 AFY cap as documented in two consecutive annual reports, whichever is later.

- 6. Provision of Lower-Cost Overnight Accommodations.** The Permittee shall provide lower-cost rooms consistent with the provisions of this condition that follow.
- a. Minimum On-Site Requirements.** The Permittee shall provide at least 18 standard double-occupancy hotel rooms<sup>3</sup> where the cost to rent such rooms overnight shall not at any time exceed the lower-cost threshold as defined in the Pacific Grove LCP as of 2024 and may be modified by the CPI yearly.<sup>4</sup> The Permittee shall also provide at least 16 hostel rooms in the proposed group/shared accommodations wing (i.e., the 'Group Wing'), which shall include 4 beds per room (twin size or larger) and may include shared bathroom facilities between rooms (where at most two such rooms may share a bathroom, and all such bathrooms are full sized), where the cost to rent each such bed in each room shall not at any time exceed \$85 (which may be modified by the CPI yearly). All such rooms shall be at least 250 square feet, and the above costs shall be inclusive of all service and other fees (e.g., parking, cleaning, resort, administrative) but exclusive of any government-mandated fees (e.g., sales tax, transient occupancy taxes). The Permittee may provide more lower-cost on-site rooms than the minimum identified herein. All such rooms and related facilities (e.g., entrances, common areas) shall be effectively integrated into the overall hotel layout in a way that maximizes their utility, shall be clearly identified on the Revised Final Plans (see Special Condition 1), and all users of such rooms shall have access to all the same hotel amenities as all other hotel guests.
- b. Programming.** For a minimum of 300 guest nights per year (i.e., one person staying one night), the 'Group Wing' shall be available and can be used for low- and no-cost accommodations for groups, the intent of which is to provide access to the coast to: (1) underserved communities (such as lower-income communities, communities of color, and other communities that have been historically marginalized and face greater barriers to coastal access); (2) school groups, prioritizing those school groups from underserved communities; and (3) other entities and groups similar to the first two, including groups that have faced barriers to accessing coastal outdoor spaces and outdoor recreation

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<sup>3</sup> Where each such room shall have either one or two beds sized at least as large as a queen or two twins, respectively, and a full-sized bathroom.

<sup>4</sup> As of 2024, such lower-cost rate is \$184 per hotel room per night.

opportunities. Use of the Group Wing in this manner shall be free to participants for at least 150 of the 300 guest nights of programming per year, and shall be lower cost otherwise (where the cost to rent such rooms overnight shall not at any time exceed the lower-cost threshold as defined in the Pacific Grove LCP as of 2024 and may be modified by the CPI yearly).<sup>5</sup> The annual monitoring report specified in subsection (d) below shall include a detailed analysis of the previous year's programming (including the groups and number of people served, the rates charged, the number of free stays, etc.), and shall include other information that can help to assess the effectiveness of the program in carrying out its objectives. The report shall also specify the programming efforts for the upcoming year, and any relevant changes necessary to improve upon its effectiveness.

- c. Marketing/Engagement Plan.** The Permittee shall actively promote and publicize the availability of the lower-cost on-site rooms, including specifically to underserved communities such as lower-income communities, communities of color, and other communities that have been historically marginalized and face greater barriers to coastal access. PRIOR TO ISSUANCE OF THE CDP, the Permittee shall provide a Lower-Cost Accommodations Marketing and Engagement Plan to the Executive Director for review and written approval, where such Plan shall at a minimum provide for the following:
- 1. Outreach.** All measures and avenues to be used to advertise, increase awareness of, and facilitate use of the lower-cost on-site rooms shall be clearly identified. Promotional methods shall include, but are expected to not be limited to: resort websites, press releases, and calendar listings; local media (e.g., Monterey Herald, Salinas Californian) and ads on radio (e.g., local radio stations and others); print ads; social media (e.g., Facebook, Twitter/X, and Instagram); and contacts with community organizations who may be able to help facilitate awareness (e.g., non-profits, environmental justice groups, labor unions, recipients of public benefits programs (by coordinating with local program administrators)) as well as schools. The Plan shall identify sample language to be used in describing the availability and price for the lower-cost on-site rooms (where said language shall be required to be consistent with the terms and conditions of this CDP), and shall provide a schedule for each type of outreach, with the goal being to reach as many potential users as possible, including audiences beyond the City of Pacific Grove that might not normally be reached through traditional and local means (e.g., communities such as Watsonville, Marina, Seaside, Del Rey Oaks, Castroville, Prunedale, Salinas). All materials shall acknowledge the California Coastal Commission's role in providing the lower-cost on-site rooms.
  - 2. Non-English Languages Provided.** All outreach described in this condition shall include a language-access element inclusive of non-English languages spoken in the targeted communities, including but not limited to Spanish,

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<sup>5</sup> As of 2024, such lower-cost rate is \$184 per room per night.

tailored to be culturally relevant, and written in plain language to help prevent educational and cultural barriers to access to the lower-cost rooms.

- 3. Monitoring.** The Plan shall describe how the Permittee will monitor and track the Plan's execution so that the Permittee and the Coastal Commission can note the effectiveness of the Plan and make changes as needed.
- d. Reporting.** The Permittee shall provide an annual report (with the first report due by December 31st of the first year of project occupancy, and subsequent reports due by on December 31st of subsequent years) to the Executive Director for review and written approval that provides clear evidence of the marketing and operation of the lower-cost rooms (including in relation to Group Wing programming) in compliance with all requirements of this condition, including sufficient detail to demonstrate the occupancy of the lower- cost rooms, the rates charged, and the implementation of the approved Lower- Cost Accommodations Marketing and Engagement Plan meet all requirements herein (where the latter shall at least describe all outreach efforts, with samples of outreach materials; all implementation challenges and successes; and all feedback and public comments received, and any responses to same), and recommendations for additional and/or modified measures to enhance awareness, use, and public utility of the lower-cost on-site rooms, including related programming. Every third such annual report shall also include an audit performed by an independent auditing company evaluating compliance with this condition.

All requirements above and all requirements of all above Executive Director approved plans/materials shall be enforceable components of this CDP, and the Permittee shall undertake development in accordance with this condition and all such approved plans/materials.

- 7. General Occupancy Requirements.** By acceptance of this CDP, the Permittee acknowledges and agrees, on behalf of itself and all successors and assigns, that:
  - a. Hotel Length of Stay Provisions.** All overnight rooms shall be open and available for rental to the general public. Rooms shall not be rented to any individual, family, or group for more than 29 consecutive days, and not for more than 14 days between the Friday of Memorial Day weekend and Labor Day inclusive. No individual ownership or long-term occupancy of hotel rooms shall be allowed.
  - b. Conversion Prohibited.** This CDP authorizes the construction and operation of a traditional hotel-style overnight product for transient occupancy only. The conversion of any of the overnight rooms to limited use overnight visitor accommodation units (e.g., timeshare, fractional ownership, etc.) or to full-time occupancy condominium units or to any other units with use arrangements that differ from the approved development shall be prohibited.
- 8. Transportation Demand Management Plan.** PRIOR TO ISSUANCE OF THE CDP, the Permittee shall submit two copies of a Transportation Demand Management Plan to the Executive Director for review and written approval. Such Plan shall

maximize the amount of employees and guests that travel to and from the hotel via non-single-occupant vehicle means (including through use of shared vehicles/carpooling, transit, bicycle/pedestrian means, etc.), and the Permittee shall actively encourage employee and guest participation in such programs and means of travel. Such Plan shall be prepared by a qualified professional and shall at a minimum include the following:

- a. Ride Share.** A ride sharing/carpooling program shall be offered to all employees, and the Permittee shall schedule shifts to benefit such program and shall offer coordination services free of charge. A commuter information area that is centrally located and accessible to all employees shall be provided in which employees are provided information on available transportation alternatives to the single-occupancy vehicle (i.e., current maps, routes and schedules for public transit, ridesharing match lists, available employee incentives, ridesharing promotional material supplied by commuter-oriented organizations, etc.).
- b. Transit Reimbursement/Stipend.** A public transit fare reimbursement program shall be offered to all employees, and the Permittee shall provide a stipend to employees who use a non-single occupancy vehicle to access work (such as the bus or train). The transit reimbursement shall be a daily, direct cash subsidy equal to 100% of the value of the applicable monthly regional transit pass divided by 20, to account for a 40-hour maximum work week (resulting in a maximum of 20 work days per month). The stipend shall be an at least quarterly, direct cash subsidy available solely for employees who do not use a single-occupancy vehicle and do not park within a mile of the site at least 51% of their yearly work hours. If an employee is eligible to receive both the transit reimbursement and the stipend, the Permittee shall offer the employee the greater of the two incentives, but is not required to provide both. Posters, brochures and registration materials associated with the program shall be available to employees at all times (including in the aforementioned commuter information area), and employees shall be informed of the program upon new employee orientation and at least annually thereafter.
- c. Pedestrian/Bicycle Travel.** Bicycle parking and shower/locker facilities shall be provided free of charge for all employees who walk/jog and/or ride bicycles to and from the workplace. Bicycle parking facilities shall be secured from the general public, shall be enclosed on all sides, and shall be capable of protecting bicycles from inclement weather (e.g., bicycle lockers, rooms, cages, etc.). The Permittee shall provide, to the maximum extent possible, communal bicycles and/or non-motorized vehicles for employee use for work-related activities that may be accomplished without a motorized vehicle.
- d. Guests.** Measures to reduce the need for vehicular use by hotel guests (e.g., shuttles to and from the Monterey Regional Airport, free bicycles for hotel guests, etc.) shall be provided.

All requirements above and all requirements of the approved Transportation Demand Management Plan shall be enforceable components of this CDP, and the Permittee

shall undertake development in accordance with this condition and the approved Transportation Demand Management Plan.

- 9. Plastic Reduction Program.** PRIOR TO OCCUPANCY, the Permittee shall submit two copies of a Plastics Reduction Program to the Executive Director for review and written approval. Such Program shall minimize, to the maximum extent possible, the use of single-use plastics in all aspects of hotel operations, including as part of hotel room occupancy, as part of conferences, restaurant/bar operations, etc.. At a minimum, the Program shall identify/include the following provisions: educational signage for staff and guests promoting and encouraging reusable items instead of single-use plastics; maximizing use of reusable foodware for all dining purposes (for dinnerware, drinkware, silverware, and ramekins/containers), and prohibiting the following items: plastic straws (and allowing only reusable straws, paper straws, or straws made from naturally occurring materials, and only upon request), Styrofoam, plastic bags, plastic bottles, and plastic single-use shampoo/conditioner/lotion bottles in hotel rooms. The Program shall provide water bottle refill stations (at a minimum in the lobby, conference area, pool area, and any other high-use areas). To the maximum extent possible, only biodegradable or compostable materials for single-use products shall be employed.
- 10. Protection of Archaeological and/or Tribal Cultural Resources.** The Permittee shall undertake the approved project in compliance with the following measures to protect archaeological and/or tribal cultural resources to the maximum extent feasible.

  - a. Notification.** At least one month prior to commencement of any ground-disturbing construction activities, the Permittee shall (1) notify the representatives of Native American Tribes listed on an updated Native American Heritage Commission (NAHC) contact list, including but not necessarily limited to the Ohlone/Costanoan-Esselen Nation (OCEN); (2) invite all Tribal representatives on that list to be present and to monitor ground-disturbing activities; and (3) arrange for any invited Tribal representative that requests to monitor and/or a qualified archaeological monitor to be present to observe project activities with the potential to impact archaeological and/or tribal cultural resources.
  - b. Monitoring.** A qualified, locally experienced archaeologist and a tribal monitor, approved by relevant tribe(s), shall be on site to monitor all activities with the potential to impact archaeological and/or tribal cultural resources, including all ground disturbing activities. The monitor(s) shall have experience monitoring for archaeological resources of the local area during excavation projects, be competent to identify significant resource types, and be aware of recommended tribal procedures for the inadvertent discovery of tribal cultural and/or archaeological resources and/or human remains.
  - c. Discovery Protocol.** If any tribal cultural deposits are discovered during the course of the project, all construction within 200 feet of such deposits shall cease and shall not re-commence until a qualified cultural resource specialist (which could be a person identified in subpart (b), above), in consultation with the

relevant tribe(s), analyzes the significance of the find and, if deemed significant, prepares a supplementary archaeological plan for the review and approval of the Executive Director that evaluates and provides suggested measures related to the discovery. The Executive Director shall review the plan and either: (1) approve it and determine that its recommended changes to the project or mitigation measures do not necessitate an amendment to this CDP, or (2) determine that the changes proposed therein necessitate a CDP amendment. The location of any and all identified archaeological and tribal cultural resources shall be kept confidential, and only those with a "need to know" shall be informed of their locations.

- d. Human Remains.** Should human remains be discovered on-site during the course of the project, immediately after such discovery, the on-site archaeologist and/or tribal monitor shall notify the Monterey County Coroner within 24 hours of such discovery, and all construction activities shall be temporarily halted until the remains can be identified. If the County Coroner determines that the human remains are those of a Native American, the Coroner shall contact the NAHC within 24 hours, pursuant to Health and Safety Code Section 7050.5. The NAHC shall deem the Native American most likely descendant (MLD) to be invited to participate in the identification process pursuant to Public Resources Code Section 5097.98. The Permittee shall comply with the requirements of Section 5097.98 and work with the MLD person(s) to discuss and confer with the descendants all reasonable options regarding the descendants' preference for treatment. Within 5 calendar days of notification to NAHC, the Permittee shall notify the Coastal Commission's Executive Director of the discovery of human remains. The Executive Director shall maintain confidentiality regarding the presence of human remains on the project site.

**11. Other Authorizations.** PRIOR TO COMMENCEMENT OF CONSTRUCTION, the Permittee shall provide to the Executive Director evidence of other required authorizations for, or alternatively evidence that no such authorizations are needed, for the development authorized by this CDP (e.g., NOAA Fisheries, Monterey Bay National Marine Sanctuary, Monterey Peninsula Water Management District, Monterey County Environmental Health Department, City of Pacific Grove, etc.). The Permittee shall inform the Executive Director of any changes to the project required by such entities, where such changes shall not be incorporated into the project until the Permittee obtains a Commission-approved amendment to this CDP, unless the Executive Director determines that an amendment is not legally required.

**12. City of Pacific Grove Conditions.** This CDP has no effect on conditions imposed by the City of Pacific Grove pursuant to an authority other than the Coastal Act, except as provided in this condition. The Permittee is responsible for compliance with all terms and conditions of this CDP in addition to any other requirements imposed by the City pursuant to the City's non-Coastal Act authority. In the event of conflicts between terms and conditions imposed by the City and those of this CDP, the terms and conditions of this CDP shall prevail.

**13. Future Permitting.** Any and all future proposed development related to this project,



this project area, and/or this CDP shall be subject to the Coastal Commission's continuing CDP jurisdiction. This CDP authorizes limited future repair, maintenance, and/or improvement development that is determined by the Executive Director to: 1) fall within the overall scope and intent of this CDP; 2) be consistent with the City of Pacific Grove LCP; and 3) not have any significant adverse impacts to coastal resources. Any development that the Executive Director determines does not meet such criteria shall require a separate CDP or a CDP amendment, as directed by the Executive Director.

- 14. Minor Adjustments.** Minor adjustments to these special condition requirements, including to any Executive Director-approved plans, that do not require CDP amendments or new CDPs (as determined by the Executive Director) may be allowed by the Executive Director if such adjustments: (1) are deemed reasonable and necessary; and (2) do not adversely impact coastal resources.
- 15. Liability for Costs and Attorneys' Fees.** The Permittee shall reimburse the Coastal Commission in full for all Coastal Commission costs and attorneys' fees (including but not limited to such costs/fees that are: (1) charged by the Office of the Attorney General; and/or (2) required by a court) that the Coastal Commission incurs in connection with the defense of any action brought by a party other than the Permittee against the Coastal Commission, its officers, employees, agents, successors and assigns challenging the approval or issuance of these CDPs, the interpretation and/or enforcement of CDP conditions, or any other matter related to these CDPs. The Permittee shall reimburse the Coastal Commission within 60 days of being informed by the Executive Director of the amount of such costs/fees. The Coastal Commission retains complete authority to conduct and direct the defense of any such action against the Coastal Commission.
- 16. Deed Restriction.** PRIOR TO ISSUANCE OF THE CDP, the Permittee shall submit to the Executive Director for review and written approval documentation demonstrating that the landowners have executed and recorded against the properties governed by this CDP (i.e., APNs 006-231-001, 006-234-004, 006-234-005, 006-234-008, and the portion of Sloat Avenue between Eardley Avenue and Dewey Avenue) a deed restriction, in a form and content acceptable to the Executive Director indicating that, pursuant to this CDP, the California Coastal Commission has authorized development on the subject property, subject to terms and conditions that restrict the use and enjoyment of that property, and that such terms and conditions shall be imposed as covenants, conditions and restrictions on the use and enjoyment of the property. The deed restriction shall include a legal description of all of the properties governed by this CDP. The deed restriction shall also indicate that, in the event of an extinguishment or termination of the deed restriction for any reason, the terms and conditions of this CDP shall continue to restrict the use and enjoyment of the subject property so long as either this CDP or the development it authorizes – or any part, modification, or amendment thereof – remains in existence on or with respect to the subject property.

### 3. FINDINGS AND DECLARATIONS

#### **A. Project Location**

The project site is located in the City of Pacific of Grove, which is a coastal community of roughly 15,000 residents located at the northern tip of the Monterey Peninsula in Monterey County between the unincorporated Del Monte Forest area of Monterey County downcoast and the City of Monterey upcoast. Pacific Grove is characterized by its historic downtown, its charming residential neighborhoods comprised of Victorian and craftsman architecture, the Asilomar Dunes area, and the almost entirely public shoreline fronted by Sunset Drive, Ocean View Boulevard, and the Monterey Bay Coastal Trail (a component of the California Coastal Trail, or CCT) that provides significant and important public access and dramatic views along a mostly rocky shoreline.

The project site is located at the far upcoast end of the City adjacent to its border with the City of Monterey and a short walk to the Monterey Bay Aquarium and historic Cannery Row, and just inland of Stanford University's Hopkins Marine Station fronting on Ocean View Boulevard. The site is bordered by Dewey and Eardley Avenues upcoast and downcoast and extends up a gentle slope inland to Central Avenue. The site is currently mostly occupied by the American Tin Cannery (ATC) building and several other structures<sup>6</sup> and totals some roughly 5.59 acres. The ATC building currently houses several 'outlet' retail stores, restaurants, and other general commercial uses. The project also proposes to use most of the public right-of-way of Sloat Avenue and portions of the public right-of-way of Ocean View Boulevard, both of which areas would be vacated by the City, for private development purposes as well, where this area measures about half an acre overall. Thus, all told, the proposed project would occupy some six acres, and essentially most of two City blocks.

The site was the subject of a local ballot initiative in 2016 when City voters approved a measure that would specifically allow for a future hotel use at the site, including to anchor the important gateway area that transitions from Monterey's popular and historic Cannery Row into the City of Pacific Grove. Since that time, the City's LCP was certified in 2020. As discussed in more detail subsequently in this report, the certified LCP envisions a hotel at this site and includes specific prescriptions for such a project, including height and design requirements to match the character and aesthetic of the adjacent community, to provide lower-cost accommodations, and to ensure substantial

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<sup>6</sup> The American Tin Cannery facility is located at the corner of Ocean View Boulevard and Eardley Avenue at the upcoast corner of the site. The site was originally developed about a century ago as the American Can Company, which provided cans to the then-booming sardine industry along Cannery Row. The site became the location of one of the first factory outlets in the state (in the 1980s) and has been used for that and other mostly commercial purposes ever since. The overall site includes the American Tin Cannery Outlets facility, an adjacent warehouse facility, an adjacent office building, an adjacent dry-cleaning facility (which would remain), and surface parking for all such operations. For ease of reference (and given that this is how the project has generally been referred to), the site is referred to as the American Tin Cannery, or ATC, site in this report.

public access and other community benefits.<sup>7</sup> The site is designated in the LCP as Visitor-Serving Commercial.

See **Exhibit 1** for a location map and **Exhibit 2** for site photos.

## **B. Project Description**

The City-approved project would provide for a complete redevelopment of the entire six acre site, including partial demolition of the existing ATC building, the total demolition of both the existing adjacent warehouse and office buildings, and clearing of existing pavement at the site, including along the upcoast two-thirds of the Sloat Avenue public street between Eardley and Dewey Avenues, and portions of Ocean View Boulevard. In its place, the City-approved project allows for a new 225-room luxury resort hotel with associated amenities, including about 11,000 square feet of street retail commercial uses along Ocean View Boulevard, on-site restaurant and bar space, rooftop gardens, banquet/meeting rooms, two pools and additional water features, a spa and fitness center, and underground and surface parking (some 290 spaces, including 255 valet parking spaces and 35 metered self-parking spaces for general public use). The resort hotel would be made up of two main wings with a variety of connected spaces and amenities. The proposed Executive Wing would be located inland of the new retail spaces along the Eardley Avenue side and would include 121 guestrooms extending up the slope toward Central Avenue, while the Groups/Family Wing would be located along the corner of Ocean View Boulevard and Dewey Avenue and would include 104 guestrooms, where both wings would have separate entrances and lobbies and rise to 40 feet in height. All told, the proposed development would include nearly 355,000 square feet of enclosed and other useable space that would “step up” the slope from Ocean View Boulevard, and would be designed with a mix of concrete, steel, glass, and wood materials that are intended to emulate a more industrial feel reminiscent of the cannery structures of the past.

The City-approved project also includes private development and uses in the current public rights-of-way (ROW) of Sloat Avenue and Ocean View Boulevard. Roughly two-thirds of Sloat Avenue between Eardley Avenue and Dewey Avenue would be vacated by the City (about 20,000 square feet), with only the downcoast portion retained where it fronts several developed properties not affiliated with the project. The vacated area would be developed as part of the resort hotel, with the now “dead-end” portion of Sloat becoming the entrance to the underground parking facility for the resort hotel. In terms of Ocean View Boulevard, the City would not vacate the right-of-way; rather the City would allow the developer to use up to 10 feet of it for private purposes via an encroachment permit, totaling about 3,200 square feet. Thus, all told the City-approved project would use about 23,000 square feet (or over half an acre) of public space for

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<sup>7</sup> The LCP was also amended in 2021 to modify certain site standards related to the ATC site (LCP-3-PGR-21-0038-1). Specifically, when the LCP was initially certified, the IP included development standards that only applied to the seaward portion of the ATC site (i.e., the parcels seaward of Sloat Avenue), and the City proposed to modify the IP so that those standards would apply to the entire ATC site (i.e., the parcels seaward and landward of Sloat Avenue and the portion of Sloat Avenue that extends through the ATC site). The changes were certified by the Commission, and thus both inland and seaward portions of the site are subject to the same IP standards.

private purposes, and significantly change the use of the remaining portion of Sloat not vacated.

