

CALIFORNIA COASTAL COMMISSION

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Staff: CLD-SF
Staff Report: November 21, 2002
Hearing Date: December 10, 2002

PROPOSED FINDINGS FOR PERMIT CONDITION INTERPRETATION AND CEASE AND DESIST ORDER

CEASE AND DESIST ORDER:	CCC-02-CD-05
RELATED VIOLATION FILE:	V-5-02-034 (Hellman Properties, LLC)
PROPERTY LOCATION:	Tracts 15381 and 15402 Seal Beach, Orange County (Hellman Ranch)
PROPERTY OWNER/ RESPONDENTS:	W.L. Homes, LLC dba John Laing Homes, LLC; Hellman Properties, LLC
VIOLATION DESCRIPTION:	Failure to fully comply with the terms and conditions of Coastal Development Permit No. 5-97-367, as amended (Hellman Properties, LLC).
SUBSTANTIVE FILE DOCUMENTS:	(1) Executive Director Cease and Desist Order No. ED-02-CD-01, (2) Staff Report and Revised Findings for Coastal Development Permit No. 5-97- 367, as amended, Emergency Coastal Development Permit No. 5-02-377-G, and (3) Background Exhibits A - I.
CEQA STATUS:	Exempt under (CEQA Guidelines (CG) §§ 15061(b)(3), 15307, 15308 and 15321; Categorically exempt under § 15061(b)(2).

I. SUMMARY

Background

On September 9, 1998, the Commission approved Coastal Development Permit (CDP) No. 5-97-367 (EXHIBIT A) (hereinafter referred to as "the Permit") authorizing, among other development, a 70 single-family lot residential subdivision in Seal Beach, Orange County called Hellman Ranch. The properties to which the Permit applies are identified as Tracts 15381 and 15402 and are located northeast of Pacific Coast Highway (State Route 1), southeast of the San Gabriel River, south of Adolfo Lopez Drive, west of Seal Beach Boulevard, and north of Marina (hereinafter referred to as the "Project Site").¹ (EXHIBIT B) On June 14, 2001, the Commission amended the Permit to modify the project description.

The Coastal Act violation that is the subject of the proposed Commission cease and desist order (CCDO) is the failure of the property owners W.L. Homes, LLC dba John Laing Homes and Hellman Properties, LLC (hereinafter referred to as "Respondents") to fully comply with the requirements of Special Condition 19.F. of the Permit.

Beginning in July 2002, John Laing Homes began unearthing Native American human remains on the site of the 70 single-family home lot residential subdivision. They continued to discover remains as the work progressed, and did not cease construction until the number had reached 22 human remains. The majority of these remains (18) were discovered on property owned by John Laing Homes. The other four remains were discovered on property owned by Hellman Properties.

On September 16, 2002, Respondents halted grading and construction activities at the Project Site after Commission Staff (hereinafter referred to as "Staff") informed them that they were violating the terms and condition of the Permit by failing to address the discovery of the Native American remains in accordance with the requirements of Special Condition 19.F.1 to the CDP. Staff requested that Respondents confirm that they would comply with the requirements of Special Condition 19.F.1. Also, on September 16, 2002, Staff received a letter from Respondents' agent Dave Bartlett indicating that work at the Project Site had been "voluntarily and temporarily stopped". (EXHIBIT C) Mr. Bartlett did not, however, provide an assurance that work would remain stopped until the violation is resolved or that Respondents would comply with Special Condition 19.F.1. Instead, on September 17, 2002, Staff received a letter from John Laing

¹ All the archaeological sites on the Project Site upon which Native American human remains have been discovered were identified as "important archaeological resources" as defined by CEQA.

Homes Project Manager Joanie Madrid (EXHIBIT D) outlining the Respondents' interpretation of Special Condition 19.F. Ms. Madrid indicated that Respondents would comply only with Special Condition 19.F.2. She did not indicate Respondents' intention to comply with the requirements of Special Condition 19.F.1. prior to resuming work.

In light of continuing discoveries of additional remains, and to insure compliance with the Permit, on September 18, 2002 the Executive Director issued to Respondents EDCDO No. ED-02-CD-01. (EXHIBIT E) The EDCDO directed Respondents to cease and desist from any non-compliance with the terms and conditions of the Permit, including all grading and construction activities potentially impacting any archaeological resources, including in the vicinity of the discoveries of any Native American human remains until Respondents implement the requirements of Special Condition 19.F.1. to address the discovery at the Project Site of cultural resources and archaeological features in the form of a Native American burial ground containing at least 20 sets of remains.

Despite numerous correspondence and several meetings among Staff, Respondents and their representatives, the Native American Most Likely Descendant (MLD)², the Native American monitors, the Native American Heritage Commission (NAHC), and the City of Seal Beach, there remains a fundamental disagreement between Staff and Respondents regarding whether the requirements of Special Condition 19.F.1. apply in these circumstances.

On October 18, 2002, Staff issued to Respondents a notice of intent (NOI) letter to commence a CCDO Proceeding. (EXHIBIT F)

The proposed CCDO would require Respondents to:

- (a) Halt all construction activity, including grading, until Respondents comply with the requirements of Special Condition 19.F.; and
- (b) Refrain from any non-compliance of the terms and conditions of the Permit.

Request for Permit Condition Interpretation

On October 1, 2002, Respondents expressed interest in seeking the Commission's input regarding the Executive Director's interpretation of Special Condition 19.F. Although the Coastal Act does not provide for an appeal to the

² The Most Likely Descendant (MLD) is the person or persons designated by the Native American Heritage Commission (NAHC) as most likely descended from the deceased Native American. In this case, the NAHC designated Gabrielino/Tongva Tribal Chairperson Anthony Morales as the MLD. The Native American monitors are also members of the Gabrielino/Tongva Tribe.