The City-approved project also provides for tree and vegetation removal (the Applicant would remove all 79 existing trees on the site),<sup>8</sup> and the planting of 136 new trees, most of which would consist of native California species, as well as landscaping with drought tolerant shrubs and groundcovers, also mostly native California species, including on rooftop gardens that will be located throughout the resort hotel complex. The project also includes water efficient irrigation systems (using drip irrigation, bubblers, high-efficiency heads, and weather-based controls) and both rainwater harvesting and graywater reclamation<sup>9</sup> for landscape irrigation purposes, requiring associated piping, filtration/treatment and subsurface tanks, but these details were not identified in the City's approval but rather to be worked out at a later date.

See **Exhibit 4** for the City-approved project plans.

### **C. City of Pacific Grove CDP Approval**

The City has been pursuing a hotel project at this site for about a decade, partnering with a series of potential developers to help implement that vision. In addition to the voter initiative from 2016 to rezone the site to allow for hotel uses,<sup>10</sup> the project went through about 3 years of City reviews as part of the local CDP application (dating back to 2019), with its local review process ramping up in earnest after LCP certification in 2020 and going through several layers of additional local review prior to the City Council's final CDP action in early 2022.

#### ***Architectural Review Board Review***

The project was reviewed by the City's Architectural Review Board (ARB) on December 15, 2020. At the December 15, 2020 hearing, the ARB passed a motion to recommend advancing the project to the City's Planning Commission with seven recommended revisions requiring the Applicant to reduce the height and scale of the Executive Wing (now called the Shoreline Wing), to relocate the service entrance, to reutilize the warehouse building (instead of demolishing it), to eliminate excavation near Ocean View Boulevard and Dewey Avenue (to reduce potential noise impacts to nearby harbor seals), to require that story poles/balloons be erected to demonstrate potential building massing, to increase use of modern design elements, and to retain the existing oak and cypress trees on the site that were noted to be in fair condition.

Coastal Commission staff also provided feedback to the City and Applicant prior to this juncture, stating as part of environmental review (i.e., in CEQA Notice of Preparation and via Draft Environmental Impact Report comments) that the project appeared to

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<sup>8</sup> These existing trees consist of eucalyptus, Monterey cypress, strawberry, Canary Island pine, and Coast live oak.

<sup>9</sup> The source of the graywater would be from guestroom shower, bath, lavatory, and sink usage.

<sup>10</sup> As discussed in more detail in the Lower-Cost Accommodations sections of this report, the City's Measure C from 1986 generally limits hotels only to certain zoning districts and prohibits the rezoning for new overnight accommodations uses in the City without a vote of the people. Thus the 2016 initiative did just that for this site.

oversubscribe the site, including in terms whether the amount of such intensively proposed development could be supported by the area's limited water supply, that it appeared to block public coastal views and otherwise not be compatible with the surrounding neighborhood, and that it wasn't clear how the project would provide for lower-cost accommodations (see all Commission staff comment letters on the proposed project as it worked its way through the City's CDP review process in Exhibit 7).

In response to the ARB's recommendations, the Applicant submitted an amended application to the City in late 2021, including a revised project description, a revised plan set, and a revised landscaping plan that incorporated a greater number of trees into the project's tree planting palette, with more of these trees consisting of native species. The primary revisions to the project at that time were to reduce building mass and to incorporate top-floor setbacks in the Family/Group (Bluffs) Wing (to better preserve the view corridor from south of Eardley when traveling north towards Monterey Bay and to lessen the visual impacts of the building as seen from Central Avenue); to incorporate additional design elements reflective of Cannery Row and other industrial/commercial buildings; to eliminate the underground parking garage below the Executive/Shoreline Wing (reducing the amount of project grading by 38 percent and the number of truck trips by 35 percent); to reduce meeting/event space (from 13,634 square feet to 12,116 square feet) and of street retail space (from 16,202 square feet to 10,968 square feet); to add at-grade parking along Central Avenue, and to reduce the overall number of parking spaces on the site (290 spaces instead of 304 spaces, based on changes in parking demand due to the decrease in proposed meeting and retail space, and based on the use of lifts to vertically stack underground parking (applying to 30 spaces)); and to increase the number of new trees (from 125 to 136 trees), and include the use of both a greater number of native tree species and a greater number of larger (48-inch box-sized) trees.<sup>11</sup>

### ***Planning Commission Denial***

The revised project was then reviewed by the City's Planning Commission on October 28, 2021 and November 18, 2021. Coastal Commission staff provided feedback to help guide the Planning Commission, again raising similar concerns as before and recommending generally that the project be reduced in size so as not to increase any water usage over the existing ATC's water use, to provide on-site lower-cost accommodations when none were being proposed, and raising questions on how the proposed lower-cost in-lieu fees were calculated. Ultimately, the Planning Commission denied the CDP application for the project at its November 18, 2021 meeting, voting 4-

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<sup>11</sup> The Applicant did not make project changes in response to all the ARB's recommendations. The Applicant considered the viability of reconfiguring the location of the project's service entrance but proposed to continue access from the "dead-end" of Sloat Avenue via Dewey Avenue. The Applicant also considered retention and reuse of the warehouse building but determined that the construction style and front façade of the building would not be compatible with the intended hotel use, and that such reuse would also result in a higher roof height with less articulation and fewer amenities than the proposed design. Regarding story poles or balloons to help decision-makers and the public get a better sense of the massing of the proposed project, the Applicant chose to forego such efforts, largely arguing that it would be too dangerous (instead, the Applicant posted renderings at three onsite locations for public review). Finally, the Applicant concluded that it could not retain more on-site trees without major project redesign, and that relocating and replanting existing trees would have a low likelihood of success.

2-1 to deny the project and to not certify the associated Environmental Impact Report (EIR). The primary concerns noted by the Planning Commission in voting to deny the CDP for the project were that the size and scale of the project were too large and led to too many public view and community character compatibility issues, that the potential for noise impacts to the harbor seals on the shoreline across Ocean View Boulevard was too great and not adequately addressed, and that the removal of all of the existing trees on the site was inappropriate. The Planning Commission also noted issues with a lack of an adequate water supply, inadequate public access amenities, unaddressed traffic impacts, and an inadequate evaluation of lower-cost visitor-serving options. The Applicant subsequently appealed the Planning Commission's denial action to the City Council.

### ***City Council Approval***

The City Council reviewed the appeal on January 12, 2022. At that time, Commission staff provided a comment letter to the Council strongly suggesting that it not take action at that time because the project suffered from too many unanswered questions and LCP conformance problems. Put another way, Commission staff didn't believe the project was compliant with the LCP and suggested that additional analysis was necessary before the Council took a CDP action (again, see Exhibit 7). Notwithstanding such recommendations, however, the City Council ultimately overturned the Planning Commission's denial by a 6-1 vote. In approving the CDP and certifying the EIR,<sup>12</sup> the City Council concluded differently than the Planning Commission and found that the issues raised by the Planning Commission were not compelling enough to warrant denial. In taking its action, the City Council also vacated the City's interest in the portion of Sloat Avenue that would be used by the Applicant for private purposes.<sup>13</sup>

The Coastal Commission's Central Coast District office received the notice of the City Council's final CDP action on January 20, 2022 (**Exhibit 3**). The Coastal Commission's ten-working-day appeal period for this action began on January 21, 2022 and concluded at 5 p.m. on February 3, 2022. Seven valid appeals of the City's CDP decision were received during the appeal period (see below and see **Exhibit 5**).

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<sup>12</sup> The EIR concluded that despite the incorporation of all feasible mitigation measures, the project would nonetheless result in significant and unavoidable impacts relating to both aesthetics and cultural resources (with respect to historic structures). In allowing the project despite these CEQA non-conformities, the City adopted a Statement of Overriding Considerations that notes that the project's benefits outweigh the project's unavoidable adverse environmental effects (see also CEQA section that follows, as well as the City's CEQA determinations).

<sup>13</sup> In addition to CDP requirements, the vacation of public road rights-of-way is governed by California Streets and Highways Code Sections 8300 through 8368, which requires a two-step process. In the first step, the City Council must pass a resolution of intent to vacate the right-of-way, which was done at the hearing where the CDP for the project was approved. The second step is the actual vacation itself, which would require a separate City Council action. The City and the Applicant are in negotiations on the amount that the Applicant must pay for the right-of-way, and the actual vacation is contingent upon the City Council's agreement thereto. In addition, actions that lead to public rights-of-way becoming private property, like this one, require CDPs, and thus the City's CDP action that has been appealed here also provides for the right-of-way vacation.

#### **D. Appeal Procedures**

Coastal Act Section 30603 provides for the appeal to the Coastal Commission of certain CDP decisions in jurisdictions with certified LCPs. The following categories of local CDP decisions are appealable: (a) approval of CDPs for development that is located (1) between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide line of the sea where there is no beach, whichever is the greater distance, (2) on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, or stream, or within 300 feet of the top of the seaward face of any coastal bluff, and (3) in a sensitive coastal resource area; or (b) for counties, approval of CDPs for development that is not designated as the principal permitted use under the LCP. In addition, any local action (approval or denial) on a CDP for a major public works project (including a publicly financed recreational facility and/or a special district development) or an energy facility is appealable to the Commission. The City's CDP action is appealable in this case because a portion of the project site is located within 300 feet of the inland extent of the beach/bluff.

For appeals of a CDP approval, grounds for appeal are limited to allegations that the approved development does not conform to the LCP and/or to Coastal Act public access provisions. For appeals of a CDP denial, where allowed (i.e., only allowed in extremely limited circumstances – see description of appealable actions, above), the grounds for appeal are limited to allegations that the development conforms to the LCP and to Coastal Act public access provisions.

The Commission's consideration of appeals is a two-step process. The first step is determining whether the appeal raises a substantial issue with respect to the grounds on which the appeal was filed that the Commission, in the exercise of its discretion, finds to be significant enough to warrant the Commission taking jurisdiction over the CDP application. This step is often referred to as the "substantial issue" phase of an appeal. The Commission is required to begin its hearing on an appeal, addressing at least the substantial issue question, within 49 working days of the filing of the appeal unless the applicant has waived that requirement, in which case there is no deadline. In this case, the Applicant has waived that deadline, and the Commission is thus under no hearing deadlines in this matter.

The Coastal Act and the Commission's implementing regulations are structured such that there is a presumption of a substantial issue when the Commission acts on this question, and the Commission generally considers a number of factors in making that determination.<sup>14</sup> At this stage, the Commission may only consider issues brought up by

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<sup>14</sup> The term substantial issue is not defined in the Coastal Act. The Commission's regulations simply indicate that the Commission will hear an appeal unless it "finds that the appeal raises no substantial issue" (see California Code of Regulations, Title 14, Section 13115(b) (CCR)). CCR Section 13115(c) of the Commission's regulations provides, along with past Commission practice, that the Commission may consider the following five factors when determining if a local action raises a significant issue: (1) the degree of factual and legal support for the local government's decision that the development is consistent or inconsistent with the certified LCP and the Coastal Act's public access provisions; (2) the extent and scope of the development; (3) the significance of the coastal resources affected by the decision; (4) the precedential value of the local government's decision for future interpretation of its LCP; and (5) whether the appeal raises only local issues, or those of regional or statewide significance. The Commission may,

the appeal. In reviewing the substantial issue question, staff will make a recommendation for the Commission to find either substantial issue or no substantial issue.<sup>15</sup> If staff makes the former recommendation, the Commission will not take testimony at the hearing on the substantial issue recommendation unless at least three Commissioners request it, and, if no such testimony is requested, a substantial issue is automatically found. In both cases, when the Commission does take testimony, it is generally (and at the discretion of the Commission Chair) limited to three minutes total per side, and only the Applicant, aggrieved persons, the local government, and their proxies/representatives are allowed to testify, while others may submit comments in writing.

If, following any testimony and a public hearing, the Commission determines that the appeal does not raise a substantial issue, then the first step is the only step, and the local government's CDP decision stands. However, if the Commission finds a substantial issue, the Commission takes jurisdiction over the underlying CDP application for the proposed project, and the appeal heads to the second phase of the hearing on the appeal.

In the second phase of the appeal, the Commission must determine whether the proposed development is consistent with the applicable LCP (and in certain circumstances, but ones that do not apply to this case, the Coastal Act's public access and recreation provisions). This step is often referred to as the "de novo" review phase of an appeal, and it entails reviewing the proposed project in total. There is no specific legal deadline for the Commission to act on the de novo phase of an appeal. Staff will make a CDP decision recommendation to the Commission, and the Commission will conduct a public hearing to decide whether to approve, approve with conditions, or deny the subject CDP. Any person may testify during the de novo phase of an appeal hearing (if applicable).

## **E. Summary of Appeal Contentions**

The appeals contend that the City-approved project raises Coastal Act public access and LCP consistency questions relating to water supply, lower-cost visitor

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but need not, assign a particular weight to a factor, and may make a substantial issue determination for other reasons as well.

<sup>15</sup> Note that in cases where a project is bisected by the appeals boundary, such as this one, the Commission can only evaluate the development in the appealable area when making its substantial issue determination. Sometimes development within the appeal boundary is clearly separable from development outside the appeal boundary (e.g., a garage wholly within the appeal boundary and a house outside of it). In other cases, though, the appeal boundary simply cuts through portions of the project, as is the case here. In such cases, it can be more difficult to parse what is subject to appeal versus not, especially the programmatic aspects of development that apply to the project overall. In this case, and with respect to the substantial issue determination, the Commission believes that it is not possible to parse out the appeal issues in a manner that clearly distinguishes project components within and outside of the appeal boundary. Instead, the Commission will evaluate the appeal issues through the lens of a complete project, which makes issues raised in the appeal boundary relevant to the entire project. If the Commission finds that the City's approval raises a substantial issue of conformance with the LCP and takes jurisdiction over the CDP application, then the location of the appeal boundary becomes irrelevant, and the Commission will consider the entire project under the CDP application for LCP and Coastal Act consistency.



accommodations, public views/community character, public access (including public parking) and associated amenities, biological resources, and historic structures. Specifically, the appeals assert that the City-approved project would violate applicable Coastal Act and LCP provisions because: 1) it is not clear that the development will be served by an adequate and sustainable long-term water supply; 2) the lower-cost accommodations mitigation lacks specificity and the methodology to determine appropriate mitigation is flawed; 3) the mass, scale, and design of the project is not compatible with the surrounding built environment and would have an adverse impact on public views; 4) the project does not include adequate public access amenities and would reduce public street parking access; 5) construction noise would have adverse impacts on a nearby harbor seal rookery and on nesting black oystercatchers, and; 6) historic resources are not adequately protected. See **Exhibit 5** for the full text of the appeals.

## **F. Standard of Review**

The standard of review for the appeal is the City of Pacific Grove LCP and the Coastal Act's public access provisions. The appeals allege that the City-approved project does not conform with that standard of review, and the Commission here is charged with evaluating those allegations in light of LCP provisions and Coastal Act public access provisions.

## **G. Substantial Issue Determination**

### **1. Water Supply**

#### ***Applicable LCP Provisions***

Water supply on the Monterey Peninsula, including in the City of Pacific Grove, is severely constrained. Within that context, individual communities are allocated a certain amount of water supply and must then approve development that can be accommodated by that supply. The LCP recognizes this framework, and only allows approval of development if it will be served by an amount of water that is within the City's allocated supply, and if such water is coming from a long-term sustainable source. Given water scarcity and the competition among a variety of uses for this resource, the LCP states that public recreational access and visitor-serving uses are prioritized for such limited supplies. Specifically, the LCP requires:

***LUP Policy INF-1:*** *The City Council shall annually review the City's water Allocation regulations and procedures, and the status of the City's water reserves. To the maximum extent feasible, the City will reserve a sufficient quantity of water to accommodate coastal priority uses designated by the Land Use Plan (i.e., public access and recreational uses and visitor-serving uses) from its allotted water supply. This allocation shall include considerations of constrained and unconstrained water demand, taking into account sources and timing of new water supply, as well as the City's overall land use and economic policies.*

***LUP Policy INF-2:*** *Development shall only be approved if it is first clearly demonstrated that the development will be served by an adequate existing water*

*allocation and sustainable long-term water supply. Individual private water systems, except for rainwater collection are prohibited.*

**LUP Policy INF-6:** *When considering new development or redevelopment/renovation projects, the City will consider the existing property domestic water allocation, the potential for on-site conservation and capture, and available City supplemental water as part of the water allocation.*

### **Water Supply Background**

Unlike other parts of the State that rely on imported water,<sup>16</sup> the Monterey Peninsula is entirely dependent on local water sources. California American Water Company (Cal-Am) is the private utility that provides water service to much of the area, including all of Pacific Grove. The Monterey Peninsula Water Management District (MPWMD, or District) is the public entity that regulates/oversees water management in the Peninsula, including allocating the amount of water each city is allowed to use each year, tracking water usage at each particular site in the region, and ultimately deciding where Cal-Am is allowed to serve water. The region's two primary water sources are the Seaside Groundwater Basin and the Carmel River.<sup>17</sup> Historically, these two sources have been overlapped, and have resulted in water supply scarcity in the greater region for decades.

More specifically, with respect to the Carmel River, it drains a roughly 225 square mile basin that begins in the Santa Lucia Mountains south of the Monterey Peninsula and travels about 30 miles before emptying into the Pacific Ocean from at the Carmel River Lagoon within Carmel River State Beach just south of the City of Carmel-by-the-Sea. The Carmel River ecosystem has traditionally been an important steelhead habitat, as it "historically supported the largest anadromous steelhead run in the chaparral ecosystems of central and southern California, but development of water and land resources led to habitat degradation and an estimated 75% population decline by 1975".<sup>18</sup> The National Marine Fisheries Service listed the south-central California coast steelhead Distinct Population Segment as threatened under the Endangered Species Act in 1997, and designated the Carmel River as 'critical habitat' under the Act necessary for its protection and survival in 2005.<sup>19</sup> By 1999, the Carmel River was listed

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<sup>16</sup> For example, much of the San Francisco Bay Area relies on canals and aqueducts that carry water from reservoirs in the Sierra Nevada mountains (e.g., the Hetch Hetchy Reservoir), Central Valley cities and farms rely on the State Water Project (with Lake Oroville the largest reservoir in the system) and the Federal government's Central Valley Project (with Shasta Lake the largest reservoir in the system and the State overall), and Southern California relies on water from the Colorado River, the Sierra Nevada (e.g., Owens Valley), and the two water projects.

<sup>17</sup> There are some other smaller sources, including desalinated water produced by the City of Sand City and recycled water produced by the City of Pacific Grove and the Carmel Area Wastewater District generally used for non-potable purposes. All of these facilities have received CDP approval from the Commission for their water production and use.

<sup>18</sup> Lopez Arriaza, Juan, et al. "Size-conditional molting and the response of Carmel River Steelhead to two decades of conservation efforts." *PLOS ONE*, vol. 12, no. 11, 30 Nov. 2017, p. 3, <https://doi.org/10.1371/journal.pone.0188971>.

<sup>19</sup> <https://www.federalregister.gov/documents/2005/09/02/05-16389/endangered-and-threatened-species-designation-of-critical-habitat-for-seven-evolutionarily>.

as one of North America's ten most endangered rivers given the demands placed on it by urban water consumption.<sup>20</sup>

In 1995, in a seminal decision as a result of investigations into both the health of steelhead and the River more broadly, as well as an analysis of historic legal water rights, the California State Water Resources Control Board (State Water Board, or Board) issued a cease-and-desist order (CDO 95-10) that substantially reduced the amount of water Cal-Am was able to legally withdraw from the Carmel River.<sup>21</sup> The Order determined that Cal-Am was diverting 14,106 acre feet per year (AFY) from the River when it only had legal right to divert 3,376 AFY<sup>22</sup> (or, put another way, Cal-Am was determined to be illegally diverting about 10,730 AFY). The State Water Board also determined that Cal-Am's Carmel River diversions were the largest single impact on instream beneficial uses of the River, including in terms of adverse effects on fisheries and overall River habitat values. Because of a lack of available supply to substitute for and offset the almost 11,000 AFY of illegal diversions, and because the effect that such an immediate reduction in water supply would have on the Monterey Peninsula, the Order allowed Cal-Am to continue to divert up to 14,106 AFY from the Carmel River beginning in 1995 with 20% per year reductions until a combination of new water sources and water use reduction would bring the amount of River water used to its legal amount.

In the intervening decade,<sup>23</sup> the State Water Board was generally dissatisfied with Cal-Am's efforts to reduce Carmel River diversions and to identify supplemental legal and sustainable water sources, and in 2009 issued replacement CDO 2009-060, which maintained the previous CDO's tenets while also finding that Cal-Am: "(a) failed to comply with the requirements of Order 95-10, and (b) is in violation of Water Code Section 1052", and that "diverting water from the river for growth is unacceptable when (a) Cal-Am has no legal right to divert the water, (b) the steelhead in the river has been declared a threatened species, (c) the river has been designated critical habitat for the steelhead and (d) miles of the river bed are dry for five to six months a year." The State Water Board concluded that "water should not be diverted from the river for growth and that the quantity of water that is illegally diverted by Cal-Am should be reduced over a period of years until illegal diversion from the river is ended." As such, the revised Order was structured only to accommodate existing users and not to accommodate new growth dependent on Carmel River water. To implement this requirement, CDO Condition 2 states:

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<sup>20</sup> See, The Conservancy at 40: The Carmel River <https://scc.ca.gov/2016/06/26/conservancy-at-40-the-carmel-river/#:~:text=In%201999%20the%20Carmel%20River,once%20again%20healthy%20and%20vibrant.>

<sup>21</sup> See State Water Resources Control Board, Order No. WR 95-10, Order on Four Complaints Filed Against the California-American Water Company, Carmel River, Monterey County, July 6, 1995.

<sup>22</sup> Where that total reflects 2,179 AFY based on SWRCB License 11866, 1,137 AFY based on pre-1914 appropriative rights, and 60 AFY based on riparian rights.

<sup>23</sup> Note that in 2007, the State Water Board recognized Cal-Am's right to divert an additional 2,425 AFY from the River, thus putting Cal-Am's maximum legal diversion at 5,801 AFY (i.e., 3,376 + 2,425 = 5,801).