Commission of an EDCDO, by statute EDCDOs expire after 90 days. In this case, the EDCDO will expire on December 18, 2002. Since Respondents still dispute the Executive Director's interpretation of the requirements of Special Condition 19.F. and the issue has not been resolved so as to permit resumption of construction activity at the Project Site, Staff is herein recommending that the Commission issue the proposed CCDO to compel Respondents to fully comply with terms and conditions of the Permit. Moreover, Staff recommends that the hearing on the proposed CCDO be combined with a hearing on the Executive Director's interpretation of Special Condition 19.F.1. since the issues are inextricably linked and the Commission's decision on whether to issue the proposed CCDO will of necessity include a resolution regarding the application of Special Condition 19.F.1.

Further Requests for Work Resumption

As discussed further below, at Respondents' request, the Commission already issued an EDCDO Amendment and Emergency Permit authorizing weather related work at the site. Respondents further request that the Commission also address as part of its deliberations of the proposed CCDO, whether Respondents are able to conduct work authorized under the Permit in areas such as the public right-of-way, or in areas graded to marine terrace (i.e., pre-human occupation), where there is no potential for impacting any archaeological or cultural resources or archaeological features. Due to the history of difficulty in ensuring compliance with Special Condition 19.F.1., and to insure that the cultural resources and archaeological features are not impacted intentionally or inadvertently in the course of further work, Staff recommends resolving this violation prior to resumption of work at the Project Site. In light of this request, however, to address the event of a hazard at the Project Site, Staff added a provision to the proposed CCDO to the effect that it shall not prohibit activities at the Project Site specifically authorized by the Executive Director under an emergency coastal development permit issued to protect public health and safety, should such a situation arise.

II. HEARING PROCEDURES

The procedures for a hearing on a proposed CCDO are outlined in Section 13185 of the California Code of Regulations (CCR), Title 14, Division 5.5, Chapter 5, Subchapter 8. The CCDO hearing procedure is similar in most respects to the procedures that the Commission utilizes for permit and LCP matters.

Although the Coastal Act clearly does not contemplate Commission hearings to dispute provisions of EDCDOs, and the time to challenge any permit condition has passed, given the current situation, the Commission staff recommends the

Commission address the interpretation of the permit condition itself in this hearing.

For a CCDO hearing, the Chair shall announce the matter and request that all parties or their representatives present at the hearing identify themselves for the record, indicate what matters are already part of the record, and announce the rules of the proceeding including time limits for presentations. The Chair shall also announce the right of any speaker to propose to the Commission, before the close of the hearing, any question(s) for any Commissioner, at his or her discretion, to ask of any other party. Staff shall then present the report and recommendation to the Commission, after which the alleged violator(s) or their representative(s) may present their position(s) with particular attention to those areas where an actual controversy exists. The Chair may then recognize other interested persons after which staff typically responds to the testimony and to any new evidence introduced.

The Commission should receive, consider, and evaluate evidence in accordance with the same standards it uses in its other quasi-judicial proceedings, as specified in CCR Section 13186, incorporating by reference Section 13065. The Chair will close the public hearing after the presentations are completed. The Commissioners may ask questions to any speaker at any time during the hearing or deliberations, including, if any Commissioner chooses, any questions proposed by any speaker in the manner noted above. Finally, the Commission shall determine, by a majority vote of those present and voting, whether to issue the proposed CCDO, either in the form recommended by the Executive Director, or as amended by the Commission. Passage of a motion, per staff recommendation or as amended by the Commission, will result in issuance of the proposed CCDO.

III. MOTIONS

MOTION 1: I move that the Commission overturn the Executive Director's determination that Special Condition 19.F.1. applies to the Respondents' discovery of the 22 Native American burial sites and that the discovery is significant.

STAFF RECOMMENDATION OF DENIAL:

Staff recommends a **NO** vote. Failure of the motion results in adoption of the following resolution and findings, and means that the Respondents must comply with the requirements of Special Condition 19.F.1. This motion passes only by an affirmative vote of a majority of Commissioners present.

RESOLUTION ON APPLICATION OF SPECIAL CONDITION 19.F.1.:

The Commission hereby affirms the Executive Director's determination that Special Condition 19.F.1. does apply and that Respondents must therefore prepare a written mitigation plan in accordance with the provisions of Special Condition 19.C. for the review and approval of the Executive Director pursuant to the requirements of Special Condition 19.F.1., as well as fully comply with all other requirements of 19.F.1 and 19.F.2.

MOTION 2: I move that the Commission issue Cease and Desist Order No. CCC-02-CD-05 pursuant to the staff recommendation.

STAFF RECOMMENDATION OF APPROVAL:

Staff recommends a **YES** vote. Passage of this motion will result in the issuance of the proposed cease and desist order. This motion passes only by an affirmative vote of a majority of Commissioners present.

RESOLUTION TO ISSUE CEASE AND DESIST ORDER:

The Commission hereby issues Cease and Desist Order No. CCC-02-CD-05 set forth below and adopts the findings set forth below to require Respondents to cease and desist from any non-compliance with the terms and conditions of the Permit, as amended; and from undertaking any further work at the site until they bring themselves into full compliance with the Permit.

IV. PROPOSED FINDINGS

A. Interpretation of Special Condition 19.F.

To adopt the cease and desist order, the Commission must find that the Respondents have failed to comply with the Permit, as discussed more fully below, in Section IV.B. Respondents admit that they have not complied with Special Condition 19.F.1. of the Permit. Respondents assert that this condition does not apply and that the Executive Director is misinterpreting the condition. Respondents have asked that the Commission review the Executive Director's interpretation of Special Condition 19.F. The Commission finds that the Executive Director's application of 19.F.1. to Respondent's discovery of 22 Native American grave sites is accurate and consistent with the intent of the Permit.