*Cal-Am shall not divert water from the Carmel River for new service connections or for any increased use of water at existing service addresses resulting from a change in zoning or use. Cal-Am may supply water from the river for new service connections or for any increased use at existing service addresses resulting from a change in zoning or use after October 20, 2009, provided that any such service had obtained all necessary written approvals required for project construction and connection to Cal-Am's water system prior to that date.*<sup>47</sup>

*Footnote 47: Multiunit residential, commercial or industrial sites may currently be served by a single water meter. The installation of additional meters at an existing service will not be viewed as a new service connection provided that the additional metering does not result in an increase in water use...*

In sum, the CDO does not allow Cal-Am to extract and provide water for any type of growth and development proposed after the CDO's effectiveness in 2009 (e.g., building new water-using development from the ground up on vacant lots, intensifying existing water-using development with additional units, etc.).<sup>24</sup>

While applying the prohibitions on new residential or commercial units from the ground up is fairly easy to understand and enforce, how to apply it to existing development at an existing service connection is a bit more complicated, including how to define what does and does not constitute an intensification of water use. To provide guidance, the California Public Utilities Commission (CPUC)<sup>25</sup> opined on how to interpret certain CDO provisions, particularly what constitutes an increase in water usage as it relates to intensifications of existing development. Specifically, in 2011, the CPUC determined<sup>26</sup> that Cal-Am could allow new connections and/or increased use of water for existing service addresses if (1) such connection/increase was due to a change in zoning or use, and where all necessary approvals had been obtained prior to October 20, 2009; or (2) if the new connection was associated with the installation of additional meters but without an increase in water use. Ultimately, CPUC's intent was to clarify that Cal-Am was not authorized to provide water in a way that would violate CDO Condition 2. Importantly, CPUC also reinforced that the CDO requirements affecting Cal-Am also apply to the MPWMD and the manner in which it divvies up water to Monterey Peninsula cities and users. Thus, CPUC's 2011 action also directed "Cal-Am to confer with MPWMD and then consult with the SWRCB to develop or select a workable protocol for determining the past use baseline as well as measuring increase in water use at existing service addresses resulting from a change in zoning or use."

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<sup>24</sup> Subsequently, in 2016 SWRCB issued CDO 2016-0016, which was designed to supersede and replace CDOs 95-10 and 2009-0060, and which maintained all previous requirements other than it reduced the amount of interim allowed diversions to 8,310 AFY (starting in 2015-2016) and extended the deadline to terminate unlawful diversions to December 31, 2021.

<sup>25</sup> Since Cal-Am is a private utility, the CPUC has jurisdiction over and regulates many of Cal-Am's operations, including in terms of rates charged for water service, akin to how CPUC regulates Pacific Gas and Electric as a private energy and natural gas utility provider.

<sup>26</sup> See CPUC's 2011 "Decision Directing Tariff Modifications to Recognize Moratorium Mandated by State Water Resources Control Board" (CPUC Decision 11-03-048).

In response to the State Water Board's Order and the CPUC's guidance, the MPWMD developed a comprehensive system of assigning water credits to each land use in the Monterey Peninsula so as to both establish a baseline of each site's water usage as well as enforceable criteria for what would constitute an increase in water usage above that baseline. The MPWMD assigns each use a water credit, which is determined by the site's square footage, number of restaurant seats, number of bathrooms, or some other quantifiable metric for the site, and then multiplied by the identified water use factor for that metric. The water use factor is the estimated amount of water used by each particular land use type, which the District determines based on actual water use data.<sup>27</sup> Thus, the District's position is that such water factors are accurate since they are based on empirical water usage data specific to the Monterey Peninsula region. In short, the District's water credit represents the District's conclusion regarding the maximum amount of water that a site is physically equipped to use. The District maintains that as long as a proposed project is at or below that amount, then it can allow Cal-Am to serve it water.<sup>28</sup>

In summary, as it relates to the Carmel River, Cal-Am is under a State Water Board Order to reduce extraction to its legal limit of about 5,800 AFY and to preclude most types of new development and intensifications of existing uses that would result in an increase in water usage, including as determined by the MPWMD.

With respect to the Monterey Peninsula's other primary source of water, the Seaside Groundwater Basin, it too is under legal constraint. The Basin provides about 30% of the Monterey Peninsula's water usage, but has been under Court order, also known as an adjudication, since 2006. The adjudication specifies how much water is allocated to the various entities that use the Basin (Cal-Am, as well as private wells for agricultural uses, etc.), as well as broader management and conservation efforts overseen by a Court-identified Watermaster. The decision resulted in an ultimate reduction in available groundwater sourced from the Seaside Groundwater Basin by approximately 50 percent, or down to 3,000 AFY, as the identified Natural Safe Yield (where natural replenishment would avoid seawater intrusion and other adverse environmental effects). Prior to the adjudication, Cal-Am pumped approximately 4,000 AFY from the Seaside Basin. Following the adjudication, Cal-Am's allocation was reduced to 1,474 AFY. The establishment of adjudicated water rights of all the users of the Basin is intended to avoid long-term damage to the Basin, including potential seawater intrusion, subsidence, and other adverse impacts of over-pumping. The adjudication establishes a physical solution to Basin management that is "intended to ultimately reduce the drawdown of the aquifer to the level of the Natural Safe Yield; to maximize potential beneficial use of the Basin; and, to provide a means to augment water supply for the Monterey Peninsula."

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<sup>27</sup> The District's water use factors are found here: <https://www.mpwmd.net/rules/Rule24.pdf>.

<sup>28</sup> Note, however, that the District's water credit system hasn't been 'approved' by the State Water Board as a legally enforceable mechanism to implement CDO Condition 2. In fact, and as discussed in more detail in the de novo findings, the State Water Board has opined that a more defensible baseline water use should be based on the past 5 years of actual flowing water at a particular site.

In line with the adjudication, the Watermaster produces an annual report specifying the health of the basin and its progress in meeting identified objectives. The most recent report from 2022<sup>29</sup> noted that water usage from the Basin was about 2,871 AFY, below the Court-ordered limit of 3,000 AFY as the defined Natural Safe Yield. And while seawater intrusion wasn't affirmatively found to be affecting water quality at that time, basin water levels were continuing to drop, and thus rendered the basin susceptible to intrusion. Specifically, the report found there are "ongoing detrimental groundwater conditions within the Basin that pose a potential threat of seawater intrusion. Groundwater levels below sea level, the cumulative effect of pumping in excess of recharge and freshwater inflows, and ongoing seawater intrusion in the nearby Salinas Valley all suggest that seawater intrusion has the potential to occur in the Seaside Groundwater Basin. However, no data collected in Water Year (WY) 2022 indicate that seawater intrusion is occurring within the [Basin]."

In summary, the Seaside Groundwater Basin is Court-ordered to supply no more than 3,000 AFY. And while the adjudication is meant to limit water usage to a sustainable level in the long-term, at the current time, the Basin remains in a somewhat precarious state given the threat of seawater intrusion. This is therefore a critically important time in Seaside Groundwater Basin management so as to prevent seawater from infiltrating the Basin. In other words, Basin management becomes orders of magnitude more complex should seawater intrude upon the resource, and thus prevention efforts at the current time are key.

In light of the limitations – legal, chemical, and biological – of the region's two primary water sources, Cal-Am, the MPWMD, area cities, and the region's wastewater collection and treatment agency, Monterey One Water, have been working on solutions to both reduce consumption and to augment supplies. On the consumption front, and working in concert with the fact that most forms of new development have not been allowed in the region for some nearly 15 years since the CDO's Condition 2 went into effect, the region has a robust water efficiency program that has worked in reducing water usage. For the 2023 water year, which ran October 1, 2022 through September 30, 2023, Cal-Am's customers in the entire Monterey Peninsula service area used just 9,118 acre-feet from all supply sources – including the Carmel River, Seaside Groundwater Basin, and recycled and stored water. This number is less than the 9,516 acre-feet used in the 2022 water year, below the 10-year average of 9,813 acre-feet annually, and well below the roughly 18,000 acre-feet it had been pumping when the State Water Board's initial CDO was promulgated in 1995 (14,000 from the Carmel River and 4,000 from the Seaside Groundwater Basin).

And on the supply side, as the Commission is well aware, there are numerous projects completed, under construction, or permitted that will provide additional supplies to the region. One of these projects, the Pure Water Monterey project by Monterey One Water, is a water recycling and groundwater injection/replenishment/reuse project that has been operational since 2020. This project takes treated wastewater and then injects it into the groundwater basin, with the benefits of having a supply generally unaffected by the whims of annual precipitation, reducing the need for water from the Carmel River,

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<sup>29</sup> <https://seasidebasinwatermaster.org/Other/2022%20Annual%20Report%20Final%2012-8-22.pdf>.

and replenishing the Seaside Groundwater Basin's supplies and staving off seawater intrusion. The project is currently operational and treating 3,500 acre feet in this manner. Relatedly, the Pure Water Monterey Expansion project is currently under construction and will expand the project's overall capacity by some 2,250 acre feet, for a total of 5,750 acre feet that can be added to the region's water supply portfolio.

And lastly in terms of new supplies, Cal-Am is working on final approvals to construct a 4.8 million gallon per day (or 14.7 acre feet per day, or 5,365 AFY) desalination facility. After several decades of planning and various proposed project iterations, the Commission ultimately approved the CDP for this project in November 2022, but subject to conditions of approval. Among the most notable is the need for updated supply and demand figures documenting how much water is needed to serve identified levels of growth over the next several decades. This point is currently subject to extensive debate, and drives to the heart of the matter regarding whether the desalination plant is actually needed in the long term. Cal-Am estimates that water demand by 2050 will be 14,480 AFY. Hence, Cal-Am argues that the additional roughly 5,400 AFY produced by the desalination plant is needed to augment the roughly 11,000 AFY available once the Pure Water Monterey Expansion is operational. The MPWMD, however, disagrees with such demand figure, and has instead forecasted a 2050 water demand of 10,599 acre feet, which is within the amount provided by existing legal supplies and the forthcoming water recycling projects. Thus, the District's position is that Cal-Am's desalination project is not needed for at least the next 30 years, and that the State Water Board should lift the CDO. The Commission, as part of its CDP approval and findings, found that while the water recycling projects would appear capable of satisfying water demand in the short term (for the next 20 years or so), there was also substantial evidence to reasonably conclude that desalination was also needed in the water portfolio for the long term. Hence, the Commission approved the CDP, but with several special conditions. Chief of among them to definitively answer the supply/demand/long-term need question is Special Condition 1, which identifies the CPUC as the final arbiter of this issue with revised supply and demand figures. If such determination shows there is a demand (i.e., a need for the project) for water in excess of what the recycling projects can provide by or before 2050, the desalination project can continue to proceed.

### ***Coastal Act/LCP Considerations***

Putting all of the above water supply background in the context of the Coastal Act and Pacific Grove LCP, a few things can be noted. Foremost, the preceding background information is meant to inform a common baseline understanding of the complicated and complex water supply situation in the Monterey Peninsula. While water is controversial and complex in most parts of California, it is particularly so in the Monterey region given its isolated nature relative to the large water projects that serve much of the rest of the state. And while there are a mélange of agencies involved, to be clear, the Commission's role and review, as part of this project or otherwise, is not enforcement of the State Water Board's CDO, or the MPWMD's allocation/water use calculations, or the manner in which the CPUC estimates supply and demand. While these other agencies' decisions and findings can inform Commission understandings, the Commission has an independent review authority under the Coastal Act to protect coastal resources, including sensitive water bodies from impairment and ensuring that new development receives water from a source that does not result in such impairment.



This is not to suggest that the Commission will always disagree and ‘override’ other agencies’ determinations, as good public policy would suggest that other government agencies, particularly other state agencies, work together so as their respective mandates harmonize and reinforce each other. But it does mean that satisfaction of one law or agency does not automatically mean that another’s is similarly satisfied.

In this light, and applying what we know about the current state of affairs in the peninsula regarding water and coastal resource health, while the Monterey Peninsula has made significant strides in recent years regarding new water supplies and decreases in demand in ensuring a sustainable water supply portfolio, there is still much uncertainty. In 2023, NOAA Fisheries reaffirmed the threatened status of Carmel River steelhead, finding that drought and fish barriers remain concerns to the long-term health of the species.<sup>30</sup> Similarly, the Seaside Groundwater Basin remains at risk of seawater intrusion, and while a goal of the Pure Water Monterey projects is to affirmatively guard against such impairment, they are not fully operational at this current time. And while there is general consensus that, in the short term, the water recycling projects can provide a sustainable water source once fully operational, there isn’t consensus beyond this time frame, including whether desalination can or will be part of a needed solution. It also bears reiterating that, at the current time, the State Water Board’s CDO is still in effect, prohibiting most forms of new water using development. The Coastal Act and LCP require new development to be served by an identifiable, available, and long-term sustainable water source. The Commission has typically interpreted such requirement to generally mean that water must come from a source without impairment to sensitive coastal resources and the species that inhabit and use them, including wetlands, streams, groundwater resources, and the ocean. In light of the above, the Commission cannot find that these tests are met in the Monterey Peninsula at this time, and thus, for purposes of Coastal Act and LCP implementation for CDP review purposes, there is not an adequate and long-term sustainable water source to serve new development in Pacific Grove, whether this project or any other.

### ***Appeal Contentions***

The appeals contend that potential water use for the project has been underestimated and there has been no clear demonstration that the development will be served by an adequate existing water allocation and sustainable long-term water supply, especially given the significant existing constraints on water availability in the region. Specifically, the appeals contend that it strains credulity that the approved 225-room hotel project (with two swimming pools, a spa and fitness center, and bars and restaurants, etc.) will use less water than the existing ATC commercial development (especially given the currently low vacancy rate), and that the City did not calculate the difference between the existing water use at the site and the estimated water use that would occur when the resort hotel development is completed. The appeals also contend that the reliance on offsite laundry services to suggest that proposed project water consumption is commensurately reduced by that amount is inappropriate, including as the offsite

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<sup>30</sup> As part of its 2023 5-Year Review: Summary & Evaluation of South-Central California Coast Steelhead: <https://www.fisheries.noaa.gov/feature-story/south-central-california-coast-steelhead-maintain-threatened-listing-status>.



laundry uses water for that purpose and that needs to be considered as a part of the project as well. See **Exhibit 5** for the full appeal documents.

### **Analysis**

In this case, the City approved the project by finding that its estimated water demand would be less than the water allocations/credits assigned to the site by MPWMD pursuant to the manner in which MPWMD calculates existing and proposed water use. In other words, the City found that the project would be consistent with the District's water allocation provisions, and, because of that fact, found the project to be consistent with the LCP.

There are numerous flaws with the City's findings. First, in terms of the water demand/allocation numbers, the project is estimated to use more water than the existing site's allocation. The District determined the ATC site to have a water allocation of 18.53 AFY based on its mix of commercial square footage (i.e., the District multiplied the square footage of the various commercial uses present on the site (whether vacant or actively used) by the water use factors for those uses, thus representing the total amount of water the site is currently 'equipped' to accommodate and not result in an impermissible intensification). The District then did the same calculation for the proposed project, including its mix of 225 hotel rooms (including number of bathrooms and fixtures in each room), pool/spa area, restrooms, and other amenities, and determined the project to use 23.43 AFY of water. Based on these metrics, the project would result in an impermissible intensification based on how the District enforces/interprets the State Water Board's CDO. However, the District then 'credited'<sup>31</sup> the project by recognizing certain water accounting measures, including providing for on-site greywater recycling and reuse, not counting any on-site laundry use, and installing waterless urinals and toilets. Per the District, these measures would total 5.52 AFY of conservation, and the District then reduced this amount from the project's water usage to then total 17.91 AFY, below the 18.53 threshold.

While conservation efforts can and should be provided on a project in a water scarce area, the District's budgeting here is improper for many reasons, including that it is premature to offer credit to the proposed greywater system since there are no engineering-level plans, details, feasibility analysis, or approval from applicable environmental health agencies whether such measures can be built, operated, and employed on the project site. In addition, simply not counting laundry or other inherent water-using features of a proposed project fundamentally undercounts expected water use. In fact, it appears that the project will use more water than the District's own water allocation for the site, and that water allocation itself is based on a hypothetical 'full use' of the ATC site when the site is not actually being used in that way,<sup>32</sup> meaning that the

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<sup>31</sup> The MPWMD Board of Directors approved a finding of 'Special Circumstances' to approve these water usage reductions from their typical water use factors on October 15, 2018.

<sup>32</sup> The ATC site has not been fully occupied for many years, with only about 33% of the site currently being used for commercial purposes. As a result, actual water use at the site is substantially less than the 'credit' identified by the district. Put another way, the 'credit' essentially identifies hypothetical use, or 'paper water', and not actual water use. If the 33% is applied to the full water use hypothetical, it would suggest that only about 6 AFY of running water is currently being used at the site.

proposed project would significantly increase water use above that that is currently the case, and possibly by over 12 AFY. Such underlying analytic issues raise fundamental questions about how a project of this type and magnitude should be analyzed in terms of baseline/existing water use and what is permissible in light of the region's current water supply inadequacies.<sup>33</sup>

And finally, the City's reliance on the MPWMD to be the arbiter of compliance under the LCP and Coastal Act is misplaced. The City did not undertake any independent analysis of whether there is an adequate and sustainable water source to serve the proposed project. The City simply determined that, because of the fact that the MPWMD determined the project be below the existing allocation (i.e., with the conservation credits added on), the project automatically satisfied the LCP's water supply requirements, and the City did not further identify any water supply issues or concerns. As noted, this is problematic inasmuch as the LCP requires the City to independently evaluate whether water is available to serve a proposed use pursuant to the findings and criteria specified. Whether a project is consistent or not with another entity's provisions does not de facto mean that it also satisfies (or not) the LCP. The City missed a key analytic step in its approval, and the lack of analysis under the LCP's coastal resource protection lens clearly raises a substantial LCP conformance issue.

In sum, water is scarce on the Monterey Peninsula, and the City's rationale behind its approval of this project, particularly one of this magnitude and scale, raises significant LCP consistency questions in terms of water supply. It clearly warrants the Commission's considerations of these important points.

## 2. Lower-Cost Accommodations

### ***Applicable LCP and Coastal Act Provisions***

Because the Coastal Act's public access policies are also an applicable standard of review for CDP appeals, Coastal Act Section 30213 is also applicable in this case regarding the provision of lower-cost accommodations. This policy evinces an intent to ensure that lower-cost visitor and recreational facilities are protected and provided along the coast, including as it relates to lower cost overnight visitor accommodations, including so as to ensure that the coastal zone is as accessible as possible to all, including the vast majority of the public who are not fortunate enough to live near the shoreline. Section 30213 states:

***Section 30213:*** *Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided. Developments providing public recreational opportunities are preferred. ...*

Building upon this clear Coastal Act direction, the LUP includes a series of provisions that require lower-cost accommodations to be provided and encouraged, and require that if new development fails to provide a range of affordability, that mitigation shall be

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<sup>33</sup> Including whether the District's method for determining baseline water usage is appropriate in the first place. As discussed in more detail in the de novo review findings, there are other ways to evaluate and define the site's baseline water usage.

required as determined by a project-specific impact analysis. Specifically, LUP Policies PRA-11 and PRA-12 require:

**LUP Policy PRA-11:** *Lower cost visitor-serving facilities, including overnight accommodations and public recreational opportunities, shall be provided and encouraged. Existing lower-cost accommodations shall be protected and maintained. Overnight accommodations are reserved for transient uses only (30 days or less).*

**LUP Policy PRA- 12:** *New development shall avoid adverse impacts to the availability and provision of lower and moderate cost visitor accommodations in the City. If new development would result in a decrease in the available supply of existing lower cost visitor accommodations, or would fail to provide a range of affordability, or fail to use land suitable for lower cost accommodations for that purpose, mitigation shall be required as determined by a project-specific impact analysis.*

The IP builds further on this LUP direction via IP Section 23.90.220(c). This IP section provides specificity on implementing lower-cost provisions, including defining what constitutes low-, medium-, and high-cost accommodations, specifying that lower-cost units must be incorporated into a proposed project in an amount equal to 25% of the number of higher-cost rooms, and allowing for an in-lieu fee in an amount to “cover the cost of mitigation proportionate to the impact of the development for which the CDP is issued.” This in-lieu fee allowance is only for projects deemed infeasible to provide for such units on site and requires a financial feasibility assessment to ascertain such information, including land value, development costs, revenue assumptions, and similar information. The IP states:

**IP Section 23.90.220(c) Lower Cost Visitor Accommodations; Protection of Low-Cost Visitor Accommodations:** *(1) Low, Moderate, and High-Cost Visitor Accommodations Defined. For purposes of this subsection, visitor accommodations shall be defined as low, moderate, or high cost as follows: (A) Low Cost. The annual average daily room rate of all economy hotels and motels in the city of Pacific Grove market area that have room rates that are equal to or below the statewide average daily room rate. Economy hotels and motels are AAA-rated one or two diamond hotels, or equivalent. (B) Moderate Cost. The average daily room rate is between low cost and high cost. (C) High Cost. The average daily room rate is 120 percent of the statewide average daily room rate or greater.*

*(2) Feasibility Analysis Required. An analysis of the feasibility of providing lower cost visitor accommodations shall be required for any application involving the expansion, reduction, redevelopment, demolition, conversion, closure, cessation, or new development of any project involving visitor overnight accommodations, with the exception of short-term rental lodging that is within residential units. If the proposed rates are not lower cost, the feasibility study shall explain why providing lower cost accommodations as part of the project is not feasible, or whether the proposed project includes amenities that would serve as a lower cost*

*option for families (e.g., additional beds per unit, suite facilities, kitchen facilities, etc.). This explanation shall address the land value; development costs; a breakdown of the estimated annual revenues (including average daily rate and occupancy rates); a breakdown of the estimated operating costs; and any other information necessary to address the feasibility of providing lower cost accommodations on site. The feasibility analysis shall be prepared at the applicant's expense.*

*(3) In-Lieu Fee Program. Specific detailed information regarding calculation and use of any required in-lieu fees as part of a mitigation program for project impacts to the availability of lower cost visitor accommodations within the city shall be included as a condition of approval of the coastal development permit for the visitor accommodations. Fees shall be adequate to cover the cost of mitigation proportionate to the impact of the development for which the CDP is issued. All in-lieu fee payments shall be deposited into a fund established by the city which shall be in an interest-bearing account and shall only be used for the provision of new lower cost overnight accommodations, within the city. Funds may be used for activities including land acquisition, construction, and/or renovation that will result in additional lower cost visitor accommodations, as well as permitting costs. The specific lower cost requirements for any project funded by the in-lieu fee program shall be determined through the coastal development permit process of the in-lieu fee funded project.*

*(4) Impact Analysis Required. An analysis of a development's impact on the availability of lower cost overnight visitor accommodations in the city shall be required for any application involving: (A) The expansion, reduction, redevelopment, demolition, conversion, closure, or cessation of any project involving overnight visitor accommodations, with the exception of short-term lodging that is within residential units; or (B) New or limited use overnight visitor accommodations, including timeshares, fractional ownership, or condominium-hotels. The impact analysis shall be prepared at the applicant's expense.*

*(5) Impact Defined. The proposed development would result in any loss in the available supply of existing lower cost visitor accommodations or would fail to provide lower cost rooms where new accommodations are proposed or fail to use land suitable for lower cost accommodations for that purpose.*

*(6) Mitigation. If the review authority determines that the development will impact existing lower cost visitor-serving accommodations, or provide only high or moderate cost visitor accommodations or limited use overnight visitor accommodations such as timeshares, fractional ownership and condominium-hotels, then mitigation commensurate with the impact shall be provided as follows: (A) Where development proposes to remove existing lower cost accommodations or replace existing lower cost accommodations with high-cost accommodations, replacement of the lost low-cost rooms shall be maximized and provided at least on a one-to-one ratio either on site or a suitable off-site location within the city. Where development proposes to remove existing lower cost accommodations or replace existing lower cost accommodations with moderate*

*cost accommodations replacement of lost low-cost rooms shall be maximized and provided at a ratio commensurate with the identified impact, taking into consideration the proposed cost increase and any additional amenities that would be provided to serve as a lower cost option for families. Replacement shall prioritize providing for lower cost accommodations on-site where feasible; where on-site provision is not feasible, off-site provision shall be completed and ready for use prior to occupancy of the new development, as feasible. (B) Where development proposes to provide for new higher cost accommodations, the number of lower cost accommodations provided shall be maximized. At a minimum, the number of low-cost units shall be equivalent of 25 percent of the number of high-cost accommodations. (C) Where it is not feasible to provide all lower cost accommodations as required on site, an equivalent combination of on site, off site, and payment of an in-lieu fee, as described under the in-lieu fee program above, commensurate with the impact shall be provided.*

*(7) Rate Control and Income Eligibility Requirements Prohibited. In no event shall a development as mitigation be required: (A) To provide overnight room rental be fixed at an amount certain; or (B) To establish any method for the identification of low or moderate income persons for the purpose of determining eligibility for overnight room rentals in any such facilities.*

### **Background**

Coastal Act Section 30213 has its origins in the 1975 California Coastal Plan (the precursor to the 1976 Coastal Act). Based on extensive public input in the early 1970s, the Coastal Plan found that few tourist facilities for persons of low and moderate income were being built in many parts of the coastal zone, and that many such low- and moderate-cost facilities were being replaced by facilities that had higher costs, particularly in terms of overnight accommodations. The Coastal Act addressed these findings in part by including the specific Section 30213 mandate to protect, encourage and, where feasible, provide lower-cost visitor and recreational facilities.