Special Condition 19.F. states:

F. Discovery of Cultural Resources/Human Remains During Post Archaeological Testing Construction Activities

- (1) *If additional or unexpected archaeological features are discovered during site preparation, grading, and construction activities for approved development other than the archaeological investigation, all work shall be temporarily halted in the vicinity of the discovery site while the Respondents comply with the following:*

The archaeologist, in consultation with the Native American monitor, shall sample, identify and evaluate the artifacts as appropriate and shall report such findings to the Respondents, the City and the Executive Director. If the archaeological resources are found to be significant, the archaeologist, in consultation with the Native American monitor, shall determine appropriate actions/recommendations, and shall submit those recommendations/appropriate actions in writing to the Executive Director, the applicant and the City. The archaeologist shall also submit the recommendations/appropriate actions for the review and approval of the Executive Director and shall be prepared in accordance with the provisions outlined in Special Condition 19.C. above. Any recommended changes to the proposed development or the mitigation measures identified in the final plan required by Special Condition 19.C. shall require a permit amendment unless the Executive Director determines that a permit amendment is not required.

Development activities may resume if the cultural resources are not determined to be 'important' as defined by the California Environmental Quality Act (CEQA).

- (2) *Should human remains be discovered on-site during the course of site preparation, grading, and construction activities, immediately after such discovery, the on-site City-selected archaeologist and Native American monitor shall notify the City of Seal Beach, Director of Development Services and the County Coroner within 24 hours of such discovery, and all construction activities shall be temporarily halted in the vicinity of the discovery site until the remains can be identified. The Native American group/person from the Juaneno/Acjachemem, Gabrieleno/Tongva, or Luiseno people designated or deemed acceptable by the NAHC shall participate in the identification process. Should the human remains be determined to be that of a Native American, the permittee shall comply with the requirements of Section 5097.98 of the Public Resources Code. Within (5) calendar days of such notification, the director of*

development services shall notify the Executive Director of the discovery of human remains.

The heading of Special Condition 19.F. includes "Discovery of Cultural Resources." This demonstrates that the Commission intended this condition to address the additional or unexpected discovery of cultural resources. Cultural resources include human remains and sites associated with human activity. NAHC's Glossary of Archaeological Terms defines "cultural resource" as relating "to remains and sites associated with human activity or activities or elements or areas of natural landscape which (sic) traditional cultural significance." It is apparent that, based upon Respondents' pre-construction archaeological investigation, the discovery of 22 sets of human remains during the grading of the Project Site was additional and unexpected. Further, there is a consistent pattern to the location, position and orientation of each set of remains. The grave sites have been discovered on the western rim of a mesa formation, in a fetal position, facing west (with one exception where the body is positioned face down).³ This pattern demonstrates a deliberateness to the burial and a potential spiritual process of burial. The MLD and Tribal Chairperson of the Gabrieleno/Tongva Tribal Council Anthony Morales has stated that areas of discovery of the remains are cemeteries. (EXHIBIT G) Rob Wood, of NAHC, has also opined that the site of the discovery is a burial ground.⁴ Thus, the Native American grave sites constitute a burial ground. A burial ground is clearly a cultural resource as it is an area of human activity. Thus, the human remains and the burial ground are cultural resources. The reference to cultural resources in the heading of Special Condition 19.F indicates that it applies to the discovery of cultural resources. Accordingly, 19.F. applies to the Respondents' discovery of the 22 grave sites.

Subsection F.1. of Special Condition 19.F. addresses the discovery of additional or unexpected archaeological features, while subsection F.2. addresses how individual remains will be handled. The 22 sets of Native American remains and burial ground were not expected and far exceed the few cultural resources that were known at the time the Permit was approved. The Respondents assert that subsection F.1. does not apply because the discovered human remains are not archeological features. The archeological feature that has been discovered is a burial ground. The NAHC Glossary defines "feature" as "[a] large, complex artifact or part of a site such as a hearth, cairn, housepit, rock alignment or activity area." A burial ground is an activity area. Both the MLD and NAHC support this position. Accordingly, the remains constitute a burial ground and therefore, subsection F.1. applies to the discovery of the remains.

³ See Commission Response to Respondents' Defense No. 3, Section VI. , page 18.

⁴ Oral communication to staff, September 17, 2002.

The Respondents also assert that subsections F.1. and F.2. cannot simultaneously apply to a discovery. They assert that only the requirements of subsection F.2. and Public Resource Code (PRC) Section 5097.98 (EXHIBIT H) apply when human remains are discovered and that they have fully complied with these requirements by preparing a plan for the treatment and disposition of the remains. Subsection F.2. addresses how human remains will be handled and refers to PRC Section 5097.98, which addresses reinterment of Native American human remains. Compliance with subsection F.1. does not affect compliance with subsection F.2. Rather, subsection F.1. requires that the Respondents address the discovery of the burial ground and other cultural resources while subsection F.2. addresses how the Respondents will deal with individual remains. These two provisions are not mutually exclusive.

The Commission also finds that the burial ground is a significant archaeological feature. The NAHC has also concluded that this archaeological feature is significant. Therefore, under Special Condition 19.F.1., the archaeologist in consultation with the Native American monitor is required to recommend appropriate actions to address the burial ground to the Executive Director, Respondents, and the City of Seal Beach, and to submit to the Executive Director for review and approval the recommendations in the form of a mitigation plan under Special Condition 19.C.