Over the years, ensuring the provision of lower-cost overnight accommodations in the coastal zone has been especially important because permit applicants have typically requested that the Commission and LCP-certified local governments approve higher-cost overnight accommodations on land zoned for visitor-serving uses (in some instances where lower-cost accommodations were already situated on the land) rather than pursuing lower-cost accommodations, such as economy hotels, resulting in the loss of either potential or actual lower-cost accommodations in appropriately zoned areas. Overall, the Commission's history of permitting overnight accommodations in the coastal zone confirms the need to guard against the loss or preclusion of lower-cost overnight accommodations along the coast, as recognized both in the Coastal Act and the LCPs that implement it.

As more higher-cost hotels are developed, the remaining lower-cost to moderate-cost hotel accommodations in the coastal zone tend to be older structures that become less economically viable as time passes. Further, as more redevelopment occurs, the stock of lower-cost overnight accommodations tends to be reduced, since it is more lucrative for developers to replace these structures with higher-cost accommodations or, as in

this case, to build a new high-end hotel on parcels that historically have not included visitor accommodations. Commission staff prepared a study for a 2016 Commission workshop on lower-cost accommodations, which reviewed statewide data about such lower-cost units in the coastal zone since 1989. In its report to the Commission in 2016, staff found that out of six “cost” categories ranging from “economy” to “luxury,” a total of 24,720 economy rooms had been lost since the late 1980s, compared to a loss of a combined 11,247 rooms in the remaining five classes. In other words, economy rooms were lost at over twice the rate, over the same time period, of all other cost categories combined. Thus, all told, nearly 70% of all overnight rooms that were lost in the coastal zone between 1989 and 2016 were attributable to lost economy rooms, whereas less than 10% of the rooms lost have been in the upscale and luxury categories, and less than 0.2% have been lost in the luxury category. Such trends have made it much more difficult for those of more limited financial means to access the coast.

Such reduction in lower- and moderate-cost overnight accommodations in the coastal zone is also a serious environmental justice issue. Section 30604(h) of the Coastal Act provides that when acting on a coastal development permit, the issuing agency “may consider environmental justice, or the equitable distribution of environmental benefits.” As defined in Section 30107.3(a) of the Coastal Act, “environmental justice” means “the fair treatment and meaningful involvement of people of all races, cultures, incomes and national origins, with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies,” and, pursuant to Coastal Act Section 30013, the Commission and all public agencies are charged with advancing environmental justice principles when implementing the Coastal Act. Thus, environmental justice considerations are also relevant to the Commission’s review of new higher-cost hotel proposals, like this one.

The Commission’s Environmental Justice Policy, adopted in March 2019, indicates that the Commission shall “strive for a no-net-loss of lower-cost facilities in the coastal zone, while implementing a longer term strategy to increase the number and variety of new lower-cost opportunities.”<sup>34</sup> In California, equitable coastal access and recreation opportunities for all populations has not been realized to date due to historic and social factors, such as discriminatory land use and economic policies and practices, with greater barriers to access experienced by low-income communities, communities of color, and underserved communities.<sup>35</sup> Spatial analysis of 2010 Census data shows a majority of Californians (70.9%) live within 62 miles of the coast, but populations closest

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<sup>34</sup> [California Coastal Commission Environmental Justice Policy](#), published by the Commission on March 8, 2019.

<sup>35</sup> “[Free the Beach! Public Access, Equal Justice, and the California Coast](#)”, Robert Garcia & Erica Flores Baltodano, 2 *Stanford Journal of Civil Rights and Civil Liberties*. 143 (2005); [Report on Coastal Act Affordable Housing Policies and Implementation](#), published by Commission staff on February 10, 2015; [Report on the Historical Roots of Housing Inequity and Impacts on Coastal Zone Demographic Patterns](#), published by Commission staff on June 9, 2022.

to the coast are disproportionately white, more affluent, and older than those who live farther inland.<sup>36</sup>

Given hotel developers predominantly pursue higher-cost and luxury hotels, including in many cases where such higher-cost offerings take the place of existing lower-cost options along the coast, it is becoming increasingly important to focus on protecting and providing lower-cost overnight accommodations in the coastal zone as required by the Coastal Act and LCPs. Absent an adequate number and type of lower-cost lodging facilities, a large segment of the population will be effectively excluded from overnight stays at the coast. To this point, “financial reasons” was listed as the number one barrier to staying overnight at the coast, as identified by respondents to a State Coastal Conservancy-commissioned survey in 2017.<sup>37</sup> By forcing this more limited means economic group to lodging out of the coastal zone (or forcing them to stay at home), there is an adverse impact on the general public’s ability to access the beach and coastal recreational areas. Such trends have thus made it more difficult for visitors of more limited means to access the coast; with many of these visitors traveling from fairly far inland locations where they cannot easily make the trip to the coast and back home again in a single day. Therefore, by protecting and providing lower-cost lodging for the price sensitive visitor as is mandated by the Coastal Act, the Commission can help to remove barriers and to increase access to a segment of the population facing inequities when visiting the coast. This in turn enhances access to our collective public coastal commons, helping to ensure true access for all.

### ***Appeal Contentions***

The appeals contend that the City-approved project raises a series of questions regarding consistency with the above-cited Coastal Act and LCP provisions that require and protect lower-cost visitor accommodations. Specifically, they contend that the approved project includes lower-cost room rates solely for eligible “heroes” (i.e., active military personnel, nurses, and frontline workers) but that the eligibility and room rates are not specified in the CDP but rather would be worked out later. The appeals further contend that the lower-cost rooms are not targeted to the general public (which is the actual LCP requirement) and that the project’s mitigation fee methodologies appear to significantly underestimate the amount of required mitigation fees. In short, the appeals contend that the City’s CDP approval does not adequately provide for lower-cost accommodations nor follow the specific prescriptions for same as laid out in the LCP. See **Exhibit 5** for the full appeal documents.

### ***Analysis***

As noted, the Pacific Grove LCP is quite specific as to lower-cost accommodation requirements. The first step in the analysis is to identify the minimum number of required lower-cost accommodation units so as to identify the minimum threshold for meeting LCP tests, all the while recognizing that the minimum threshold is just that, a minimum, and the actual LCP requirement is to maximize the number of such units (see

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<sup>36</sup> [Coastal Access Equity and the Implementation of the California Coastal Act](#), Reineman, et al., (2016) Stanford Environmental Law Review Journal, v. 36. Pages 96-98.

<sup>37</sup> [Explore the Coast Overnight- An Assessment of Lower Cost Accommodations](#), published by State Coastal Conservancy on January 8, 2019.

IP Section 23.90.220(c)(6)). Such analysis requires an evaluation of the type of units proposed, and whether they are low, medium, or high cost. The Commission has used a variety of methodologies for this purpose, and here the LCP incorporates a version of one of those methodologies, focusing on the average of all Pacific Grove area hotel and motel unit rates during peak summer times that are below the statewide average daily unit rate to determine the lower cost threshold. Here, the statewide average daily unit rate for July/August 2023 (the most recent data on the issue) was about \$200. There were only six hotels and motels in the Pacific Grove area that have July weekend rates below that amount, ranging from a low of \$157 to a high of \$199, with an average of \$184. Thus, based on the LCP's specific methodology, the current lower cost threshold is no more than \$184 per night for a standard double-occupancy economy hotel room (and, conversely, given that the LCP identifies higher cost as 120% of the statewide average daily unit rate, the current higher cost threshold is \$240 per night).

In this case, the Applicant's lower-cost analysis (prepared in 2020) identifies all 225 hotel units (that range in size from 420 square feet for standard queen or king rooms to 685 to 800 square feet for suites) as higher-cost, with a proposed rate of between \$250 and \$400 per night.<sup>38</sup> Thus, the LCP at a minimum would require the Applicant to provide at least 56.25 lower cost units.<sup>39</sup> However, the Applicant's analysis concludes that it is not feasible to provide any of the required 56.25 rooms as lower-cost, whether onsite as part of the proposed project or as part of some other project completed by the Applicant within the City.<sup>40</sup> The analysis reviewed the financial feasibility of the project under then-current economic assumptions (again, in 2020), employing a \$400/room/night rate for 104 of the 225 rooms and \$250/room/night rate for the remaining 121 of the 225 rooms. With those assumptions, along with information about vacancy rates and other operating revenues, the Applicant's analysis concluded that the hotel would have an annual surplus of roughly \$1.9 million which made the proposed project financially feasible. However, with 56 of the project's rooms at a lower cost rate of \$117/room/night, "on-site mitigation would make the ATC Project financially infeasible" due to a "financial gap of approximately \$9 million."<sup>41</sup>

In lieu of providing the LCP-required lower cost rooms on site, the Applicant proposed to provide the City a mitigation fee that the City could use for development of lower-cost overnight accommodations elsewhere, where the Applicant based their proposed fee on a cost estimate of \$32,000 to develop each such unit, or a total mitigation fee of \$1.8 million (i.e.,  $56.25 \times \$32,000 = \$1,800,000$ ). However, during the City Council approval hearing, and in response to Council questions regarding the preference for on-site accommodations rather than an in-lieu fee, the Applicant informed the City that it was in

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<sup>38</sup> "Lower-Cost Overnight Accommodation Impacts and Mitigation Analysis for the American Tin Cannery Project".

<sup>39</sup>  $225 \text{ high cost rooms} \times 25\% = 56.25 \text{ rooms}$  must be provided at lower-cost.

<sup>40</sup> The LCP requires any such off-site and/or compensatory units developed from mitigation fees to be provided within City limits.

<sup>41</sup> The analysis uses a lower-cost average daily rate (ADR) of \$117, based on the ADR for economy class hotels in the Pacific Grove market area (including Pacific Grove, Pebble Beach, Carmel-by-the-Sea, Carmel Valley, and Monterey) back in 2020 (when the statewide average daily room rate was about \$173), which would appear as reason for the difference in identified thresholds.



fact feasible to provide lower-cost units on-site, and at that time proposed the ‘Heroes’ program. This program would provide lower-cost accommodations to nurses, firefighters, and police officers. The City Council ultimately approved this program, with the details regarding room cost, the mechanics of how one qualifies to be a ‘hero’, and other program elements to worked out at a later date with the Applicant and City staff.

The City’s approval raises a series of questions and problems in terms of LCP conformance. First, the Applicant’s feasibility analysis raises questions as to its assumptions and utility, including because at a basic level the Applicant appeared to disregard its ultimately conclusion that any on-site lower-cost units were infeasible when it proposed the Heroes program. Clearly, some form of lower-cost accommodations were actually feasible. And second, some of the assumptions made raise questions about their validity. All development costs used in the analysis were provided by the Applicant and the analysis states that some of the information provided deviated substantially from industry norms and required reconciliation.<sup>42</sup> The analysis also used fairly low room rates for its estimates of revenues from the higher cost rooms as compared to other higher end offerings nearby on the Monterey Peninsula, estimating a per room cost at this site of only \$250 per night, which is 60-80% less than nearby higher end offerings,<sup>43</sup> and only \$10 more than what the LCP would define as moderate cost. In addition, it applied a lower cost room rate of \$117/room/night when the LCP defined lower cost threshold was actually higher (and is \$184/room/night today). By doing so, it appears to significantly underestimate potential revenues, which skews the analysis toward less feasibility for lower cost on-site rooms. Moreover, the analysis did not identify a mix of on-site and off-site room options, but rather simply evaluated two mitigation scenarios. The first scenario included reducing the total number of high cost rooms (specifically, the rooms that would be priced at \$250/room/night) from 225 to 169 rooms, and then pricing 56 rooms at a lower-cost rate of \$117/room/night, and the second scenario analyzed the feasibility of providing the above-described in-lieu fee for those 56 rooms instead of making them lower cost. The analysis did not include any evaluation of an off-site option, and it substantially deviated from the way in which the Commission typically calculates in-lieu fees in such a circumstance. While the Commission has used various metrics over the years for this calculation, in recent years it has used \$100,000 (in 2015 dollars) as a base construction cost estimate for an off-site lower cost unit, and has updated that number yearly using the Turner Building Cost estimate (in 2023, this amount is about \$145,000).<sup>44</sup> However, the Commission has made clear that even this metric isn’t a perfect proxy, including because it can

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<sup>42</sup> As stated on page 19 of the report: “All development cost assumptions for the ATC Project were provided by the Developer. However, EPS reviewed these cost assumptions against standard per unit factors typical for hotel projects of this nature, and consulted with the Developer to reconcile any assumptions that appeared to deviate substantially from industry norms.”

<sup>43</sup> For example, the least expensive room for a one-night stay on a Saturday in July 2024 at other nearby higher end hotels ranges from about \$700 to over \$1,300 (starting at \$699 for the Plaza Hotel, \$726 at the Intercontinental, \$995 at the Spanish Bay Inn, \$1,145 at the Pebble Beach Lodge, and \$1,345 at the Casa Palmero Inn).

<sup>44</sup> The Turner Building Cost Estimate is an industry standard that is used widely by federal and state governments to measure costs in the nonresidential building construction market in the United States: <https://www.turnerconstruction.com/cost-index>.

significantly undercount the amount of money it takes to construct an actual lower-cost unit.<sup>45</sup> But, for comparison purposes, using this metric would result in a total in-lieu fee of over \$8 million,<sup>46</sup> clearly well above the Applicant's identified \$1.8 million. This latter number was calculated based on the difference between what it would cost to construct a lower-cost unit off-site versus a 'break even' revenue stream. In other words, the 'subsidy' per unit, meaning that the developer would need a subsidy of \$32,000 for each off-site lower-cost unit, and this difference is what the in-lieu fee was based. The Commission is not aware of using this financial/analytic approach in past projects, and it certainly isn't recognized in the LCP.

A perhaps more analytically appropriate in-lieu fee would not be based hypothetical industry standards, but rather would use the site-specific assumptions provided in the Applicant's feasibility analysis of what it would take to build a lower-cost unit in Pacific Grove. And in fact, the analysis included a series of metrics to estimate this cost, including the size of a typical lower-cost unit (423 square feet, inclusive of needed common spaces such as a lobby and hallways), 1 parking space per unit (at \$33,095 per space in a structured lot, or taking up about 325 square feet of per space at \$335/square foot), land costs of \$6 million per acre (where an estimated 0.72 acres would be needed for a 47-unit lower-cost hotel), plus a 10% administration fee. When applying these data points and assumptions, the cost to build a lower-cost unit in Pacific Grove would actually be roughly \$464,000 per unit based on the study's numbers. At 56.25 units, this fee would equate to over \$26 million. Since this in lieu fee amount is based on more accurate and precise assumptions, including in terms of including land costs and related measures necessary for an actual project to be realized, it clearly represents a more accurate manner in which to assess an off-site in-lieu fee. And the fee ultimately proposed by the Applicant and applied by the City, \$1.8 million, is multiple orders of magnitude less than such estimate, some 15 times less.

And lastly, the City's approval of the 'Heroes' program (that would provide reduced cost rooms to nurses, firefighters, and police officers), while well-intentioned, raises its own LCP consistency problems. First, the LCP does not allow using this type of method to identify those who would be eligible for lower cost rooms (see IP Section 23.90.220(c)(7)). Second, none of the 'nuts and bolts' in terms of actual implementation, including room rates, eligibility, or other mechanics were actually specified in the City's approval. And third, the overall intention behind the requirement for lower cost rooms is so that the general public is able to make use of the rooms, especially so that those with more limited means are not priced out of overnight rooms in the coastal zone altogether, and a 'Heroes' program of this type does not achieve that objective, even if it were allowable by the LCP, which it is not.

In short, the City's approval is not consistent with the LCP's lower-cost visitor accommodation requirements. And for a project of this scope and magnitude in an area where it is so difficult to build new accommodations units of any kind, it is even more important to ensure such consistency so as to ensure that lower-cost units are indeed

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<sup>45</sup> See Commission findings on this topic in the Ocean Avenue Partners mixed-use project in CDP 5-22-0799.

<sup>46</sup> 56.25 lower-cost units times \$144,750 construction cost-per-unit equals \$8,142,187.50.

provided. For all of the above reasons, the City's approval raises a substantial LCP conformance issue with respect to low-cost visitor-serving accommodations.

### **3. Public Views/Community Character**

#### ***Applicable LCP and Coastal Act Provisions***

The LCP is protective of public views and the visual qualities of Pacific Grove's coastal areas as a resource of great public importance. The LCP does this through policies and standards that apply to new development more broadly, as well as specific provisions that apply to the ATC site. Among the broader directives, new development is required: to protect public views to and along the shoreline, and to minimize landform alteration (LUP Policy SCE-1); to protect scenic resources and other coastal resources as a City priority (LUP LUD-1), and to be evaluated against development standards where all such standards are interpreted as maximums (such as for height) or minimums (such as for story stepbacks) that are required to be reduced (or increased) to protect and enhance such resources to the maximum extent feasible (LUP Policy LUD-1). For development located in designated scenic areas, which includes development sites like this one abutting and/or visible from Ocean View Boulevard, the LCP prohibits development from blocking or significantly adversely affecting significant public views (LUP Policy SCE-5), and requires visual analyses (e.g., renderings, story poles, etc.) to document a proposed development's potential visual impact (IP Section 23.90.160(b)(1)(E)). For visitor-accommodation projects like this project "that fronts on and/or is visible from Ocean View Boulevard or the Ocean View Boulevard Recreational Trail, story stepbacks and building articulation shall be required to ensure that buildings and other structures do not dominate blue water ocean views, do not domineer over the public space, and do not appear as large flat planes" (IP Section 23.90.180(c)(4)(B)). And finally, the LCP includes numeric site development standards specific to the ATC site, including specifying a maximum building height of 40 feet (with small appurtenances up to 8 feet higher so long as they do not significantly impact public views), and up to 90% site coverage only if additional public access amenities are provided above and beyond which the LCP would typically require (IP Section 23.90.180(c)(4)(G)). The LCP states:

***LCP Policy SCE-1:*** *Public views to and along the shoreline shall be protected and enhanced, and alteration of natural landforms shall be minimized.*

***LCP Policy SCE-5:*** *The City will designate scenic areas of the Coastal Zone, including those areas described in Policy SCE-3, as areas having special scenic significance requiring the imposition of project-specific development standards designed to protect these scenic areas (refer to Figure 4, Scenic Areas). Development standards for such special scenic significance areas shall include, but not be limited to, special siting and design criteria, including height and story limitations, bulk and scale limitations, screening and landscaping requirements, natural materials and color requirements, minimizing lighting that spills into nighttime public views, avoiding glares from windows and reflective surfaces, requirements to prepare landscaping plans utilizing drought tolerant and native plants that protect and enhance scenic resources; minimizing land coverage, grading, and structure height; and maximizing setbacks from adjacent open space areas. Clustering to maximize open space views may also be considered.*

*Development within visually prominent settings, including those identified on Figure 4, and on all parcels that abut Ocean View Boulevard and Sunset Drive, shall be sited and designed to avoid blocking or having a significant adverse impact on significant public views, including by situating buildings, access roads, and related development in a manner and configuration that maximizes public viewshed protection, and through such measures as height and story limitations, and bulk and scale limitations. Clustering development to maximize open space views may also be considered.*

**LUP Policy LUD-1 (in relevant part):** *Protection of sensitive habitats, natural landforms, scenic resources, and other coastal resources is a priority in all City actions and decisions, and all development standards (including with respect to height, setback, density, lot coverage, etc.) shall be interpreted as maximums (or minimums) that shall be reduced (or increased) so as to protect and enhance such resources to the maximum extent feasible. Development shall only be authorized when the proposed use is allowed per the applicable land use designation, and when it meets all applicable Local Coastal Program policies and standards...*

**LUP Policy DES-3:** *The height limit for commercial development in Land Use Plan Areas I and III will vary, but in no case shall structures be more than 40 feet high. Minor exceptions to such height limit may be allowed for mechanical appurtenances that do not impact public views. Detached commercial signs shall be of a size, location, and appearance such that they do not detract from the area's scenic qualities and cause visual clutter and blight.*