B. Basis for Issuance of the Cease and Desist Order

The statutory authority for issuance of this Cease and Desist Order is provided in Section 30810 of the Coastal Act, which states, in relevant part:

- (a) If the Commission, after public hearing, determines that any person...has undertaken, or is threatening to undertake, any activity that... is inconsistent with any permit previously issued by the Commission, the Commission may issue an order directing that person...to cease and desist.*
- (b) The cease and desist order may be subject to such terms and conditions as the Commission may determine are necessary to ensure compliance with this division, including immediate removal of any development or material...*

The Commission finds that Respondents have violated the Coastal Act by failing to fully comply with the terms and conditions of the Permit, including Special Condition 19.F.1, as discussed above in Section IV.A. The Commission finds that both subsections of 19.F. apply to Respondents' discovery of the 22 Native American grave sites, and that this discovery is significant. Therefore, Respondents are required to prepare a mitigation plan to address these cultural resources pursuant to subsection F.1., in addition to preparing a treatment plan

for the Native American remains pursuant to the requirements of subsection F.2. To date, Respondents have undertaken development pursuant to the Permit without complying with the requirements of subsection F.1. Therefore, the Commission finds that Respondents have undertaken and are continuing to threaten to undertake development inconsistent with the Permit. Accordingly, this CCDO is authorized by Coastal Act Section 30810.

C. Chronology, Background and Administrative Resolution Attempts

On September 9, 1998, the Commission approved the Permit authorizing among other development, a 70 single-family lot residential subdivision in Seal Beach, Orange County. The initial permittee, Hellman Properties subsequently transferred 18.4 acres W.L. Homes dba John Laing Homes. Thus, both Hellman Properties and John Laing Homes are permittees. Hellman continues to own other property addressed by the Permit.

On July 17, 2002, Staff became aware of the discovery of Native American human remains from a report of the discovery prepared by the City. Subsequent reports document continuing discoveries of remains and other cultural resources, primarily on the site of the 70 single-family lot subdivision owned by John Laing Homes.

At a meeting on August 15, 2002, Staff and Respondents discussed the requirements of Special Condition 19.F. of the Permit. Staff advised Respondents of the requirement to halt work in the vicinity of the discoveries of Native American human remains or other cultural resources, the likely significance of the cultural resources that have been discovered at the Project Site, and the need to submit the reports and analyses required by Special Condition 19.F. Respondents replied that construction grading was halted within 100 feet of the burial sites and that the reports and analyses were being prepared.

On September 6, 2002, Staff sent a letter to Respondents regarding their compliance with the requirements of Special Condition 19.F. of the Permit. Staff directed Respondents to halt all grading and construction activity and discontinue any excavation and recovery that may impact Native American human remains and other cultural resources until the Executive Director has approved a written mitigation plan. Staff requested that Respondents submit a schedule for completion of the mitigation plan. Finally, Staff requested that Respondents provide Staff by September 18, 2002, with a written explanation of their interpretation of the requirements of Special Condition 19.F., and the reasons why the remains should not be considered significant.

On September 12, 2002, Staff met with Respondents regarding their compliance with the requirements of Special Condition 19.F. At this meeting, Staff expressed serious concerns regarding Respondents' compliance with the terms and conditions of the permit. Staff indicated that in light of the potential significance of the Native American human remains and other cultural resources that have been discovered, Respondents should prepare a mitigation plan pursuant to Special Condition 19.F.1. Respondents asserted that the requirements of Special Condition 19.F.1. had not been triggered and that they were following the requirements of Special Condition 19.F.2. They did not express any intention to discontinue grading or excavating the remains and other cultural resources. Respondents expressed the opinion that the presence of 18 sets of remains⁵ at the Project Site does not mean the Project Site was a Native American burial ground. In addition, although Ms. Madrid reported that no artifacts had been recovered at the Project Site, artifacts had in fact been recovered at the Project Site.⁶

On September 12, 2002, Staff sent a letter to Respondents urging them to halt all grading and construction activity that could potentially disturb known and potential Native American human remains and other cultural resources. (EXHIBIT I) Staff also requested that Respondents refrain from exhuming any additional remains and other cultural resources until the issue of Respondents' compliance with Special Condition 19.F. of the Permit is resolved.

On September 16, 2002, Staff was informed by the City of Seal Beach that four additional sets of Native American human remains had been exhumed and that excavation had continued in the past week despite Staff's requests for cessation of activity. The MLD and the Native American monitor also informed Staff that Respondents were not complying with their recommendations and were continuing to grade in the vicinity of the discoveries of the remains.

Therefore, on September 16, 2002, Staff attempted to contact Respondents by telephone, and sent by facsimile an NOI letter informing Respondents of Staff's intent to issue an EDCDO to compel Respondents to temporarily halt all work potentially impacting the archaeological resources while the archaeologist, in consultation with the Native American monitor investigates the cultural resources and archaeological features discovered and reports their findings to the Executive Director, Respondents, and the City of Seal Beach. Staff also noted that there are additional requirements of Special Condition 19.F.1. that follows submittal of this report. Staff provided Respondents with the opportunity to avoid the issuance of an EDCDO by providing a written assurance to Staff by 5:00 p.m. that all grading and construction activity would be immediately halted and that Respondents would fully comply with the requirements of Special Condition 19.F.

⁵ Only 18 sets of remains had been discovered at the time.

⁶ See discussion of Susan Hori letter dated October 1, 2002 on page 13.

Although Staff received a letter from Respondents' agent Mr. Bartlett later that evening, it did not meet the standard set forth in Staff's NOI letter. Although, Mr. Bartlett's letter indicated that work would be "voluntarily and temporarily" stopped, it did not indicate Respondents' intention to fully comply with the requirements of Special Condition 19.F.1. prior to resuming work.