**IP Section 23.90.160(b)(1)(E):** *Applications for Development in Scenic Areas. The following documentation and requirements shall be provided for all CDP applications within scenic areas, including those mapped in LUP Figure 4; all development on, seaward, or visible from Ocean View Boulevard, Sunset Drive, and the pedestrian recreational trails seaward of these roads; and any other development that may adversely impact public views: (1) Site-Specific Visual Analysis. At a minimum, the visual analysis shall include the following: ... (E) Any other information deemed necessary to determine the visual impact of the proposed project, including but not limited to analysis of the heights of existing buildings within 150 feet of the proposed structure; story poles and netting showing proposed ridgelines; and visual simulations to help identify potential visual impacts.*

**IP Section 23.90.180(c)(4)(A)&(B):** *Visitor-Serving, Visitor-Accommodation and Sunset Service Commercial Design Standards. In addition to all other applicable LCP policies, the following design standards for development within the visitor-serving, visitor-accommodation and sunset service commercial LUP land use designations shall apply:*

*(A) Coverage. Building and other site coverages shall be limited to the degree necessary to maintain public views, maintain adequate open space to preserve small-scale visual landscapes, maintain water quality (including by limiting*

*impervious surfaces), and maintain community character, including through requirements for compact design, pervious materials, and maximized landscaping and open space. In no case shall site coverage exceed 90 percent of total lot area. To the extent possible, any space remaining uncovered should be accumulated to maximize positive visual impacts and usability.*

*(B) Heights and Articulation. Building and other structure heights shall be limited to the degree necessary to maintain public views, maintain pedestrian scale, and maintain community character. In no case shall building and other structures exceed 40 feet as measured from existing grade, and all such heights shall be reduced as necessary to ensure to the maximum extent feasible that existing blue water views from public vantage points are predominantly maintained. For new development that fronts on and/or is visible from Ocean View Boulevard or the Ocean View Boulevard Recreational Trail, story stepbacks and building articulation shall be required to ensure that buildings and other structures do not dominate blue water ocean views, do not domineer over the public space, and do not appear as large flat planes.*

***IP Section 23.90.180(c)(4)(G)(i)&(ii) (in relevant part):*** *(G) American Tin Cannery Site. ... [T]he following additional design standards apply to new development at the American Tin Cannery site comprised of Assessor's Parcel Numbers 006-231-001, 006-234-004, 006-234-005, and the portion of Sloat Avenue between Eardley Avenue and Dewey Avenue (C-V-ATC zoning district): (i) Coverage. Site coverage may only be allowed up to 90 percent of the total site area if the project includes consistent public amenities that enhance public access (e.g., restrooms, bicycle racks, seating areas, sidewalk and roadway access improvements on and off site, etc.) beyond that which is required by the LCP for compliance with other requirements. Otherwise, site coverage may be decreased if substantial public coastal access amenities are not incorporated into the project. (ii) Minor exceptions to height limits may be allowed for mechanical appurtenances up to an additional eight feet; provided, that no public views are significantly impacted and the equipment is appropriately screened.*

In addition, since Coastal Act public access provisions are also relevant in appeals like this, Section 30251's protection of public views as a form of public access also applies. Section 30251 states:

***Section 30251:*** *The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas such as those designated in the California Coastline Preservation and Recreation Plan prepared by the Department of Parks and Recreation and by local government shall be subordinate to the character of its setting.*

### ***Appeal Contentions***

The appeals contend that the approved project oversubscribes the site with development that will degrade public views and will not maintain community character and compatibility, especially given that this site is a prime, highly visible location in the City near many visitor destinations. The appeals also contend that the City failed to require any onsite form of visual assessment (e.g., story poles and netting, balloons, etc.) to approximate the project's bulk, height, and scale, and thus it is not possible to assess the impacts the approved development will have on public views in this highly scenic area of the City's waterfront. The appeals overall contend that the project is too large for the site and doesn't adequately meet the LCP's provisions for development in scenic, prominent locales like this one. See **Exhibit 5** for the full appeal documents.

### ***Analysis***

The approved development would cover an area of roughly 6 acres, rise to 40 feet in height, and total some roughly 350,000 square feet of floor area. Based on this size, it would be one of the largest developments in the Monterey Peninsula, and larger than the three largest structures in the Monterey/Pacific Grove communities combined.<sup>47</sup> And while the approved design does include articulation to break up the perceived mass and scale of the project when viewed from Ocean View Boulevard, particularly when compared with the existing ATC structures which are industrial-type facades that encroach right up to Ocean View Boulevard, and visual renderings suggest only limited blockage of any existing public blue water views, the project also considerably increases the amount of development at the site overall. The project includes substantial hotel development on what is presently a surface parking lot, as well as on what is currently Sloat Avenue. This public street currently bisects the inland and seaward portions of the ATC site, thereby separating structures on both sides. The City's approval allows for hotel development in this area, and thus this natural articulation is lost, as is its ability to help limit perceived massing in public views. And finally, and as discussed in more detail in the Public Access section, the project doesn't appear to provide the type of public access amenities that are required of a project at this site to reach the LCP's maximum 90% site coverage. Many of the amenities appear more geared to hotel guests than to the general public, and certain public access impacts related to the loss of public parking are unmitigated. Thus, it doesn't appear that the finding to provide for the site's coverage can be met.

All of this is to say that a structure of this size and scope clearly raises questions as to whether it meets the LCP's specific prescriptions for development in this area, and whether it meets the Coastal Act's public view access protection provisions. And this is only compounded by the fact that the site is located in a visually prominent spot kitty-corner to the immensely popular Monterey Bay Aquarium, the Monterey Bay Coastal Recreation Trail, and right near the City's border with Monterey. It thus serves as a

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<sup>47</sup> The adjacent Monterey Bay Aquarium occupies approximately 2.5 acres and is some 30 feet height, just next to it the Intercontinental Hotel occupies about 1 acre and is 46 feet in height, and just upcoast the Monterey Plaza Hotel occupies some 2 acres at 47 feet in height.

'gateway' location to the City, and highlights the importance of ensuring its visual compatibility.

Finally, it should be noted that many Appellants have raised concern about the project's lack of story poles and reliance on visual simulations to guide decision-making. As part of the City's review, the City's Building Official found that placing story poles to document structure height would be a safety hazard given strong winds and adjacent development. The Appellants argue the LCP requires story poles in order to make affirmative findings regarding a project's consistency with the LCP as it ensures an understanding based on physical objective markers, and that visual simulations are an imperfect substitute. While the Appellants raise some valid points, it is inaccurate to state that the LCP affirmatively requires story poles. Rather, the LCP requires "any other information deemed necessary to determine the visual impact of the proposed project", and lists story poles and renderings as types of tools to determine visual impact. In sum, while it would appear that some form of story poles, balloons, or other similar tools could have been employed (including on non-windy days, etc.), the lack of same does not de facto render the project LCP inconsistent and thus unapprovable as the Appellants suggest.

In any event, the sheer size and scale of this project, including the way it appears to potentially oversubscribe the site in terms of mass, and its impacts on views and the coastal viewshed all raise questions as to its conformity with applicable Coastal Act and LCP public view and community character provisions. When understood in relation to the site's prominent location as a critical "gateway" site into the City, such issues clearly warrant Commission review. In sum, the project raises a substantial issue with respect to public views and community character compatibility.

#### **4. Public Access**

##### ***Applicable Coastal Act and LCP Provisions***

The Commission's appellate review lens includes the Coastal Act's public access policies as well as the access provisions of the LCP. The Coastal Act grants a high priority to public recreational access uses and activities to and along the coast. The Act protects and encourages lower-cost visitor and recreational facilities where feasible and states a preference for developments providing public recreational opportunities. In addition, the Coastal Act requires that oceanfront land and upland areas suitable for recreational use be protected for recreational uses. In particular:

***Section 30210:*** *In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.*

***Section 30211:*** *Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization...*

***Section 30212(a):*** *Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects ...*

**Section 30212.5:** *Wherever appropriate and feasible, public facilities, including parking areas or facilities, shall be distributed throughout an area so as to mitigate against the impacts, social and otherwise, of overcrowding or overuse by the public of any single area.*

**Section 30213:** *Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided. Developments providing public recreational opportunities are preferred. ...*

**Section 30221:** *Oceanfront land suitable for recreational use shall be protected for recreational use and development unless present and foreseeable future demand for public or commercial recreational activities that could be accommodated on the property is already adequately provided for in the area.*

**Section 30222:** *The use of private lands suitable for visitor-serving commercial recreational facilities designed to enhance public opportunities for coastal recreation shall have priority over private residential, general industrial, or general commercial development, but not over agriculture or coastal-dependent industry.*

**Section 30223:** *Upland areas necessary to support coastal recreational uses shall be reserved for such uses, where feasible.*

**Section 30240(b):** *Development in areas adjacent to...parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those...recreation areas.*

Section 30210 of the Coastal Act requires the Commission to maximize public recreational access opportunities. Section 30211 prohibits development from interfering with the public's right of access. In approving new development, Section 30212 requires new development to provide access from the nearest public roadway to the shoreline and along the coast, save certain limited exceptions, such as existing adequate nearby access. Sections 30213, 30221, 30222, and 30223 prioritize visitor-serving and recreational uses on oceanfront land over other types of development, particularly uses that provide lower-cost opportunities, and also require that parking be provided in a manner that mitigates overcrowding of any particular area. Section 30240 protects against impacts to adjacent park areas, such as the Pacific Grove recreational trail along Ocean View Boulevard at the site. And finally, the Coastal Act Section 30210 direction to maximize public recreational access opportunities represents a different threshold than to simply provide or protect such access opportunities and is fundamentally different from other like provisions in this respect. Put another way, it is not enough to simply provide access to and along the coast, and not enough to simply protect access, rather such access must also be maximized. This terminology distinguishes the Coastal Act in certain respects and provides fundamental direction with respect to projects along the California coast that raise public access issues, especially where a private developer is proposing to use public land for private purposes, as is the case here.



And the LCP includes a similar set of goals, objectives, policies, and implementing standards designed to protect, maintain, and improve a multitude of public access and recreational opportunities along the Pacific Grove shoreline and its parks and trails. For example, the LUP includes policies encouraging 'complete streets' that are safe for cars, bikes, pedestrians, and transit, maintaining a continuous bike path along the City's shoreline, provisions requiring bike racks, maintenance of existing public parking areas, etc. The LUP also encourages enhanced visitor and public access, circulation, and parking at the ATC site, and requires that any loss of public parking that may adversely impact public access be relocated or otherwise mitigated. The IP requires that any application for development that has the potential to impact public access, either temporarily or permanently, must submit a Public Access Management Plan that identifies existing access and recreational opportunities, analyzes impacts to such opportunities, and provides mitigation to reduce or offset those impacts. Finally, with respect to the project site specifically, IP Section 23.90.180(c)(4)(G)(i) only allows 90 percent coverage if the project provides public amenities over and above what the LCP would otherwise require.<sup>48</sup> Specifically, the LCP states:

***LUP Policy INF-22:*** *New development in the Coastal Zone shall include adequate off-street parking to minimize the disruption of significant coastal access routes. All traffic impacts associated with new development shall be mitigated appropriately.*

***LUP Policy PRA-1 (in relevant part):*** *The City will strive to provide safe and adequate access to and along the City's shoreline and other points of public interest...*

***LUP Policy PRA-2:*** *The City will enhance access to its shoreline, while maintaining the Coastal Zone's unique character, by reducing the impact of automobiles. This shall be accomplished, in part, by encouraging use of public transit within the Coastal Zone, and by providing nonvehicular Coastal Zone access opportunities for bicycles and pedestrians. When considering a Coastal Development Permit application for any development that could reduce or degrade public parking opportunities near beach access points, shoreline trails, or parklands, including any changes in parking timing and availability, evaluate the potential impact on public coastal access, and ensure existing levels of public access are maintained, including through ensuring that alternative access opportunities, including bike lanes and parking, pedestrian trails, and relocated vehicular parking spaces, are provided so as to fully mitigate any potential negative impacts and maximize access opportunities. Any revenue from fee-based parking programs within the Coastal Zone shall only be used to fund public access improvements within the Coastal Zone.*

***LUP Policy PRA-3:*** *Any sign that could reduce public coastal access, including signs limiting public parking or restricting use of existing lateral and/or vertical accessways, shall require a Coastal Development Permit. Appropriate signing*

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<sup>48</sup> Where such provision was made applicable to the whole of the ATC site via the City's first amendment to the LCP in 2021 (LCP Amendment Number LCP-3-PGR-21-0038-1).

*should be considered for popular visitor destinations and access points in conjunction with other sign programs under coastal access and habitat protection policies. However, excessive signs and other visually intrusive landscape features shall be avoided. The City will develop a coordinated sign program for the City's shoreline area to ensure consistency of information and presentation, and to ensure that such signs effectively integrate into the shoreline with the least amount of impact to public views.*

**LUP Policy PRA-5 (in relevant part):** *The City will also consider the following opportunities: a. Encourage enhanced visitor and public access, circulation and parking at the American Tin Cannery building and property...*

**LUP Policy PRA-8 (in relevant part):** *Development with the potential to impact public access, whether during construction or after, shall develop a Public Access Management Plan designed to identify and limit impacts to public access. Plans shall identify peak use times and measures to avoid disruption during those times, minimize road and trail closures, identify alternative access routes, and provide for public safety...*

**LUP Policy PRA-9:** *New development shall ensure that public access opportunities are maximized, including though offsetting any temporary (e.g., during construction) and potential permanent impacts to public access (including in terms of increased traffic leading to impacts to public access use of the City's circulation system) appropriately and proportionally. Development shall provide for public access enhancements and improvements as much as possible, including in terms of providing public access use areas in private development projects (e.g., visitor serving development) as appropriate. Development that does not meet these requirements shall be denied.*

**LUP Policy PRA-11 (in relevant part):** *Lower cost visitor-serving facilities, including overnight accommodations and public recreational opportunities, shall be provided and encouraged...*

**LUP Policy INF-14:** *The City will seek to make "complete streets" improvements to the existing circulation system serving the Coastal Zone for expanded use by all users including pedestrians, bicyclists and transit passengers of all ages and abilities, as well as trucks, buses and automobiles.*

**LUP Policy INF-16:** *The City will require a construction phase traffic control plan for new development that has the potential to disrupt circulation on arterial or collector streets.*

**LUP Policy INF-22:** *New development in the Coastal Zone shall include adequate off-street parking to minimize the disruption of significant coastal access routes. All traffic impacts associated with new development shall be mitigated appropriately.*

**IP Section 23.90.180(c)(4)(G)(i) (in relevant part):** *(G) American Tin Cannery Site. ... [T]he following additional design standards apply to new development at*

*the American Tin Cannery site comprised of Assessor's Parcel Numbers 006-231-001, 006-234-004, 006-234-005, and the portion of Sloat Avenue between Eardley Avenue and Dewey Avenue (C-V-ATC zoning district): (i) Coverage. Site coverage may only be allowed up to 90 percent of the total site area if the project includes consistent public amenities that enhance public access (e.g., restrooms, bicycle racks, seating areas, sidewalk and roadway access improvements on and off site, etc.) beyond that which is required by the LCP for compliance with other requirements. Otherwise, site coverage may be decreased if substantial public coastal access amenities are not incorporated into the project.*

***IP Section 23.90.220(b)(1): Applications for Development Potentially Affecting Public Access.*** *The following documentation and requirements shall be provided for the following applications: (1) Paid Public Parking Program. The establishment of a paid public parking program or changes to an existing program (e.g., changes in hours, locations, rates, etc.) shall require a CDP. At a minimum, applications must include the following: (A) Identification of the location, hours, and rates of paid public parking. (B) Analysis of potential impacts of paid parking on coastal access; including the availability of free parking at other coastal locations, alternative access opportunities such as bike lanes and public transit. (C) Establishment of a dedicated fund where all parking fees will be held and utilized solely to improve and enhance coastal access and recreation opportunities.*

***IP Section 23.90.220(b)(3): Permanent Public Access Impacts.*** *Development that has the potential to permanently impact coastal access, including in terms of limitations of use hours, limitations on particular recreational activities, or increased traffic leading to impacts to public access use of the city's circulation system, shall require development of a public access management plan. At a minimum, the plan must include the following: (A) Identification of the locations, times, and types of all closures and/or limitations to existing public access and/or recreational opportunities. (B) Documentation regarding the necessity of any closures and/or limitations (e.g., avoid overuse, protect biological resources, maintain water quality, etc.). (C) Analysis of potential impacts to coastal access; including the availability of alternative access and recreation opportunities at other coastal locations. (D) Mitigation measures to avoid and/or offset impacts to public access, including providing additional and/or enhanced public access improvements in other locations and/or additional low-cost recreational opportunities. (E) Private development projects (e.g., visitor-serving development) shall provide for public access enhancements and improvements both on and off-site as much as possible.*

### **Appeal Contentions**

The appeals contend that the City-approved project does not provide adequate public access amenities, and that the amenities provided are largely geared to hotel guests and not the general public. The appeals further contend that the project reduces existing public access and amenities by allowing private use of portions of the Sloat Avenue and Ocean View Boulevard rights-of-way. The appeals also contend that the approved project will result in the loss of existing on-street public parking spaces along public

streets and that no mitigation was required for such loss, thereby adversely impacting the general public's ability to access and recreate in this area. Finally, the appeals contend that traffic both during construction and post construction will impact the public's ability to access this highly visited area of the coast. See **Exhibit 5** for the full appeal documents.

### ***Analysis***

The Coastal Act and LCP both speak to maximizing public access and recreational opportunities, and the LCP also requires such amenities be provided at the ATC site above and beyond what the LCP would ordinarily require. In other words, the LCP recognizes the site's particular importance for public access purposes and seeks to ensure that any project here makes public access amenities, needs, and spaces an integral part.

The City-approved project does not meet such requirements. While the project does include some public amenities, including access to a rooftop garden, interpretive signage, and a public restroom, these do appear to be more geared towards hotel guests than being reserved for public benefit, as the appeals suggest. In addition, the rooftop garden and the courtyards are intended to be areas where individuals simply walk from one end to the other and are not intended for individuals to occupy for longer periods of time (with tables, seating areas, etc.), reducing any potential utility. Further, both the garden and bathroom are accessed from the interior of the hotel facility itself, meaning that the public must traverse private space (including retail and restaurant space) where not only would such a configuration present psychological barriers to general public access, but it would also create a perceived pressure to purchase goods, or to only use such facilities with a purchase, all of which limits their public access utility. Even with signage, the public rarely feels comfortable enough to access and use public areas so engrained within a private structure, thereby enforcing the perception that such uses are not open to the general public and reducing their public access usefulness in this regard.

In addition, the project includes elements that will actually reduce public access and amenities such as the conversion of roughly two-thirds of Sloat Avenue, or about 20,000 square feet, and a roughly 3,000 square-foot portion of the public sidewalk along Ocean View Boulevard, from public to private use. These rights-of-way and street areas currently provide significant public utility, including for general public use, access, parking, and public views across about the half-acre in question, and all of that would be lost through the project. The approved project would convert the entire portion of Sloat Avenue, including its travel lane, sidewalks, and parking, from public use to private hotel use (i.e., the hotel structure would be physically located in this space). And portions of the public sidewalk along Ocean View Boulevard would be used as an elevated walkway open for both public and private use. The City's approval does not include any form of mitigation of this loss of public property. With such unmitigated impacts and with the limited utility of the project's public access offerings, the requisite LCP findings cannot be met. In sum, the City's CDP approval raises a substantial Coastal Act and LCP conformance issue regarding public access.

## 5. Habitat Resources

### **Applicable LCP Provisions**

The Pacific Grove coastal zone supports a wealth and diversity of environmentally sensitive habitats (ESHAs), biologically sensitive species, and significant marine resources. Many of these can be vulnerable to development activities, whether during construction or for the life of projects. The LCP includes a robust framework to prevent adverse impacts to such habitats and species, including those habitats located in offshore marine areas. Relevant LCP provisions include:

**LUP Policy BIO-1:** *Environmentally Sensitive Habitat Areas, or “ESHAs,” are defined as any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments. In Pacific Grove these areas include, but are not limited to, dune, wetland, streams, coastal bluff, sandy and rocky beaches, intertidal and subtidal zones, tide pools, kelp forests, offshore reefs, rocks, and islets, and rookery areas.*

**LUP Policy BIO-3:** *Applications for development within and near Environmentally Sensitive Habitat Areas, including wetlands and streams, shall be accompanied by a habitat assessment prepared by a qualified biological and a botanical survey by a qualified expert prepared at the owner’s expense, prior to consideration of a project within the City. The habitat assessment and botanical survey shall, at a minimum, identify and confirm the extent of the Environmentally Sensitive Habitat Area, document any site constraints and the presence of sensitive species, recommend buffers and development setbacks and standards to protect the Environmentally Sensitive Habitat Area, recommend mitigation measures to address any allowable impacts, and include any other information and analyses necessary to understand potential Environmentally Sensitive Habitat Area impacts as well as measures necessary to protect the Environmentally Sensitive Habitat Area resource as required by the Local Coastal Program*

**LUP Policy BIO-7:** *The City will preserve its character-defining flora and fauna, such as rosy ice plant (*Drosanthemum floribundum*), Monterey pine, Monterey cypress, Coast Live Oak, Monarch butterfly, Harbor seal, Southern Sea Otter, Humpback and Gray Whale and Black Oystercatcher.*

**LUP Policy BIO-11:** *The City will implement seal pupping protection measures, including installation of split-rail fencing, installation of temporary “no climb” wood lattice fencing or other alternative that provides visual access, and educational signage if found necessary to prevent harm or harassment of harbor seals during the spring pupping season generally February through May, at various locations along the Pacific Grove shoreline east of Berwick Park and immediately adjacent to the Pacific Grove Recreation Trail. Impacts to public access from such measures shall be minimized. In addition, the City may use trained volunteer docents, including National Oceanic and Atmospheric Administration trained Bay Net volunteer docents when available, to educate and engage the public on the*

*activities of the seals, and to monitor and document all activities in the vicinity of the program, including any unauthorized human interruptions.*

**LUP Policy BIO-12:** *The City will protect Black Oystercatchers and their rocky intertidal habitat along the City's shoreline. The City shall work in cooperation with the California Central Coast Black Oystercatcher Monitoring Project or its successor, the Pacific Grove Museum of Natural History, Monterey Audubon Society, and other appropriate entities and research efforts, to implement identified conservation measures necessary to carry out this policy. The California Central Coast Black Oystercatcher Monitoring Project, which monitors and assesses Black Oystercatcher populations and breeding success, is developing specific conservation measures, and will coordinate with the City, California Coastal National Monument/BLM, and California Department of Parks and Recreation at Asilomar as appropriate to their respective jurisdictional authority. Protective measures shall include an education program, using interpretive signage, outreach material, and docents to promote public understanding of the sensitive nature of the Black Oystercatcher habitat and the importance of not disturbing breeding pairs. The California Central Coast Black Oystercatcher Monitoring Project coordinators or their designees may seek permission from the appropriate landowner (e.g., City of Pacific Grove, California State Parks, Bureau of Land Management, etc.) to apply for a Coastal Development Permit on the landowners behalf to place temporary signage, physical barriers, and wildlife monitoring cameras where appropriate, at vulnerable nesting areas during the breeding season (March into September) to help reduce disturbance. Impacts to public access from such measures shall be minimized.*

**LUP Policy MAR-5:** *Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to species and areas of special biological significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.*

**LUP Policy DES-6:** *New lighting fixtures shall be mounted at low elevations and fully shielded to direct lighting downward, and away from the shoreline. Lighting along walkways should be mounted on low bollards or ground buttons. Lighting shall be focused on targeted use areas, and floodlighting shall be prohibited. Exterior lighting fixtures should complement the architectural style of structures. Lighting shall be limited to that necessary to provide for public safety, and shall be sited and designed to limit glares and light spill off-site.*

### **Background**

The project site is currently developed with several structures and parking lots and surrounded on three sides with similar urban development. Immediately across Ocean View Boulevard is rocky shore habitat, including tidepools (intertidal and subtidal areas), and small sandy beaches, along with Stanford University's Hopkins Marine Station

complex. The marine environment here is part of the Monterey Bay National Marine Sanctuary (MBNMS) and the Lover's Point-Julia Platt State Marine Reserve (SMR). This shore habitat supports diverse marine bird life and marine mammals, including three nearby beaches that are important known pupping and haul out areas for the Pacific harbor seal (*Phoca vitulina*): Fisher Beach, which is located at the eastern/upcoast end of the Hopkins Marine Station adjacent to the Monterey Bay Aquarium and approximately 255 feet from the ATC site; West Beach, which is along the downcoast/western side of Hopkins, and approximately 400 feet from the site's corner along Ocean View Boulevard and Dewey Avenue, and the Fifth Street Rookery, which is further west/downcoast and about 1,000 feet from the ATC site. Harbor seals regularly haul out on these beaches to rest and, in March and April, female harbor seals give birth on these beaches. Females bear one pup each year and may nurse it for four to six weeks before it is weaned, typically in the same location year after year,<sup>49</sup> including where the mother will leave the pup on the beach while she forages for food in nearby waters.

Harbor seals are particularly vulnerable to human disturbance. Noise, light, and vibration can cause stress to harbor seals, which can result in injury, relocation, or abandonment of pups. Harbor seals are protected by the Marine Mammal Protection Act implemented by the National Marine Fisheries Service (NMFS, or NOAA Fisheries), which generally prohibits their 'take'<sup>50</sup> unless authorized via an Incidental Take Permit (ITP) issued by NMFS. Generally speaking, NMFS can authorize an ITP for certain activities that will result in unintentional, but not expected, take, such as for construction projects, scientific research, and energy/oil and gas projects. Since the offshore waters are part of the Monterey Bay National Marine Sanctuary, the Sanctuary also prohibits take in a similar fashion as NOAA Fisheries does, with a National Marine Sanctuary permit required to allow for such otherwise prohibited activity. In addition, the California Department of Fish and Wildlife (CDFW) prohibits all injury, damage, take, or possession of any living marine resource in State Marine Reserves (as applies to all of offshore areas in the ATC vicinity) except in relation to scientific, research, or restoration purposes.

Offshore of the project site, the larger rocks above high tide and wave spray support roosting birds as well as the black oystercatcher (*Haematopus bachmani*), which is present year-round and nests on these rocks. Nesting pairs have been observed along the rocky shoreline adjacent to Hopkins Marine Station, approximately 500 feet from the ATC project site.<sup>51</sup> The black oystercatcher is federally listed as a "Species of Conservation Concern" and CDFW placed black oystercatchers on a high priority status

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<sup>49</sup> Females have high site fidelity in that they will return to the same spot on the same beach or rocky outcrop year after year to give birth to and raise their pups.

<sup>50</sup> Which is defined similar to the Endangered Species Act in terms of hunting, capturing, harassing, killing, or attempting same.

<sup>51</sup> According to the project's EIR, in 2016, seven pairs of black oystercatchers were documented to nest along the Pacific Grove shoreline (pg. 185 of FEIR). And four nests were spotted in close proximity to the Hopkins Marine Station in 2023 per the Monterey Audubon's Black Oystercatcher Reproductive Success Report. Black oystercatcher pairs are monogamous, nest March – September, and spend several months teaching their young to forage for invertebrates.

for further investigation and conservation. Black oystercatchers are a species of high conservation concern due to their small population size, low reproductive success, and dependence on habitats that are highly vulnerable to human disturbance. If parents are driven away from the nest by any disturbance, such as noise, the eggs or chicks are left vulnerable to gulls and other predators. The young require four to five years to reach full maturity and begin nesting.

See **Exhibit 1** for a map of the offshore beaches located near the project site.

### ***Appeal Contentions***

The appeals contend that the approved project does not adequately protect harbor seal habitat or black oystercatcher nesting territory located offshore near the project site. Specifically, the appeals contend that construction noise, including demolition and excavation, could adversely affect these species, especially during pupping and nesting seasons in violation of the LCP's resource protection policies. The appeals also contend that the City-approved mitigation measures are not adequate to protect these species during construction activities and that the approved mitigations are vague, are reactive and not proactive (i.e., mitigation is implemented after disturbance is noted), and do not contain adequate standards for work stoppage, work recommencement, or noise reduction effectiveness. One appeal also contends that the project's lighting will substantially increase the nighttime luminescence beyond the exterior of the buildings/site, which could negatively impact birds in the surrounding area. See **Exhibit 5** for the full appeal documents.

### ***Analysis***

As noted, the Pacific Grove LCP includes a suite of provisions to protect habitats broadly, as well as black oystercatchers and harbor seals specifically. The LCP requires, mirroring Coastal Act Section 30231, that marine resources be maintained and enhanced, with special protections afforded to areas with special biological significance. The offshore area clearly meet this 'special biological significance' standard given its status as a National Marine Sanctuary and State Marine Reserve. The LCP also includes specific protections for harbor seals and black oystercatchers, including implementing measures to protect pupping, as well as to protect the rocky intertidal habitat for oystercatchers, both of which are character-defining fauna in Pacific Grove, and are also protected under relevant State and Federal law.

The project's EIR recognized these resources and underwent an extensive review of potential impacts, finding that construction noise from the project site could result in impacts to offshore resources, and was the most potentially concerning aspect of the proposed project.<sup>52</sup> The EIR walked through the science and literature on construction

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<sup>52</sup> The EIR also evaluated the impact of lights and windows on such resources, and found that, in conformance with LUP Policy DES-6, shielding, bird friendly windows, and other lighting downcasting techniques so as to reduce light spill would adequately protect against any adverse impacts, particularly when understood in relation to the surrounding urban context with the existing ATC site, residential development, and the Hopkins Marine Station all being existing light-emitting uses.



noise impacts, finding that NMFS uses 90 decibels<sup>53</sup> as the in-air threshold for when harbor seals exhibit behavioral disruption, with 100 decibels for other pinnipeds.<sup>54</sup> However, it did note that much of the literature is based on underwater sound, and thus while these above water thresholds are identified by the EIR as the 'industry standard' at this current time, more research was needed on this topic. This is particularly important since pregnant harbor seals are stationary for long periods of time and don't have as much capacity for movement away from a disruptive noise source.

The EIR then quantified the construction activity for the purpose of estimating the potential for offshore noise impacts. The Applicant estimates that construction will take between 18-24 months, with the loudest potential for noise being during initial demolition and subterranean excavation. During this loudest phase and at Fisher Beach, which is the closest harbor seal location to the ATC site at 255 feet away, noise is expected to reach up to 81 decibels. It also estimated that ambient noise at Point Cabrillo, which is the seaward-most point of Hopkins Marine Station and in between Fisher Beach and West Beach, is currently 64 decibels. Thus, the EIR concluded that noise should not adversely affect marine mammals, including because it would be less than the NMFS-recommended 90 decibel, and because of the distance from the project site to area beaches, intervening structures and topography, and general existing noise from surrounding ocean conditions and urban development. That said, the EIR also found that harbor seals are "a unique receptor and marine mammal protection is a priority for the City" and thus recommended a series of mitigation measures that were included as part of the City's approval. These measures included only allowing demolition, grading, and excavation (the loudest activities) to take place outside of harbor seal pupping season (i.e., no such work between February through June), and biological monitoring during "phases of construction that generate higher noise and vibration levels", comprised of daily monitoring during demolition and excavation, and twice monthly during the remainder of the construction program. It also provided authority for the required on site monitor to stop work based on identified "activity or behavior identified by the monitor(s) indicative of unusual stress or threatening relocation", with work to resume "only after noise levels are reduced and additional noise/disturbance protection measures are employed and tested in the field for effectiveness."

The Commission's Ecology group has reviewed project materials, relevant literature, and consulted with numerous local experts in the field of marine mammal and avian protection. With respect to potential black oystercatcher impacts, oystercatchers are especially sensitive to visual disturbance, and susceptible to disturbance from construction noise and vibration. And with respect to potential harbor seal impacts, the general consensus is that there isn't a clear answer as to whether or not the project's construction noise would or would not adversely impact harbor seals. As noted, the literature on such issues is evolving and imprecise, and thus it can't for certain be said

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<sup>53</sup> For perspective, 90 decibels is roughly equivalent to a food blender at 3 feet away indoors, 100 decibels is equivalent to a jet flyover at 1,000 feet, and normal speech is about 60 decibels.

<sup>54</sup> See NMFS' 'Marine Mammal Acoustic Thresholds' listed here: <https://www.fisheries.noaa.gov/west-coast/conservation/esa-section-7-consultation-tools-marine-mammals-west#marine-mammal-acoustic-thresholds>.

that 90 decibels is the absolute threshold for acceptable noise impacts. Multiple harbor seal experts agreed that behavioral responses can occur at noise levels below 90 decibels. And given that construction noise is estimated to be close to this noise level, there remains the potential for adverse impacts. Therefore, the finding that the project shall protect and maintain marine habitats and species cannot be made with certainty. Hence, at a minimum, there is a need for much more robust monitoring, specificity on actions that should be taken, and mitigation measures that should be applied to protect such species and their habitats. Put another way, while the City-approved monitoring program at a broad level is a good start, it lacks sufficient details to effectively carry out its objectives. For example, it doesn't specify the actual triggers for work stoppage, including what would constitute harm and distress; it doesn't specify/require that relevant resource agencies, including NMFS, CDFW, the Sanctuary, or the Commission would be notified of such stoppage (only the City and the Applicant would be notified); and it does not specify what would happen if construction activity couldn't safety restart. Altogether, the project raises some significant habitat concerns that have not been resolved though the City's approval.

In sum, the City's CDP approval raises a substantial LCP conformance issue regarding coastal habitat resources.

## **6. Historic Resources**

### ***Applicable LCP Provisions***

The LCP includes provisions designed to identify, maintain, enhance, and protect historical resources throughout the City, including LUP directives for the City to implement various programs and efforts to protect historical resources, including by maintaining and updating an inventory of historic resources and engaging citizens and groups in historic preservation efforts. The LUP also requires redevelopment of structures of historical significance to retain the lines of original designs as much as possible and requires compliance with federal historical resource protection standards. Finally, the IP requires that applications for development that may impact historical resources submit a Historic Resources Report that describes the potential resources on site, discusses potential impacts, describes how impacts may be minimized, and explores alternative designs and how they relate to existing historic resources. The LCP states:

***LUP Policy CRS-4:*** *The City will update the background information for all archaeological sites identified within the Coastal Zone to develop a current assessment of the resources' potential historical significance and evaluate their vulnerability to climate change, including those sites recommended or determined to be eligible for listing in either the National Register of Historic Places or the California Register of Historic Resources; and conduct the further research needed in order to determine the present condition of each site and to make an assessment of their potential eligibility for listing on either register, and therefore, their potential historical importance.*

***LUP Policy CRS-7:*** *Rehabilitation, reconstruction, remodeling, or exterior modification of existing structures with historic or architectural significance in the Pacific Grove Retreat, and other neighborhoods in the Coastal Zone, shall relate*

*to or retain the lines of the original design as much as possible and alterations shall provide evidence of substantial compliance to the Secretary of the Interior standards for historic resources.*

**LUP Policy CRS-8:** *Design review shall be required as part of the Coastal Development process in order to maintain historical continuity and visual harmony of new development within the Pacific Grove Retreat and other neighborhoods in the Coastal Zone.*

**LUP Policy CRS-9:** *In order to protect historic structures, unwarranted demolition shall be avoided by implementing standards for demolition.*

**LUP Policy CRS-10:** *The City will continue its ongoing programs of citizen involvement in carrying out its historic preservation policies and programs.*

**LUP Policy CRS-12 (in relevant part):** *Other historic or architecturally unique structures, including the Julia Morgan structures at Asilomar State Beach and Conference Grounds, shall be protected and maintained to the fullest extent possible...*

**LUP Policy CRS-13:** *The City will maintain and update the Historic Resources Inventory, with assistance from professional consultants and the Heritage Society of Pacific Grove, to provide a current description of the historic and visual character of the Pacific Grove Retreat and of the other historical neighborhoods in the Coastal Zone.*

**IP Section 23.90.200(b)(2)(A-C):** *Applications for Development Potentially Affecting Cultural Resources. The following documentation and requirements shall be provided for all CDP applications that may impact cultural resources: ... (2) Historic Resources Report. For new projects that include demolition or alterations to potential historical resources, a historical assessment report prepared by a qualified professional is required prior to approval of the project. The lead author must meet the Secretary of the Interior's professional qualifications standards (36 CFR Part 61) in history or architectural history. At a minimum, the historical assessment report shall include the following: (A) Detailed description of the historical resources at the project site. (B) Discussion of potential adverse impacts on historical resources from the project. (C) Recommended mitigation, minimization, and/or avoidance measures to protect historical resources, including description of alternative designs for the proposed project (if any are proposed) and how alternative designs relate to the historical resources on the site and alternative design impacts compare to those of the project.*

### **Appeal Contentions**

The appeals contend that several of the buildings that will be modified or demolished qualify as historic for listing under State and local historic resource inventories. The appeals further contend that the project was never referred to the City's Historical Resources Committee (HRC), which is the local deliberative body tasked with historic

evaluation and recommendations, including adding and deleting properties from the City's Historic Resources Inventory. See **Exhibit 5** for the full appeal documents.

### **Analysis**

According to the EIR and as part of the project's LCP-required historic review, the City found that the existing ATC buildings are not listed on any national, state, or local historic preservation registers, but do contain important historic elements of note. The EIR found:<sup>55</sup>

*The American Tin Cannery does appear individually significant under Criterion 1 (Events) as a property that is individually associated with events that have made a significant contribution to the broad patterns of local or regional history, or the cultural heritage of California or the United States. The American Tin Cannery, originally known as the American Can Company, directly contributed to the development of the Monterey Peninsula fish canning industry. Between 1927 and 1954, the complex served as the sole producer of the famous Monterey one-pound oval sardine can. The plant's physical location in proximity to the industry, its use of modern methods of production, and its ability to efficiently produce the product, assured a competitive edge for the Monterey sardine fishery against its southern California competitors. The growth of the industry and the success of the American Can Company was directly tied with industrial development during the City's 1927-1945 period of development, as identified in the Pacific Grove Historic Context Statement (2011). (emphasis in original)*

Thus, the site's use has played an important role in local and state history. In addition, architecturally, the site similarly is of local importance, including because it's the only former industrial canning building in Pacific Grove (with other nearby historic canning facilities along Cannery Row in Monterey having predominantly since been redeveloped into hotels and other uses, including the adjacent Monterey Bay Aquarium which used to be the Hovden Cannery). In addition, and while the site is not a canning facility anymore and is instead a mix of retail and commercial uses, the upcoast portion of the site is the only known example of Art Moderne design in Pacific Grove, and its distinctive 'sawtooth' roof too has some architectural distinction related to same. In short, the current buildings are not formally listed in any historic inventories, but they do hold some relevant local historic significance.

The City-approved project would partially demolish the 'sawtooth'/Art Moderne building and completely demolish the neighboring warehouse building. While the City's approval incorporated a series of EIR-identified measures to mitigate for potential historic impacts (including maintaining most of the sawtooth building and restoring its character-defining elements in conformance with National Park Service historic repair/preservation standards, and including a public interpretive display highlighting the building's past importance in the canning industry), the EIR nevertheless found that the project would have significant and unavoidable impacts to historic resources. The EIR found: "the American Tin Cannery will no longer retain sufficient historic integrity to convey its

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<sup>55</sup> See Draft EIR page 8-25.

significance and will no longer be eligible for listing in the California Register of Historical Resources or the Pacific Grove Historic Resources Inventory.”<sup>56</sup>

While the EIR concluded that the project would result in adverse historic impacts, the City approved the project nevertheless through a Statement of Overriding Consideration. Some of the rationale for this finding was that the project met LCP objectives related to historic preservation and coastal resource protection more broadly.

In short, the City, during CEQA and CDP review, analyzed the site’s potential historic attributes, documented and described them, and required certain measures to retain some of the more important historic attributes, particularly the distinctive sawtooth roof element. The City found that demolition of the warehouse building was better from an aesthetic perspective in terms of not having industrial facilities located in a prime and conspicuous waterfront location, and that the sawtooth building’s facade changes would break up mass and scale by creating courtyards and other architectural interest. In other words, the City balanced the need for historic resource protection with other LCP coastal resource objectives. And the LCP allows modifications to structures with historic elements, whether listed or not, and the City appropriately followed its prescriptions. These are all reasonable conclusions, particularly in light of the fact that some of the most character-defining elements of the existing site will be retained, and that many of these historic canneries in the area have been repurposed over the years into other similar modern uses where history can be honored while also adaptively reusing these facilities for modern purposes. The City’s approval does not raise a substantial LCP conformance issue with respect to historic protection.<sup>57</sup>

## **7. The “Five Substantial Issue” Factors**

When considering a project on appeal, the Commission must first determine whether the project raises a substantial issue of LCP conformity and/or Coastal Act public access conformity, such that the Commission should assert jurisdiction over the CDP application for such development. At this stage, the Commission has the discretion to find that the project does or does not raise a substantial issue of LCP and/or Coastal Act conformance. The Commission’s regulations lay out the following five factors that it may consider when determining whether the issues raised in a given appeal are “substantial” (14 CCR section 13115(c)): the degree of factual and legal support for the local government’s decision; the extent and scope of the development as approved or denied by the local government; the significance of the coastal resources affected by the decision; the precedential value of the local government’s decision for future interpretations of its LCP; and, whether the appeal raises only local issues as opposed to those of regional or statewide significance. The Commission may, but need not, assign a particular weight to a factor, and may make a substantial issue determination for other reasons as well.

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<sup>56</sup> See Draft EIR page 8-24.

<sup>57</sup> In addition, the City’s Historical Resources Committee is not listed in the LCP as having any required CDP reviewing authority or given legal status to review CDP applications. This contention too does not raise a substantial issue. And the project’s historic elements were reviewed by the Architectural Review Board, Planning Commission, and City Council, thereby providing sufficient historic review in this regard.

In this case, these five factors, considered together, support a conclusion that the City's approval of a CDP for this project does raise a substantial issue of both LCP conformance and Coastal Act public access conformance.

In terms of factual and legal support, while the City's record is voluminous and was reviewed by various deliberative bodies, certain factual and legal conclusions are not well founded, specifically in terms of water supply (e.g., rote reliance on the MPWMD's water allocation provisions to satisfy LCP water supply requirements and findings without any independent analysis is not legally adequate), lower-cost accommodations (e.g., feasibility assessments, mitigation fee amounts, specifying the only persons who are eligible for lower-cost rates when the LCP prohibits same), and public coastal access (e.g., finding the project maximizes public access while bona fide public access impacts of the project related to the loss of public streets remain unmitigated). These findings suggest a substantial LCP conformance issue.

In terms of the extent and scope of development, by almost any measure, the project is large, and would be one of the largest on the entire Monterey Peninsula, spanning almost 6 acres and multiple City blocks. Its size, and particularly when understood in relation to the number of coastal resource issues implicated (water supply, habitat resources, lower-cost accommodations, public views, public access, etc.) and the other substantial issue factors, clearly argues for a substantial issue determination.

In terms of potential precedential and prejudicial impact, it should first be noted that any one case, like this one, is decided on its specific facts and its specific merits, and is not entirely dispositive as to how subsequent CDP decisions will be made. At the same time, there is always the potential that the City (and/or potential future applicants) might see the City's action here as precedential. And in fact, it is possible that such a decision could have ripple effects on nearby communities and their LCP implementation related to the City's interpretation of shared issues, particularly water supply, that could be used in relation to other projects in the Monterey Peninsula coastal zone that are subject to similar water issues, and thus it's important to analytically get it right, which also argues for substantial issue.

In terms of the significance of the coastal resources involved, the project includes a suite of significant coastal resource issues, ranging from water supply (and the accompanying impacts to the sensitive aquatic environment) to lower-cost accommodations to public coastal access to marine mammal protection, which also argues for substantial issue.

Finally, in terms of whether the appeal raises only local issues as opposed to regional or statewide issues, all of these issues are important locally as well as statewide given the breadth and scope of the coastal resources implicated as described above.

Taken together, the City-approved CDP for the project does not adequately address Coastal Act public access and LCP coastal resource protection issues, and the five factors, individually, and on the whole, support a finding of substantial issue as to conformity of it with the Coastal Act and the certified LCP. Thus, for the reasons stated herein, the Commission finds that Appeal Number A-3-PGR-22-0004 raises substantial issues with respect to the City-approved project's conformance with the certified LCP

and the public access policies of the Coastal Act and takes jurisdiction over the CDP application for the proposed project.

## **H. De Novo Coastal Development Permit Determination**

The standard of review for this CDP determination is the City of Pacific Grove certified LCP. All Substantial Issue Determination findings above are incorporated herein by reference.

### **1. Proposed Project**

On de novo review and including in response to the issues identified in the preceding Substantial Issue analysis, the Applicant has modified their proposed project. While its core elements remain the same in terms of it being a full-service hotel resort, several changes have been proposed in response to the substantial issues previously identified regarding the former City-approved version. The newly proposed project is reduced in size and scope from 225 hotel rooms to 206 (along with a 'Group' wing with 64 beds in 16 units in a shared accommodations construct), removal of one pool and spa (from 2 pools and 2 spas to one pool and one spa), relocation of a vehicle entrance/turnaround along Ocean View Boulevard and replacement with a public park/open space along the intersection of Ocean View Boulevard and Dewey Avenue, and an overall reduction in square footage of some 85,000 square feet. In addition, and as explained in more detail in the subsequent findings, several project elements have also been modified, including now providing direct public access to the 'living' green roof from the new public park and direct public bathroom access from Eardley Avenue, and a new lower-cost accommodations component comprised of 18 on-site traditional hotel rooms at LCP-defined lower-cost rates, a 16-unit/64-bed on-site Group wing with shared accommodations, and low- and no-cost overnight stays for lower-income groups for 300 guest nights (i.e., one guest for one night) per year within the Group wing, all as described in more detail subsequently.