On September 17, 2002, Staff spoke with Mr. Rob Wood of NAHC regarding the Native American human remains and other cultural resources that have been discovered at the Project Site. The purpose of contacting NAHC was to investigate Respondents' assertion that the Project Site may not be a Native American burial ground and that a burial ground would not be considered an archaeological feature. Mr. Wood provided a preliminary opinion that (1) the Project Site is a burial ground, and (2) that a burial ground, with or without the presence of other artifacts, would be considered a cultural resource and an archaeological feature.

On September 17, 2002, Staff received a letter from Ms. Madrid that did not reference Mr. Bartlett's letter nor agree to cease grading and construction activity at the Project Site in accordance with the NOI letter. Rather than agreeing to comply with the terms and conditions of the permit, Ms. Madrid asserted that Special Condition 19.F.1. was not applicable and thus no mitigation plan was required. Ms. Madrid stated that "the excavation and removal of the human remains discovered at the site is being conducted in accordance with Special Condition 19.F.2." and "...John Laing Homes intends to continue implementation of the recommendations provided under PRC Section 5097.98." Ms. Madrid's letter confirms Respondents' refusal to comply with Special Condition 19.F.1. despite repeated cautions from Staff that such non-compliance violates the terms and conditions of the Permit.

On September 18, the Executive Director issued to the Respondents EDCDO No. ED-02-CD-01 pursuant to his authority under PRC Section 30809.

On October 1, 2002, Staff met with Respondents, their attorney Susan Hori, Mr. Bartlett, archaeologists from EDAW, Inc.⁷, the City of Seal Beach and NAHC. The meeting consisted of a discussion of the interpretation of Special Condition 19.F. Respondents reiterated their assertion that they had complied with the provisions of Special Condition 19.F. by preparing a treatment plan for the Native American human remains pursuant to the requirements of Special Condition 19.F.2. Respondents inquired whether they could request Staff to schedule a Commission hearing in order to seek input from the Commission regarding the Executive Director's interpretation of the requirements of Special Condition 19.F. Staff responded that they would consider Respondents' request.

⁷ EDAW, Inc. was under contract with the City of Seal Beach to be the consulting archaeologist.

In a letter dated October 1, 2002, Ms. Hori responded to EDCDO No. ED-02-CD-01. (EXHIBIT E) Ms. Hori summarized points made in a letter from EDAW archaeologist James Cleland Ph.D. to Staff dated September 30, 2002. In that letter, Dr. Cleland responded to questions raised in Staff's letter to Respondents dated September 6, 2002. Dr. Cleland concluded that although "archaeological artifacts" other than the Native American human remains and associated grave goods have been discovered during grading, these materials are "simply an extension of the sample that was recovered during the testing and mitigation programs" and "are not considered significant beyond what we already know about the sites." Dr. Cleland also opined that apart from the associated grave goods, the artifacts recovered do not require preparation of a mitigation plan pursuant to Special Condition 19.F.1. and that "Collection and mapping of these materials during monitoring is sufficient to complete the mitigation requirement under CDP Condition 19.F.1." Ms. Hori restated Respondents' interpretation of the requirements of 19.F. and asserted that they have complied with the requirements of Special Condition 19.F.2. and PRC Section 5097.98. Ms. Hori also summarized Respondents' efforts to prepare a plan for the treatment and disposition of the remains pursuant to Special Condition 19.F.2. She noted that the implementation of the treatment plan is exempt from CEQA and the Coastal Act and asserted that human remains are not archaeological features.

On October 16, 2002, Staff, including the Executive Director, met with Respondents, Ms. Hori and Mr. Bartlett. In this meeting, the Executive Director indicated that he had determined that the archaeological resources at the site were significant, and therefore Respondents' responsibilities under 19.F.1. were triggered. Respondents indicated that they accepted their responsibility to prepare a mitigation plan to deal with the Native American burial ground and other cultural resources discovered at the Project Site pursuant to the requirements of Special Condition 19.F.1. Respondents also expressed a willingness to consider preserving a portion of the Project Site for reintering the remains and associated grave goods. Respondents acknowledged that they have discovered a concentration of burial sites in a partially graded area of the Project Site where there are several partially exhumed sets of remains (hereinafter referred to as "Site A"). It was agreed that the Executive Director would contact NAHC Executive Secretary Larry Myers to ask him to facilitate a negotiation between Respondents and the MLD and the Native American monitors regarding the preparation of mitigation plan pursuant to the requirements of Special Condition 19.F.1. and the reinterment issue. Staff would also participate in the process.

On October 18, 2002, Staff issued to Respondents a NOI letter to Commence a CCDO Proceeding due to their failure to comply with the requirements of Special Condition 19.F.1. The NOI letter noted that since the initiation of grading of the Project Site on July 8, 2002, Respondents had fully exhumed approximately 18 sets of Native American human remains and partially exhumed 4 sets of remains.

The NOI letter asserted that Native American human remains are “cultural resources” and trigger the requirements of 19.F.1. and 19.C. The NOI letter also stated it is clear that the 20 sets of Native American human remains constitute a burial ground, which is a “cultural resource” and an “archaeological feature”, as these terms are used in 19.F.1.

On October 29, 2002, Staff met with Respondents and Ms. Hori, the EDAW archaeologists, the City of Seal Beach, NAHC, the MLD and Native American monitors regarding the contents of a mitigation plan prepared pursuant to Special Condition 19.F.1. There was further debate regarding the requirement for the plan under Special Condition 19.F. and whether the pre-construction archaeological investigation plan prepared pursuant to 19.C. was adequate. Potential contents of the mitigation plan discussed included the following: (1) cataloging discoveries made to date, (2) gathering additional ethnographic data regarding the Project Site to draw conclusions about the historic use of the Project Site, (3) identification of additional testing necessary at the Project Site, (4) an analysis of the mitigation options available to avoid or minimize the impact of the development upon the cultural importance of the Project Site, and (5) selection of the mitigation measures with an explanation of the selection process.

There followed a discussion regarding measures necessary to protect the partially exhumed remains from vandalism and the weather. Respondents refused to commit to a delivery date for the mitigation plan, but agreed to provide a schedule for submittal.⁸ Respondents asserted that the requirements of Special Condition 19.F.2. and PRC Section 5097.98 enables them to reinter the Native American human remains in Gum Grove Park immediately in order to protect them from the elements and vandalism.⁹ The MLD and Native American monitors objected and expressed their desire for the preservation of Site A for reintering the exhumed remains. Finally, plans were made for a field meeting at the Project Site to discuss security concerns and protecting the remains from the weather while the mitigation plan is being prepared and implemented.

On November 4, 2002, Staff met with Respondents, Mr. Bartlett, the EDAW archaeologists, and the MLD and Native American monitors at the Project Site to discuss actions necessary to protect the exhumed and partially exhumed Native American human remains from the vandalism and the weather. Also discussed were measures to implement a Storm Water Pollution Protection Program.

On November 7, 2002, Staff granted Ms. Hori's request for an extension of the deadline for submittal of the Statement of Defense (EXHIBIT J) in response to

⁸ No schedule has been submitted since the meeting.

⁹ Gum Grove Park is owned by Hellman Properties, not John Laing Homes, and is currently leased to the City of Seal Beach. Ownership of Gum Grove Park is being transferred to the City pursuant to the terms and conditions of CDP No. 5-97-367, as amended.

the NOI letter to Commence CCDO Proceedings from November 7, 2002 until November 12, 2002.

On November 8, 2002, Staff issued amendment A1 to EDCDO No. ED-02-CD-01 (EXHIBIT K) to authorize Respondents to undertake temporary measures at the Project Site necessary to protect from the weather and insure the security of the partially exhumed Native American human remains and other cultural resources, including the Native American burial grounds. The amendment also authorized implementation of the approved Storm Water Pollution Prevention Plan to prevent erosion. To the extent that these temporary measures are not authorized under the Permit, Staff also issued Emergency CDP No. 5-02-377-G (EXHIBIT L) to authorize the work described in the amendment. Staff, Respondents, the archaeologists, and the MLD and Native American Monitors were in agreement regarding the temporary measures.

D. CEQA

The Commission finds that issuing an order the Respondents to cease and desist from non-compliance with the requirements of the terms and conditions of CDP No. 5-97-367, as amended, is consistent with the requirements of the California Environmental Quality Act (CEQA) of 1970 and will have no significant adverse effects on the environment, within the meaning of CEQA. The proposed CCDO is exempt from the requirement for the preparation of and Environmental Impact Report, based upon Sections 15060(c)(3), 15061(b)(3), 15307, 15308 and 15321 of CEQA Guidelines.

V. ALLEGATIONS

- (1) W.L. Homes, LLC dba John Laing Homes, LLC and Hellman Properties, LLC are the owners of Tracts 15381 and 15402 in the City of Seal Beach, County of Orange. **(Admitted)**
- (2) Since the initiation of construction grading at the Project Site, Respondents have discovered 22 sets of Native American human remains. **(Admitted)**
- (3) On September 18, 2002, Respondents received a facsimile of EDCDO No. ED-02-CD-01. In response to Staff's request on September 16, 2002, Respondents halted work at the Project Site. **(Admitted)**
- (4) Respondents have failed to comply with the terms and conditions of CDP No. 5-97-367, as amended, including Special Condition 19.F. **(Denied)**
- (5) Native American human remains are a cultural resource, as that term is used in Special Condition 19.F.1. of the Permit. **(Denied)**

- (6) Twenty-two sets of Native American human remains constitute a Native American burial ground, which is a cultural resource and an archaeological feature, as those terms are used in Special Condition 19.F.1. of the Permit. **(Denied)**
- (7) The additional and unexpected discovery of 22 sets of Native American human remains at the Project Site triggers the requirements of both Special Conditions 19.F.1. and 19.C., as well as 19.F.2. **(Denied)**

VI. RESPONDENTS' STATEMENT OF DEFENSE AND COMMISSION RESPONSE

Respondents' Defense No.1:

Respondents dispute that human remains constitute an "archaeological feature" as that term is used in Special Condition 19.F.1. They also assert that human remains are not "artifacts". Respondents further dispute that human remains trigger the requirements of 19.F.1. and 19.C.

Commission Response:

Staff has never asserted that individual sets of human remains are an "archaeological feature" or "artifacts". What staff has asserted is that Native American human remains are a cultural resource and that a Native American burial ground is a cultural resource and an archaeological feature, as those terms are used in Special Condition 19.F.1. Accordingly, Special Condition 19.F.1. is triggered. This position is supported by NAHC. In a letter to Staff from NAHC Executive Secretary Larry Myers dated September 30, 2002, Mr. Myers states:

Native American human remains and associated grave goods are without question culturally and spiritually significant, and as stated above, recognized as such by Federal and State Law, including the California Environmental Quality Act (CEQA). (EXHIBIT M)

Respondents also note that in the same letter, Mr. Myers states, "The NAHC does not believe Native American Human remains should be referred to as 'archaeological resources.'" Respondents seem to rely on the assertion that the remains do not rise to the level of "archaeological resources" and therefore should not be accorded the special treatment required by Special Condition 19.F.1. In fact, the Commission does not assert that Native American human remains are "archaeological resources" but rather that they are cultural resources, and that a Native American burial ground is a cultural resource and an archaeological feature. Mr. Myers's statements reflect NAHC's view that the term "archaeological resources" is not appropriate for human remains because it does not adequately convey the spiritual and cultural importance of the remains. The

NAHC does, however, clearly view human remains as cultural resources as that term is used in 19.F.1, as evidenced by Mr. Myers' letter. Mr. Myers goes on to say that NAHC believes that a written plan should be formulated for the protection of the remains and associated grave goods that have been exhumed to date, and the others that potentially remain there.