### **2. Water Supply**

As discussed in the preceding Substantial Issue determination, the Pacific Grove LCP can largely be understood as a two-step process. The first step is ensuring that the City has a sufficient water allocation to provide the site with water. This can largely be understood as whether the particular site in question has a water allotment from the Monterey Peninsula Water Management District (i.e., whether the site is allowed water in the first place pursuant to the District's water management programs and policies). And the second step is ensuring that such water is coming from a source and in an amount that is environmentally sustainable. On this point, the Commission has typically understood 'sustainable' to mean water that is being extracted in such a manner as to not have any adverse impacts to sensitive coastal resources, including wetlands, streams, creeks, the ocean, and other aquatic habitats.

Regarding the first point, as discussed, MPWMD has allotted 18.53 AFY of water to the ATC site, which it finds is both the amount the City is allowed to allocate for the site, and which represents what the site is equipped to accommodate at full use. This metric is what the District uses to ascertain the amount of water an existing site is 'allotted' and thus what it will allow Cal-Am to serve. As applied to this project, the District has indicated that, so long as water usage remains at or below this amount, the project

doesn't run afoul of their water allocation provisions. To be clear, this provision of the LCP is akin to the requirement for a 'will-serve' letter or some other type of affirmative determination that the applicable water provider can and will legally provide water to the proposed development, including in conformance with their own procedures. If the entity cannot or will not provide water for whatever reason, then this independently would require a project's denial regardless of whether the water source is sustainable or not. In other words, this prong of the LCP can be understood as a factual yes or no in terms of the water provider allowing water to be served to this proposed project. The District has said yes, so long as it's below the 18.53 AFY amount. When viewed in this light, such determination can serve to satisfy the first part of the LCP's water supply requirement as it relates to the allocation requirement.

However, regarding the second point, as explained in detail in the Substantial Issue findings, at this time, given the myriad factors facing the Monterey Peninsula's water supply, including in terms of historic adverse impacts to sensitive aquatic species in the Carmel River as a result of water overconsumption, concerns regarding overdraft and seawater intrusion in the Seaside Groundwater Basin, the State Water Board's CDO to prohibit new connections and intensifications of existing connections, and various uncertainties regarding the timing of Cal-Am's desalination project, the efficacy of Monterey One Water's Pure Water Monterey Expansion, and various determinations regarding the region's water demand and supply assumptions, it cannot be found at the current juncture that such water would currently come from a long-term, sustainable supply.

In light of such determination, the question then goes to how to apply such understanding to this proposed project. While it's more straightforward to apply this understanding to a new use on vacant land (as it's clearly new water-using development when there isn't available supply to newly serve it), it's somewhat more complex to apply it to existing developed sites. One way to understand it is that the public policy goal of the area is to reduce water usage from existing levels so as to bring the Peninsula's water usage into a sustainable state. As such, it doesn't really matter if there is an existing water-using use as any form of new water-using development must be denied unless and until the requisite Coastal Act findings regarding water supply health and adequacy can be met. This position would certainly be consistent with the intent of the State Water Board's CDO, which is premised overall on the requirement to reduce water usage to legal and sustainable levels. Reducing water usage would also clearly be consistent with the LCP's requirement to protect sensitive aquatic resources and only provide water in an amount that sustains such resources. Applying this understanding to this proposed project would result in its denial, as there wouldn't be any water available to serve it unless and until there is evidence about the sustainability of the region's water supply.

A second way to approach this is to cap water usage at existing usage amounts. The idea in this scenario would be to recognize that there is currently water flowing at the site, and thus limiting new development to that actual flowing amount wouldn't exacerbate the problem. It would effectively maintain the baseline status quo. The question then would become one of how to calculate and determine the appropriate 'baseline'. The MPWMD has its own protocols for doing so, including establishing water



demand and use calculations based on the site's 'capacity for use', or what the site is physically equipped to accommodate water-wise at full build out rather than what it actually uses. The State Water Board has opined that, while the District's 'capacity for use' method may be appropriate in some cases, another analytically compelling method would be to determine the actual average water use for a water year from the past five years, or to use both methods and use whichever is the lesser amount. This makes sense for a variety of analytical reasons, not the least of which being that the idea that a baseline should be based on the amount of water the site could use at full occupancy and use is also inaccurate from a CDP perspective inasmuch as changes in use and changes in intensity of use, such as would occur should new/different tenants come into the space, is development requiring its own CDP, and such development itself would be required to meet the same LCP water supply tests as this proposed development, and would not be somehow 'grandfathered' in and allowed to use that amount of water no questions asked. As a result, the concept embedded in the District's 'full use' baseline is inherently flawed.

That said, MPWMD has strongly opposed the use of actual water consumption data, arguing that doing so may incentivize prospective property sellers to artificially increase water use to facilitate changes in use by prospective buyers, as well as penalize those that implement conservation features to reduce water consumption. Additionally, MPWMD claims that it is unlawful to use actual water consumption data because it would violate CPUC policies regarding customer privacy,<sup>58</sup> and MPWMD's Board even went as far as to adopt a resolution identifying the flaws and legal problems associated with using actual water data, and concluding that they will not do so when establishing baseline water usage.<sup>59</sup> It should be noted that Commission staff, despite repeated requests for same, were not given the actual flowing water records for the ATC site, with the non-disclosure agreement cited as justification for not doing so, even if it appeared to staff that the property owner and underlying site users weren't under the same restrictions as MPWMD and Cal-Am, and could have provided such data legally as it was their own water data. In any case, and as a work around, the actual flowing water for the site can be estimated by using the District's water use factors as applied to only the square footage that is currently occupied by a tenant, thereby avoiding counting vacant space as using water. Commission staff worked with the Applicant to get such rent data, and then applied the water use factors to that square footage. The results of that exercise show that, as of July 2022, the estimated total water use was 5.924 AFY, with water use as of July 2021 at 8.030 AFY, and, pre-Covid, at 13.159 AFY as of July 2019. While it is true that the pandemic and the project's pendency has led to some increases in vacancies, which could skew such numbers, it is also true that the site has not been at full occupancy and use for many, many years, and since well before 2019. Using these numbers as a proxy for what the State Water Board suggests is a more

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<sup>58</sup> Specifically, the District cites to a non-disclosure agreement required by Cal-Am of its customers as a prerequisite to providing water service that prohibits providing access to water use records to anyone other than the specific account holder. The District indicates that this agreement means that neither MPWMD nor Cal-Am are legally allowed to provide actual water consumption data for existing service addresses.

<sup>59</sup> See Resolution No. 2018-05 adopted in 2018 at: <https://www.mpwmd.net/resolutions/2018/Resolution2018-05.pdf>.

accurate determination of existing/baseline water use shows that the site's running water has ranged from roughly 6 AFY to 13 AFY. And applying this metric to the site would yield a pretty significantly downscaled project.

And finally, a third permutation, and related to the second one, is to cap water usage in line with what the MPWMD did for this site in terms of its capacity for use. As described previously, the MPWMD's 18.53 AFY water allocation is based on the amount of water the site is physically equipped to accommodate at full occupancy. Water usage fluctuates, particularly at a commercial building where tenants routinely change hands, which is evident by the fact that the site appears to have used only about 6 AF last year, but three years earlier it had used about twice that amount. And, to the District's point, looking at actual water usage can lead to deviations for a variety of reasons, particularly for commercial spaces, that can make it difficult for use in planning applications like this. At the same time, this is simply 'paper water' inasmuch as it doesn't actually reflect running water, nor the long-term sustainability of its source. When using this method, which is the version relied on by the District and the City, the site would be allowed no more than the 18.53 AFY identified/allocated for this site.

Each of the three permutations runs across the spectrum of methodologies for evaluating water use under the LCP. The most conservative approach, of course, would be the first alternative (no new water use allowed scenario) that indicates that no water use at the site is permissible pursuant to the LCP, which would require project denial. While this would help address coastal resource impacts more broadly as it relates to water supply issues, the existing status quo at the site would remain, so it would only hold such impacts steady, and not actually decrease them. In other words, denial of this project would not mean that the existing commercial uses at the site also go away, and thus water use would be expected to continue at current levels (i.e., roughly 6 AFY). To put it another way, denial would eliminate new water use, but is not likely to reduce water use at this site and there is still the possibility of the site being entirely rented out and utilizing their full 'paper' water amount. That said, there would still be resource value to applying this scenario.

The second alternative (actual flowing water scenario) makes more sense since it is applying a more apples to apples comparison between the actual water currently being used at the site and what a future project would be using. In other words, the water use stays the same, but the use that is using it would change, from commercial uses to hotel uses. Application of this scenario suffers from the fact that there can be any number of reasons why water use might be at a certain level in an existing situation (including, as the District identifies, where potential applicants might try to increase their water use in order to be allowed a larger development in the future), but it also is more analytically pure because it compares actual before and after consumption, and allows for decisions to be made based on the water use difference, and what that difference means in terms of the applicable LCP coastal resource requirements and questions raised. Even with

the inherent issues, this scenario is probably the simplest, most straightforward, and analytically accurate scenario.<sup>60</sup>

And lastly, the third alternative would be to apply the District's water use credits to the site as the District recommends (the estimated water use at full capacity scenario). This method is probably the least protective of coastal resources that are impacted by water demand, but it has the benefit of providing the market with greater certainty in terms of potential growth, even as it essentially represents 'paper' water credits and not actual water use. As applied to the subject case, it also is the option that allows the City to move forward with what it considers its largest growth opportunity site at the scale the City has long envisioned, going back to the citizens' initiative from almost a decade ago that allowed the project at this location in the first place. And where that project is a visitor-serving project, a project type that has priority over other types of projects that might otherwise be considered here under the LCP and the Coastal Act. This scenario also leans most heavily on estimates that the Peninsula's water supply issues are nearing a point where they will not lead to these types of difficult questions as a general rule, and where development may be able to proceed in the relatively near future based on a sustainable supply, thus mooted some of these very questions.

In short, it is a judgment call as to the best method to find LCP consistency, requiring the weighing of costs and benefits, including costs and benefits of different potential resource outcomes, and applying various temporal considerations. And while it may not be directly applicable to other potentially proposed development on the Peninsula, including as it is attributable uniquely to the context and attributes of the proposed project at this location at this time, the Commission here applies the third scenario. Thus, as long as water use is below 18.53 AFY, then the Commission can find the project consistent with the LCP on this point. **Special Condition 5** thus limits the approved project to that amount, and requires the MPWMD to provide written concurrence that the approved project in its totality (inclusive of all hotel rooms, restaurants, pool/spa amenities, and any other water-using development, and not offering 'credit' for off-site laundry or greywater system) is within such water budget.<sup>61</sup> It also requires audits of actual water usage so as to ensure compliance with such water budget over time, and remedial measures if such usage is in excess of this limit. MPWMD staff have reviewed the Applicant's proposed project and has preliminarily confirmed that it falls under the prescribed 18.53 AFY amount.

### 3. Lower-Cost Accommodations

As described in the Substantial Issue findings, the Pacific Grove LCP includes a robust set of specific standards related to the provision of lower-cost accommodations. The LCP defines what qualifies as lower-, medium-, and higher-cost accommodations,

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<sup>60</sup> And has been the method repeatedly recommended by Commission staff for as long as this application has been pending at the local level; see Exhibit 7.

<sup>61</sup> To be clear, this condition requires total water consumption to be within 18.53 AFY. If the Applicant provides signoff of the efficacy of on-site greywater recycling and use by requisite agencies (as required of **Special Condition 1(d)**), then such 'credit' could be understood in relation to the 18.53 AFY water budget. In other words, the condition doesn't provide for a 'credit' per se, but rather such savings would be reflected in the amount of water the site actually uses.

requires new development to provide lower-cost accommodations in an amount equal to at least 25% of the number of high-cost accommodations, and requires such lower-cost units to be provided on-site as part of the proposed project, unless doing so is found to be infeasible. On this point, the LCP requires a detailed analysis underlying the factors regarding a project's infeasibility of providing such lower-cost units on site, including specifying the financial assumptions and rationale for this conclusion. If on-site infeasibility is determined, then the LCP allows for such lower-cost requirements to be satisfied by the payment of an in-lieu fee in an amount equal to providing new such accommodations units elsewhere in the City.

This LCP construct is specific and rather unique to the City, and three important points should be made. The first is that the standards are more robust and detailed than many other LCPs, which is reflective of the fact that the City's LCP is the most recent newly certified one in the State. The LCP was fully certified for the first time, with the City assuming CDP review authority, in 2020, and thus the lower-cost provisions reflect some of the Commission's most recent contemporary understandings of the importance of these issues. Second, the LCP speaks to the importance of providing lower-cost units on-site as part of the proposed project, with in-lieu fees and off-site units allowed only as a second resort due to on-site infeasibility issues. And this is for several reasons, including both the Commission's general difficulty in getting in-lieu fees spent on actual new lower cost units, as well as the overarching goal of providing more equitable mixed-use/income accommodations types in the coastal zone, which is both a public access issue as well as an environmental justice issue. These understandings after almost 45 years of Coastal Act implementation helped inform the LCP's on-site preferences. And third, and perhaps most importantly for this project, these policies were written with the ATC site in mind. This reason is twofold: one, the LCP envisioned a hotel at this site, with various iterations of hotel proposals in the past. And in fact, this particular hotel proposal was in its infancy when the LCP was being developed. And two, there simply aren't many other sites in the City where new hotel development would be possible. Due to water supply issues as discussed previously, and due to voter initiatives from the 1980s that restrict the building of new hotel units, developing new hotel units at all, let alone lower-cost ones, is a difficult endeavor in Pacific Grove. As such, and while the LCP's lower-cost requirements apply throughout the coastal zone to all accommodations projects, there was a particular understanding of their applicability to the then-upcoming proposed ATC project to meaningfully provide lower-cost units and address this pressing affordable lodging issue in the Monterey Peninsula.

In this case, the Applicant is proposing 188 high cost rooms, which would necessitate the provision of 47 lower-cost ones (i.e., 25% of the higher cost rooms) whether on site, in an offsite project (i.e., a 47-room lower cost hotel), or a fee (calculated for 47 rooms to be some \$22 million in this case.<sup>62</sup> In light of this, and in response to the articulated issues with the City's previous approval, the Applicant revised its lower-cost proposal to include three parts. The first is to include 18 traditional, double-occupancy hotel rooms interspersed within the rest of the hotel. These units would be capped at the LCP's defined lower-cost rates, which, as described previously, at the current time in 2024

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<sup>62</sup> Where that fee is inclusive of land acquisition, construction costs, and a 10% management fee, estimated to be \$463,972.55 per unit, or \$21,806,710.08 for 47 units: see Exhibit 6.

would be no more than \$184 per night. The second component is the construction of a 'Group' wing somewhat separated from the main hotel facility, but still on-site and part of the overall ATC hotel resort complex. In this area, there would be 64 shared beds within 16 units. Each bed would be priced at \$85 with common areas and shared bathrooms (eight bathrooms in total, with each bathroom serving two units, or serving occupants of up to 8 beds total). And third, within this Group wing, the Applicant proposes a program to provide for low- and no-cost stays for groups, including from schools, underrepresented youth, and underserved communities. The Applicant proposes to provide at least 300 bed-nights per year<sup>63</sup> in the Group wing for such programming, where 150 such stays would be free, and the others would be provided at lower cost (again, where each of the rooms wouldn't cost more than \$184 per night). The Applicant indicates that the intent is also to work in partnership with the Monterey Bay Aquarium and other area attractions and educational facilities to provide for environmental education opportunities along with overnight stays.

There are numerous issues to discuss with respect to the Applicant's proposal. It first should be noted that the proposal to provide for on-site lower-cost hotel rooms is clearly consistent with both the intent and letter of the LCP's lower-cost requirements. That said, the LCP requires 47 such units, and this proposal is for 18, thus not all of the requirement is satisfied. The Applicant believes that the remainder of its proposal in terms of its proposed Group wing and its low- and no-cost group programming efforts fills in that remaining 29-unit gap. Their thinking is that, pursuant to the Commission's general understanding, including from research done by Hostelling International, a hostel bed utilizes about 125 square feet and a lower-cost, double-occupancy hotel unit 250 square feet. Thus, based on these typical unit sizes, the Applicant seeks a '2:1 conversion', meaning that 2 hostel beds are equivalent to 1 hotel room or "unit" for LCP purposes. In other words, the Applicant wants the Commission to consider the 64 beds in 16 shared rooms (with shared bathrooms) to be the equivalent of 32 standard lower cost hotel rooms. And the Applicant posits that, along with programming efforts totaling some 300 bed-nights per year within, more than satisfies the LCP's requirements.

A first question is how to treat the proposed hostel/group/shared accommodations construct as a form of lower-cost accommodation. One could argue that these units are inferior to the luxury hotel units being proposed in the main hotel complex, and that the lower-cost units should all be like-for-like in terms of affordable hotel rooms (with private bathrooms, minimum double occupancy, and on the same grounds/treated in all the same manner as the rest of the hotel). Another way to look at it is that these type of proposed shared accommodations are an affordable way to target single travelers and couples who may not need a full hotel room and would benefit from cheaper shared accommodation. In addition, these types of units would be geared toward the budget conscious traveler and would therefore be more amenable to being reserved for and used by those who need such lower-cost accommodation the most, rather than a low-cost hotel room that could be used by a higher-income traveler who would already be

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<sup>63</sup> Where one bed-night is when one user of one bed stays one night. At full occupancy of the Group wing, and its 64 total beds, a group of 64 staying for one night would take up 64 of the 300 bed-nights.

looking to stay at the high-end ATC hotel. In other words, a hostel/group quarters might naturally better target those of lower income and be more fruitful in this regard.

Still yet, there are questions as to how to analytically compare an \$85 per bed shared room (4 occupants) with an individual \$184 lower-cost hotel unit at double occupancy. When looked at from the perspective of a single traveler or couple, the price point would be below the \$184 threshold and could therefore be considered lower-cost, bracketing whether this is a correct comparison between these two accommodations types (i.e., sharing rooms and bathrooms with strangers). However, when looked at the price per unit, the four beds in the hostel unit would be \$340, almost double the \$184 hotel room cost and clearly not lower-cost, particularly for a family of four who each want their own bed. In addition, while the Applicant believes the correct comparison between these two accommodations types is two hostel beds to every one hotel room, there are questions as to whether this is appropriate or not. While square footage and occupancy may lead to the 2:1 conclusion, based on other metrics, like privacy, bathrooms, and price per unit/bed, these are analytical apples and oranges that do not lend themselves to a clean 2:1 conversion.

In light of all of this, several points can be made. First, all of the benefits and limitations identified previously regarding hotel vs. hostel/group quarters can be true. It is accurate to state that hostels can provide a specific type of accommodation for couples and single travelers, and can better naturally target the type of budget conscious traveler for whom such lower-cost rooms are intended. And, based on the proposed rates, the proposal can be understood as lower-cost for those that seek hostel style accommodations – usually single travelers, couples, or groups of friends on a budget. But it's also true that many people, including families with young children, will not seek and will not be comfortable in a shared accommodation construct and will instead seek a traditional hotel room. And in a hotel project with 188 traditional hotel rooms, and in an area with severe limitations in terms of where additional hotel units can be built (again, due to water scarcity, voter restrictions, lack of vacant properties, etc.) where it is imperative to take full advantage of the extremely limited opportunities for when units of any type are proposed, the lower-cost units provided should reflect the rest of the product, and thus include lower-cost hotel units. And, again, such lower-cost hotel units are more conducive to serve as an option for families, where they would be more likely to seek out the privacy and lower-cost price point associated with this accommodation type over a group quarter. As such, a package/mix provides the benefits of both of them.

Second, while the Commission understands the rationale behind the Applicant's 2:1 hostel bed to hotel room conversion based on size alone, the other inherent differences between the two accommodations types simply does not lend itself to such a 'clean' ratio. Two twin hostel beds in a shared room is simply not the same as two twin beds or one queen size bed in a private traditional hotel room. A more apt comparison between the two would be to compare units for units, in this case one hotel room with one hostel unit. The Commission can then understand the proposed Group wing to be comprised of 16 units. Thus, the proposed project provides 18 hotel units and 16 group/hostel units.

And third, while it is an even more ‘apples to oranges’ analytical comparison between units and lower-cost programs, the Commission can ‘value’ the Applicant’s proposed group programming provisions within the context of the LCP’s on-site lower-cost requirements for this project. And in this case, the proposal seeks to provide at least 150 free and 150 lower cost stays per year for those who traditionally may not be able to experience a coastal zone stay and related activities. This represents a meaningful lower cost accommodation benefit, and clearly is in line with the Commission’s environmental justice principles and the objective of ‘access for all’. Again, it is acknowledged that this isn’t a perfect analytical fit, and that the program will mean that the Group wing isn’t available to other users during these group occupancy times. But the ability to provide free and lower cost group accommodations so close to the shore and in such a highly visible and prime coastal locale for schools, youth groups, and other underrepresented communities is something that strikes at the heart of the Commission’s lower-cost accommodations, public coastal access, and environmental justice mandates.

In short, while some may argue that the Applicant should provide 47 standard double-occupancy hotel rooms on site at a lower cost to satisfy the LCP, the Applicant has actually proposed a mix of lower cost amenities to satisfy the LCP, and that package can be considered by the Commission as well. The fact that the Applicant is proposing eighteen on site, lower cost hotel rooms is significant, including as it has been difficult in the Commission’s experience to get fully integrated lower cost rooms as part of these types of projects, and there’s a significant benefit to having that in this case. In addition, the 16 hostel/group rooms perform a different lower cost function, and target a different type of user, which provides a range of different accommodation options. Together, and together with the group programming aspect, the Applicant has proposed a significant lower cost visitor serving package, one that avoids in-lieu fees, and actually targets on-site and offsetting lower cost facilities, where the package can be considered adequate to satisfy the LCP’s requirements in a slightly different way.