As previously noted, Staff asserts that Special Condition 19.F. was intended to address the discovery of cultural resources, as indicated by the title. Staff asserts that it was the Commission's intention for subsection F.1. to address the additional or unexpected discovery of culturally related items including Native American human remains and such archaeological features as a Native American burial ground. Twenty-two sets of Native American human remains constitute a burial ground, which is an archaeological feature, as that term is used in Special Condition 19.F.1. As previously noted, NAHC's Glossary of Archaeological Terms defines "cultural resource" as relating "to remains and sites associated with human activity or activities or elements or areas of natural landscape which (sic) traditional cultural significance." The Glossary also defines "feature" as "[a] large, complex artifact or part of a site such as a hearth, cairn, housepit, rock alignment or activity area."

Respondents' Defense No. 2:

Respondents assert that since the Native American human remains were initially discovered on July 8, 2002, they have fully complied with Special Condition 19.F. by satisfying the requirements of subsection F.2. of the Special Condition. Respondents assert that subsection F.1. was designed to deal with the discovery of additional and unexpected archaeological features and artifacts, not the discovery of human remains. They assert that only the requirements of subsection F.2. and PRC Section 5097.98 apply when human remains are discovered and that they have fully complied with these requirements by preparing a plan for the treatment and disposition of the remains. Respondents also note that implementation of PRC Section 5097.98 is exempt from the requirements of the Coastal Act.

Commission Response:

The Commission does not assert that Respondents have not complied with the requirements of Special Condition 19.F.2., or that it is inappropriate to comply with the requirements of that subsection or that it has regulatory authority over the implementation of the requirements of PRC Section 5097.98. Rather, both subsections of Special Condition 19.F. are triggered by the discovery of the remains and the burial ground, and therefore the Respondents must comply with both subsections of 19.F. Contrary to the Respondents interpretation, the subsections of 19.F. are not mutually exclusive and should be read in tandem.

EDAW, in consultation with the MLD, the Native American monitors, and NAHC has prepared a detailed plan entitled Hellman Ranch: Treatment Plan for Native American Human Remains and Associated Burial Artifacts pursuant to the requirements of Special Condition 19.F.2. Staff notes, however, that although Respondents claim the Treatment Plan describes the measures agreed upon by the interested parties for the “treatment and disposition” of the Native American remains, the Plan does not specify where or how the remains will be reinterred. Furthermore, as previously noted the Treatment Plan addresses how the remains will be handled but it does not address the treatment of the Native American burial ground. This is required by Special Condition 19.F.1.

Respondents’ Defense No. 3:

Respondents dispute Staff’s assertion that 22 sets of Native American human remains constitute a Native American burial ground and that a burial ground is an archaeological feature. In support of this assertion, Respondents cite EDAW’s finding that the artifacts discovered at the Project Site indicate prehistoric occupation between 5,000 and 2,800 years ago (3,000 BC to 600 BC), and between 2,100 and 600 years ago. They also assert that because the remains have not been dated, the exact age of the remains cannot be definitely determined and may range over 4,000 years or more.

Commission Response:

At the meeting with Staff on October 16, 2002, John Laing Homes Southern California President Steve Kabel noted that there appears to be a consistent pattern in the location of the Native American burial sites and the position and orientation of the human remains. This pattern clearly indicates deliberateness and potentially a ritual process with spiritual significance. He indicated that the remains have been found on the westerly rim of mesas at the Project Site and that with the exception of one set of remains, they have been exhumed in a fetal position “facing the sunset” (west).

In a letter from the MLD and Tribal Chairperson of the Gabrieleno/Tongva Tribal Council Anthony Morales to John Laing Homes Vice President of Operations Richard C. Nelson dated September 6, 2002, Mr. Morales states “Considering the close proximity of the burials and the large number of burials unearthed thus far in Site A, it is the opinion of the Tongva Nation that Site A is one of these cemeteries. Due to the concentration of burials in the area, we have reason to believe that there are more burials that will be discovered.” (EXHIBIT G)

Respondents’ Defense No. 4:

Respondents assert that Staff’s interpretation of Special Condition 19.F. is illogical insofar as it would require that individual sets of Native American human

remains be treated differently as a Native American burial ground. Respondents also assert that Staff is attempting to substitute its jurisdictional authority to determine the treatment and disposition of the Native American human remains for that of NAHC and the MLD.

Commission Defense:

The Commission is not attempting to assert its jurisdictional authority over the treatment and disposition of the Native American human remains pursuant to the requirements of PRC Section 5097.98. PRC Section 5097.98 clearly states that the MLD designated by NAHC has the exclusive authority to make recommendations to the landowner or his or her authorized representative regarding the treatment and disposition of the remains and associated grave good with appropriate dignity. Furthermore, the Commission does not dispute that implementation of PRC Section 5097.98 is exempt from the requirements of the Coastal Act. The Commission is not attempting to regulate implementation of PRC Section 5097.98. Rather, the Commission has a statutory mandate to enforce compliance with the terms and conditions of the Permit, including the compliance with Special Conditions 19.F.1, which addresses the discovery of additional cultural resources and archaeological features include a burial ground.