As such, **Special Condition 6** codifies the Applicant’s proposal, and includes important measures to ensure that these lower-cost provisions are effectively carried out over time. Among other things, the condition specifies that the lower-cost thresholds are caps,<sup>64</sup> and that all hotel fees, including parking, resort fees, and administrative fees, with the exception of government-imposed fees/taxes, are to be reflected/included in that price. The condition also specifies some minimum standards for the lower-cost units, including that such hotel rooms must be at least 250 square feet (with a queen size bed or two twins) and all users of the lower-cost hotel units and the hostel/group quarters are required to have access to the same amenities in the rest of the hotel as would any other paying guest, including those in the high cost rooms. As for programming, while the condition is meant to be slightly broad in order to be nimble enough for flexibility in program elements, the condition does specify some overall minimum performance standards, including requiring at least 300 bed-nights per year of group stays, with 150 of those free and the other 150 capped at the LCP’s lower-cost

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<sup>64</sup> Subject to changes with the Consumer Price Index.

unit threshold,<sup>65</sup> specifying that the targeted clientele is those from lower-income communities, communities of color, and other communities that have been historically marginalized and face greater barriers to coastal access, and requiring yearly monitoring reports that identify program effectiveness and group composition, along with the proposed programming for the upcoming year. The condition also requires yearly monitoring and a third-party audit every third year to help measure effectiveness of the lower-cost provisions overall, as well as outreach to market such rooms to inland communities, including in Spanish and other appropriate languages.

And finally, **Special Condition 7** requires that all overnight accommodations (hotel rooms and group quarters) be open and available to the general public, that rooms shall not be rented to any individual, family, or group for more than 29 consecutive days and that no individual ownership or long-term occupancy of hotel rooms shall be allowed. To further ensure that the hotel operates as proposed and approved, **Special Condition 7(b)** prohibits the conversion of any of the hotel overnight rooms to limited-use overnight visitor accommodation units (e.g., timeshare, fractional ownership, etc.) or to full-time occupancy condominium units or to any other units with use arrangements that differ from the approved project, as well as requires annual monitoring reports to ensure same.

In conclusion, the Applicant has proposed a meaningful package of lower-cost accommodation types that can serve as lower cost options for families (in 18 such hotel rooms), for single/couple travelers (in 64 beds in shared group accommodations), and for underserved groups (via at least 150 free and 150 lower cost stays for group programming). The Commission welcomes – and prefers – these types of on-site lower cost packages as a means of addressing Coastal Act and LCP lower cost overnight accommodation issues, and finds that as conditioned the project can be found consistent with the LCP.

#### **4. Public Views/Community Character and Public Access**

As described in the Substantial Issue section previously, the LCP is protective of public views, including stating that the visual qualities of Pacific Grove’s coastal areas are a resource of public importance, requiring development to be compatible with its built and natural environment surroundings, and otherwise ensuring development does not significantly adversely impact significant public views. To meet these overarching objectives, the LCP specifies that protection of scenic resources and other coastal resources must be the priority in all City actions and decisions, and that all development standards (including with respect to height, setback, density, lot coverage, etc.) must be interpreted as maximums (such as for height) or minimums (such as for setbacks) that are required to be reduced (or increased) to protect and enhance such resources to the maximum extent feasible. And for the project site specifically, development needs to include sufficient articulation and massing so as to avoid the appearance of domineering over the adjacent public realm.

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<sup>65</sup> Meaning that 150 guest nights are free, and 150 guest nights are capped at the LCP’s lower-cost threshold of \$184 per night as of 2024.



In addition, because the project site is located in such a visually conspicuous and popular visitor-serving location, the LCP only allows the proposed site coverage of up to 90% if significant public access amenities are provided beyond which the LCP would ordinarily require. In other words, the LCP requires some of the allowed site coverage to be programmed for public plazas, parks, restrooms, and similar public access amenities so as to maximize public recreational access and utility at this important site. With such requirements, and with the overall understanding that the LCP mirrors the Coastal Act in terms of the requirement to maximize public recreational access opportunities, the issues of access and views/character are largely intertwined. In short, the project needs to respect its surroundings and ensure that public access is an intrinsic part of the project.

### ***Analysis***

As described previously, while the overall site plan and design aesthetic has largely been retained from the City-approved version, the Applicant has made some modifications to better address views and access, including to 'fix' some of the issues and problems identified from the City's approval. There are several design changes, including by overall making the project smaller by some 85,000 square feet and removing a proposed vehicular ingress/egress along Ocean View Boulevard. Doing so provides for the creation of a new public park/plaza at the downcoast site corner at Ocean View Boulevard and Dewey Avenue. Such change, along with other proposed articulation and small 'pocket' plazas along the rest of the Ocean View Boulevard frontage and proposed landscaping, should help to soften the perceived mass and scale of the building from the road and from the Monterey Bay Coastal Trail, which is a key LCP objective so as to avoid structures looming over the public viewshed. In addition, the Applicant has also modified certain public access elements to better meet LCP objectives, including now providing direct access from the new park to the living roof, which itself will be open and available for public enjoyment with benches, interpretive displays, and other amenities. The living roof area will aid in public enjoyment and offer an exciting opportunity for the general public to obtain expansive views of Monterey Bay from an elevated vantage point. In addition, the public restroom has been relocated closer to Eardley Avenue so as to better provide for access and use for the general public without having to venture deep into the hotel itself. Having a readily accessible public restroom, particularly in this area with the many children and families coming to and from the Monterey Bay Aquarium, is an important public benefit.

The Applicant firmly believes that the proposed design and access offerings materially will benefit this site over the existing status quo and meet the LCP's requirements for this site, including going 'above and beyond' what would ordinarily be required and provide extra benefits for the public and not just hotel guests. They opine that this project isn't introducing a new structure to a currently undeveloped site, or even one on the seaward side of the road or fronting the shoreline, but rather is replacing the existing ATC building which itself is a large two-story structure that takes up the entire City block with little setback from the road and few amenities geared to the general public. And while the sawtooth building includes some notable and distinctive architectural features (and these features, like the roof, will be predominately retained), it otherwise is a flat, uninterrupted plane along this visually prominent stretch.

While reasonable people can – and often do – disagree when it comes to matters of design and community character, in this case and given the context, the Commission agrees with the Applicant’s assessment. While the project is clearly still quite large, and there could be other permutations that could further add articulation (e.g., not building in the Sloat Avenue right-of-way and keeping it as a public street) or otherwise reduce its size and scope, it’s also true that the site is not pristine. Rather, the site is a mix of old industrial buildings and surface parking lots that can be put to better and higher uses. In sum, the project will provide for some pretty substantial public access benefits that materially will benefit the public, and will do so with a design approach that similarly respects the character of the area as much as possible for a large project of this type.

**Special Condition 1** thus approves the proposed site plan and overall design, and includes a series of conditions and performance standards to ensure consistency with LCP design requirements, including final plans that specify landscaping (e.g., only using native and non-invasive species to provide for visual softening and screening of structural development), signage (e.g., reducing their number and visibility, and using natural materials and earth tones to effectively blend in with the surrounding aesthetic), lighting (e.g., using wildlife friendly lights facing downward and shielded to prevent light spill and glare), utilities (e.g., placing them underground or away from public view), and windows (e.g., using non-glare and bird safe glass) to all be compatible with the overall area design aesthetic. And **Special Condition 4** similarly codifies the proposed public access amenities via a Public Access Management Plan, with provisions to ensure that such amenities (e.g., the public park, living roof, and public restroom) are clearly identified on final plans, adequately signed to alert the public of these spaces, include appropriate amenities to aid in their enjoyment (e.g., benches, picnic tables, and trash cans), and maintained over time to maximize their use and utility in this regard.

That being said, the proposed project does materially affect public parking and the use of public street space. The project still proposes to convert portions of the existing Sloat Avenue public street to private hotel use. Doing so will result in the loss of some 20,000 square feet of publicly owned space, 17 parking spaces along the street (along with an additional 7 spaces lost along Dewey and Eardley Avenues due to curb cuts, driveways, and similar measures to access the proposed hotel), as well as its sidewalk space and corresponding ability for the public to easily walk between Eardley and Dewey Avenues. The project also proposes to encroach into the Ocean View Boulevard right-of-way with an elevated sidewalk that will be privately owned but open to public use, totaling some roughly 3,000 square feet. While the Ocean View Boulevard encroachment can be addressed through conditions that clearly state that such elevated walkway is to remain open and available for public use without obstruction (and **Special Condition 1(a)** does just this), the Sloat Avenue and public parking impacts require more evaluation. The privatization of this area represents both a direct, quantifiable impact,<sup>66</sup> including direct loss of parking spaces, as well as a more intangible loss of public space to private use that is difficult to fully quantify. Public space of any type, particularly so close to the

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<sup>66</sup> As part of the City’s street right-of-way vacation efforts, the appraised value of the roughly 20,000 square feet of road space that would be sold to the Applicant was valued at roughly \$2 million, or about \$200 per square foot (as of December 2021). The City has not yet sold the street, pending resolution of the Commission’s action on this CDP.

ocean and prime visitor-serving uses, is a valuable common resource that must be protected, or, at a minimum, sufficiently mitigated. While one way to address this issue is through alternative siting and design that eliminates the privatization of this street, including eliminating it from hotel use (and instead having elevated walkways above the street to connect ‘wings’ on either street side, as is done with some structures along Cannery Row) and thereby avoiding the impact in the first place, another way is to ensure that the public utility of the street space is fully mitigated.

The Applicant proposes to mitigate for the loss of parking by adding six on-street spaces (through elimination of existing driveways that serve the existing ATC site), and providing 20 new spaces in a new paid public lot at 124 Central Avenue. The end result will be a net gain of 2 spaces. And while this is true, it’s also true that the public is losing sidewalk space, that the new spaces will be located further away and not as close to area amenities, and that the public’s real estate is lost. The on-street parking around the ATC site represents some of the closest, low-cost parking for visitors to the Monterey Bay Aquarium and Monterey Bay Coastal Trail. To access the coast, visitors who park in the public lot on 124 Central Avenue will have to traverse around the ATC hotel and downhill from Central Avenue. This represents an even greater barrier for visitors with ADA-needs.<sup>67</sup> In short, the Applicant’s public parking proposal does not have the same utility nor access to the coastline as the on-street parking spaces that will be removed around the ATC site, and thus does not sufficiently mitigate for the impact.

To do so, **Special Condition 4(d)** requires the 20 spaces in the public lot to be free for 6 hours a day subject to a 3-hour maximum stay for any one vehicle (and ADA spaces free all day and not subject to such restrictions). This requirement recognizes that the utility of these spaces isn’t as high as the status quo, and thus to make up the difference, the spaces are free of charge during this time frame. Along with the fact that there is a net increase in public parking overall, the finding can be made that parking and public space impacts from Sloat Avenue’s conversion to private use are appropriately mitigated in this way. To further ensure that the project addresses traffic and multi-modal transportation requirements, **Special Condition 8** requires the preparation of a Transportation Demand Management Plan that requires, among other things, ride sharing programs and transit passes to reduce single-occupant car trips for workers, as well as shuttles and free bikes for guests to accomplish same.

As proposed and as conditioned, the project meets the LCP’s requirements for public view and public access protection and provision overall, as well as the specific directives for this specific site. It also adequately mitigates for the project’s impacts to public streets. The end result is a project that should be a measurable improvement over the status quo and one worthy of this prime coastal setting.

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<sup>67</sup> It should also be noted that the on-street parking spaces located on Ocean View Boulevard, Eardley Avenue, Dewey Avenue, and Sloat Avenue are authorized by a Commission-issued CDP (3-04-027) that allows the City to operate a metered parking program that includes a 2-hour time restriction for 31 parking spaces on Sloat Avenue and Ocean View Boulevard between 9am and 6pm, consistent with other 2-hour parking areas within the City (i.e., at Lover’s Point). Any changes proposed to the on-street parking spaces on these streets must obtain an amendment to the CDP, for which the City must apply.

## 5. Habitat Resources

As explained in the Substantial Issue section, the LCP includes numerous provisions to protect the area's rich biological resources, including policies mirroring the Coastal Act in this regard to prevent adverse impacts to environmentally sensitive habitats and biologically sensitive species, including marine wildlife haul-out, breeding, and nesting habitats located along the beaches and offshore rocky areas near the project site. The LCP also includes specific protections for marine mammals such as harbor seals. And while the project is located in an inland location and not physically within coastal waters, as identified in the project's EIR and as noted in the substantial issue findings, the project's construction may result in adverse impacts that transcend the site, particularly with respect to noise. And while the project's EIR recognized such potential impacts and identified ways to mitigate them, it didn't go into sufficient detail regarding the specific mechanisms by which construction noise and impacts would be defined, monitored, reported, and corrected should there be any.

In this vein, Commission staff, including the Commission's Ecologist Dr. Rachel Pausch, has reached out to various local marine mammal and avian experts to best articulate the specifics of what would constitute adverse impacts and recommended monitoring techniques to sufficiently document such impacts should they occur. The result of such collaboration is the Marine Wildlife Protection Plan required by and specified in **Special Condition 3**. This condition builds upon that which the Commission required in previous projects in the area,<sup>68</sup> and defines, among other things, the locations for habitat monitoring (i.e., the 'Protection Areas', defined as the three identified harbor seal rookeries at West Beach, Fisher Beach, and Fifth Street and out to at least 10 meters offshore), the protocols for where and how biological monitors are to assess for potential impacts (including provisions for on-site as well as remote monitoring), the specific behavioral cues for what may constitute an adverse impact (e.g., sustained head raises/alerts, rapid movements in response to acute noise stressors, feeding/nursing disruptions), and the notification process for when, in the monitor's best professional opinion and in conformance with the identified criteria, construction noise is adversely impacting marine wildlife, including harbor seals and black oystercatchers. These notifications include the Commission's Executive Director, as well as other fellow resource experts at the Monterey Bay National Marine Sanctuary and NOAA Fisheries, and may, depending on the severity of potential impact, necessitate a stop work order and new CDP authorization.

Again, it's important to reiterate that these are all precautions and that the EIR found that construction impacts should not be substantial, including in light of expected noise levels in these sensitive offshore environments, as well as with precautions to avoid the loudest construction activities during pupping season (which is similarly included in the special conditions). And that analysis was based on the previous City-approved project, which was larger and included more extensive grading than what is currently proposed. In fact, the project's smaller scope and elimination of certain structural elements along Ocean View Boulevard (and replacement with the public park/plaza) reduces excavation

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<sup>68</sup> Including in the Monterey Bay Aquarium's new sea otter research and rescue facility authorized via CDP 3-23-0656-W.

by about 27,500 cubic yards, which should translate into a reduction of noise and vibration impacts at the most seaward project location.

With such understanding and as conditioned, including ensuring that such provisions are identified as part of required Construction Plans (see **Special Condition 2**<sup>69</sup>), the project can be found consistent with the LCP's habitat resource provisions.

## 6. Archaeological/Cultural Resources

As shown on Figure 7 of the LUP, the entire coastal zone in the City of Pacific Grove has been designated an Archaeologically Sensitive Area, including the project site. The LUP requires development to implement reasonable mitigation measures to protect identified archaeological or paleontological resources. The LUP further requires a site survey and associated report, and a mitigation plan to be completed by a qualified archaeologist for projects within an archaeologically sensitive area. Applicable LUP provisions include:

***LUP Policy CRS-1.** The City will conduct consultations with any federally recognized California tribal government listed on the most recent notice of the United States Federal Register and any non-federally recognized California tribe listed on the California Tribal Consultation List maintained by the California Native American Heritage Commission that identifies as native to the Monterey Peninsula, including the Ohlone Costanoan Esselen Nation, in accordance with state law.*

***LUP Policy CRS-2.** The City will ensure the protection, preservation, and proper disposition of archaeological resources within the Coastal Zone by assessing the potential impact of proposed development and ensuring, to the maximum extent feasible, that tribal concerns are considered before actions on proposed development are taken and that such impacts are avoided, minimized, or mitigated in conformity with the Coastal Act and other applicable legal requirements.*

***LUP Policy CRS-3.** The City will assist developers and landowners by providing early identification of sensitive sites so that archaeological resources can be considered and protected during the early phases of project design. The City shall require new development to prepare an archaeological report by a qualified professional and, where appropriate, shall require mitigation measures to adequately protect and preserve potential archeological resources.*

An archaeological assessment was included in the EIR and found that the project location has a high sensitivity for archaeological resources. Prehistoric shell middens and habitation sites have been recorded to the immediate northwest, north, and southeast of the project site and given their distribution and the recorded depths of deposition (approximately one meter below the surface), there is a high likelihood that

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<sup>69</sup> **Special Condition 2** also includes the Commission's suite of typical best management practices to ensure that construction activities avoid adverse coastal resource impacts, including on water quality and nesting birds. And **Special Condition 9** also protects coastal water quality and habitats through a required Plastic Reduction Program to minimize single-use plastics in all aspects of hotel operations.

additional prehistoric resources may lie beneath the current ATC facility complex. Furthermore, the site is situated within the recorded boundaries of an historic Chinese village and intact deposits relating to this resource have been recovered within the project vicinity.

The Monterey Bay region is represented by the Ohlone/Costanoan-Esselen Nation (OCEN), which is comprised of over 600 enrolled tribal members of Esselen, Carmeleno, Monterey Band, Rumsen, Chalon, Soledad Mission, San Carlos Mission (Carmel) and/or Costanoan Mission Indian descent. The EIR documents the Applicant's and City's tribal consultation efforts, including working with OCEN officials to develop appropriate construction mitigation protocols (such as on-site monitoring during ground construction activities and stop-work orders should human or other sensitive remains/materials be unearthed).

**Special Condition 10** carries forward these measures, and includes the Commission's typical archaeological protection protocols, which, similar to the identified habitat resource protections, must be identified on all required construction plans. As conditioned, the project can be found consistent with the LCP's archaeological/cultural provisions.

## 7. Other

### ***Other Agency Approvals***

In addition to CDP authorization under the Coastal Act and LCP, the proposed project appears to affect the Monterey Bay National Marine Sanctuary, which may need to provide authorization, and may affect marine resources that are protected by NOAA Fisheries, as well as water resources governed by the Monterey Peninsula Water Management District and applicable health and building departments. To ensure that the Applicant has a sufficient legal interest to carry out the project consistent with the terms and conditions of this CDP and to ensure that the proposed project is authorized by all applicable regulatory agencies, **Special Condition 11** requires the Applicant to submit written evidence either of these other agencies' approvals of the project (as conditioned and approved by this CDP) or evidence that such approvals are not required. **Special Condition 12** also specifies that the Permittee is to follow all other requirements and conditions imposed by the City of Pacific Grove pursuant to their non-Coastal Act authorities. If there is any conflict, however, between those conditions and this CDP, this CDP shall govern.

### ***Future Permitting***

The Commission herein fully expects to review any future proposed development at and/or directly related to this project and/or project area, including to ensure continued compliance with the terms and conditions of this CDP through such future proposals, but also to ensure that any such future proposed development can be understood in terms of same. Thus, any and all future proposed development at and/or directly related to this project, this project area, and/or this CDP shall require a new CDP or a CDP amendment that is processed through the Coastal Commission, unless the Executive Director determines a CDP or CDP amendment is not legally required (see **Special Condition 13**).

### ***Minor Changes***

This CDP authorizes the project proposed except as modified by the special conditions. As is typical of large and complicated construction projects like this, there can be the need for minor changes as circumstances dictate. Thus, this approval allows for such changes through either (a) a CDP amendment, or (b) if the Executive Director determines that no amendment is legally required, then such changes may be allowed by the Executive Director if the Executive Director determines that such changes: (1) are deemed reasonable and necessary; and (2) do not adversely impact coastal resources (**Special Condition 14**).

### ***Indemnification***

Coastal Act Section 30620(c)(1) authorizes the Commission to require applicants to reimburse the Commission for expenses incurred in processing CDP applications. Thus, the Commission is authorized to require reimbursement for expenses incurred in defending its actions on the pending CDP applications in the event that the Commission's action is challenged by a party other than the Applicant. Therefore, consistent with Section 30620(c), the Commission imposes **Special Condition 15** requiring reimbursement for any costs and attorneys' fees that the Commission incurs in connection with the defense of any action brought by a party other than the Applicant challenging the approval or issuance of this CDP, or challenging any other aspect of its implementation, including with respect to condition compliance efforts.

### ***Deed Restriction***

The terms and conditions of this approval are perpetual and run with the land, thus binding any future buyers and owners of the properties subject to this CDP. This approval is also conditioned for a deed restriction to be recorded against the property involved in the application (see **Special Condition 16**). This deed restriction will record the conditions of this permit as covenants, conditions and restrictions on the use and enjoyment of the property.

## **I. California Environmental Quality Act (CEQA)**

CEQA Section 21080.5(d)(2)(a) prohibits a proposed development from being approved if there are feasible alternatives and/or feasible mitigation measures available that would substantially lessen any significant adverse effect that the development may have on the environment. CEQA further requires the decision-making agency to balance, as applicable, the economic, legal, social, technological, or other benefits, including region-wide or statewide environmental benefits, of a proposed project against its unavoidable environmental risks when determining whether to approve a project. If the specific benefits of a proposal outweigh the unavoidable adverse environmental effects, the adverse environmental effects may be considered "acceptable."

The City of Pacific Grove, acting as the CEQA lead agency, certified a final Environmental Impact Report for the project in January 2022. Pursuant to State CEQA Guidelines Section 15093, the City prepared and adopted a Statement of Overriding Considerations that notes that although the EIR identifies significant and unavoidable

impacts in the categories of Aesthetics and Cultural Resources,<sup>70</sup> the City found that there are overriding considerations that provide specific economic, legal, social, technological, and other benefits, including region-wide or statewide environmental benefits, that outweigh the unavoidable adverse environmental effects.

The Commission's review, analysis, and decision-making process for CDPs and CDP amendments has been certified by the Secretary of the Natural Resources Agency as being the functional equivalent of the environmental review required by CEQA (CCR Section 15251(f)). Accordingly, in fulfilling that review, this report has analyzed the relevant coastal resource issues with the proposal, has addressed comments received, and has identified appropriate and necessary modifications to address adverse impacts to such coastal resources. The Commission finds that only as modified and conditioned herein will the proposed project avoid significant adverse effects on the environment within the meaning of CEQA. Thus, the proposed project as modified will not result in any significant environmental effects for which feasible mitigation measures have not been employed, consistent with CEQA Section 21080.5(d)(2)(A).

#### 4. APPENDICES

##### **A. Substantive File Documents<sup>71</sup>**

- American Tin Cannery Hotel and Commercial Project EIR

##### **B. Staff Contact with Agencies and Groups**

- City of Pacific Grove Community Development Department
- California Public Utilities Commission
- California Water Resources Control Board
- California Department of Fish and Wildlife
- Monterey Bay National Marine Sanctuary
- United States Department of Fish and Wildlife
- NOAA Fisheries
- Monterey Peninsula Water Management District
- Stanford University, Hopkins Marine Station
- Unite Here

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<sup>70</sup> Cultural resources include archaeological and historic resources. In this case, the EIR found that the project would have significant and unavoidable impacts to historic resources, namely historic structures, but not archeological/cultural resources.

<sup>71</sup> These documents are available for review in the Commission's Central Coast District office.