As previously noted, the Commission's position is that 22 sets of Native American human remains constitutes a Native American burial ground and that a burial ground or cemetery is a cultural resource and an archaeological feature, as those terms are used in Special Condition 19.F.1. Both the MLD and the NAHC support this position. Irrespective of the treatment and disposition of the individual sets of Native American human remains, Staff has consistently taken the position that a Native American burial ground is a significant cultural resource and an archaeological feature that requires the preparation of a mitigation plan pursuant to the requirements of Special Condition 19.F.1. Special Condition 19.F.1. requires that the mitigation plan be prepared in accordance the provisions in Special Condition 19.C. Mitigation measures may include "capping of archaeological sites, data recovery, and curation of archaeological resources as defined by the California Environmental Quality Act (CEQA)." An important function of the plan would be to protect potential Native American human remains that have not yet been exhumed. As previously noted, both NAHC and the MLD agree that the Project Site (or at least Site A) is a burial ground and that a mitigation plan should be prepared in accordance with the requirements of Special Condition 19.F.1.

VII. CEASE AND DESIST ORDER

Staff recommends that the Commission issue the following cease and desist order:

Pursuant to its authority under PRC Section 30810, and in light of the fact that there have been cultural resources, and additional or unexpected archaeological features discovered at the site, and the Executive Director's determination that such resources are significant, the California Coastal Commission hereby orders W.L. Homes, LLC dba John Laing Homes, LLC and Hellman Properties, LLC, their agents and any persons acting in concert with any of the foregoing to cease and desist from: undertaking any activity in non-compliance with the terms and conditions of Coastal Development Permit (CDP) No. 5-97-367 (Hellman Properties, LLC) including all grading and construction activities at the Hellman Ranch site potentially impacting cultural resources, including Native American human remains or archaeological features, including burial grounds, until the following requirements are satisfied:

- (1) The archaeologist consults with the Native American monitor and determines the "appropriate actions/recommendations" to be taken, as required by Special Condition 19(F)(1) of the Permit;
- (2) The archaeologist prepares and submits recommendations/appropriate actions in writing to the Executive Director, Respondents and the City of Seal Beach. The archaeologist must also submit a mitigation plan (prepared in accordance with the provisions outlined in Special Condition 19.C. of the Permit to the Executive Director, the State Office of Historic Preservation and the appropriate Native American person/group from the Juaneno/Acjachemem, Gabrielino/Tongva, or Luiseno people designated or deemed acceptable to the Native American Heritage Commission (NAHC);
- (3) These recommendations/appropriate actions are submitted to the Executive Director for review and approval, and such approval is granted; and
- (4) The permit is amended to authorize implementation of the recommendations/appropriate actions, unless the Executive Director determines that a permit amendment is not required, as provided by Special Condition 19.F.1. of the Permit.

This cease and desist order shall not prohibit activities at the Project Site specifically authorized by the Executive Director under an emergency coastal development permit issued to protect public health and safety.

IDENTIFICATION OF THE PROPERTY

The property that is the subject of this cease and desist order is described as follows:

Tracts 15381 and 15402 in the City of Seal Beach, County of Orange.

DESCRIPTION OF UNPERMITTED DEVELOPMENT

Respondents' failure to comply with the terms and conditions of CDP No. 5-97-367, as amended, including Special Condition 19.F.

TERM

This order shall remain in effect permanently unless and until rescinded by the Commission.

FINDINGS

This order is issued on the basis of the findings adopted by the Commission on December 10, 2002, as set forth in the attached document entitled "Proposed Findings for Cease and Desist Order No. CCC-02-CD-05."

COMPLIANCE OBLIGATION

Strict compliance with this order by all parties subject thereto is required. Failure to comply strictly with any term or condition of this order including any deadline contained in this order or in the above required coastal development permit(s) as approved by the Commission will constitute a violation of this order and may result in the imposition of civil penalties of up to six thousand dollars (\$6,000) per day for each day in which such compliance failure persists. Deadlines may be extended by the Executive Director for good cause. Any extension requests must be made in writing to the Executive Director and received by Commission staff at least 10 days prior to expiration of the subject deadline.

APPEAL

Pursuant to PRC § 300803(b), any person or entity against whom this order is issued may file a petition with the Superior Court for a stay of this order.

EXHIBITS

- A. Coastal Development Permit (CDP) No. 5-97-367 (Hellman Properties, LLC).
- B. Map of Tracts 15381 and 15402 from CDP No. 5-97-367-A1.
- C. Letter from Dave Bartlett, Dave Bartlett Associates, to Lisa Haage and Karl Schwing and Teresa Henry dated September 16, 2002.
- D. Letter from Joanie Madrid, John Laing Homes to Karl Schwing dated September 17, 2002.
- E. Executive Director Cease and Desist Order No. ED-02-CD-01.
- F. Notice of Intent to Commence Commission Cease and Desist Order Proceeding dated October 18, 2002.
- G. Letter from Most Likely Descendant and Tribal Chairperson of the Gabrieleno/Tongva Tribal Council Anthony Morales to Richard C. Nelson John Laing Homes dated September 6, 2002.
- H. California Public Resources Code Section 5097.98.
- I. Letter from Karl Schwing to Jerry Tone, Hellman Properties and Terry Crowther, John Laing Homes dated September 12, 2002.
- J. Respondents' Statement Of Defense dated November 12, 2002 (as redacted)*
- K. Amendment A1 to Executive Director Cease and Desist Order No. ED-02-CD-01.
- L. Emergency CDP No. 5-02-377-G (Hellman Properties, LLC, W.L. Homes, LLC dba John Laing Homes).
- M. Letter from Larry Myers, Native American Heritage Commission to Karl Schwing dated September 30, 2002.

*In order to protect the confidentiality of the location of the Native American human remains, pursuant to §§ 6254(r) and (k)) of the Public Resources Code some documents attached to this cease and desist order as exhibits have been redacted.