

PLANNING COMMISSION

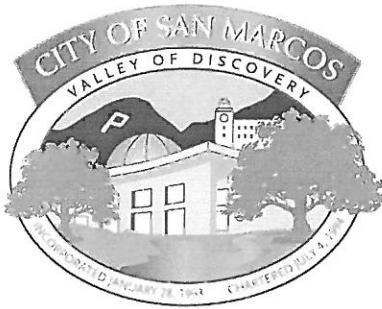
ADDITIONAL ITEM ADDED AFTER DISTRIBUTION OF PACKET

1. Staff Memo dated 9/21/14
2. Letter from San Luis Rey Band of Mission Indians -
dated 8/28/14
3. Staff Response to Comment 9/21/14
4. U.S. Fish & Wildlife email comments - 8/27/14

Agenda # 2 (San Marcos 13, 4C)

Date 9/21/14
Time 6:10 PM





Memorandum

TO: Planning Commission
FROM: Planning Division
DATE: 9/2/14
SUBJECT: P14-0013, Resolution PC 14-4428 (TSM 14-003)
San Marcos 13, LLC

Revise the following conditions:

Condition J3:

Street trees along Oleander Avenue shall have a minimum size of twenty-four (24) inch box and comply with the City Minimum Tree Standards for height and spread at time of installation. The spacing of street trees along Oleander Avenue shall be a minimum of thirty (30) feet, and shall be located whereas not to interfere with the line-of-sight for vehicles at the intersection of "Street A" and Oleander Avenue.

shall be revised to:

Street trees along Oleander Avenue shall have a minimum size of twenty-four (24) inch box and comply with the City Minimum Tree Standards for height and spread at time of installation. The spacing of street trees along Oleander Avenue shall be a ~~minimum~~ maximum of thirty (30) feet, and shall be located whereas not to interfere with the line-of-sight for vehicles at the intersection of "Street A" and Oleander Avenue.

Condition Q11:

Side yards shall have a minimum of five (5) feet of level open space between the building footprint and any slope or retaining wall in conjunction with the required building setback of ten (10) feet for a side yard in the Single-Family Residential (R-1-10) Zone.



shall be revised to:

Side yards shall have a minimum of ~~five (5)~~ three (3) feet of level open space between the building footprint and any slope or retaining wall in conjunction with the required building setback of ten (10) feet for a side yard in the Single-Family Residential (R-1-10) Zone.

Add condition prior to issuance of grading permit:

The applicant shall enter into a pre-excavation agreement with a Luiseño tribe to provide for the following: 1) a culturally affiliated Luiseño Native American monitor during initial grading activities; 2) the return of cultural items that may be found during project construction; and 3) proper treatment of any burial remains found.

Add condition during the construction phase:

Initial grading activities shall be monitored by a qualified archaeologist and Luiseño Native American monitor. In the event that buried archaeological resources are exposed during project construction, the archaeologist and Luiseño Native American monitor shall have the authority to halt and redirect construction until the significance of the find can be determined. If the discovered archaeological resources display the potential to be significant, the archaeologist shall notify the City of San Marcos immediately. Recommendations could include preparation of a treatment plan, which would require recordation; collection and analysis of the discovery; preparation of a technical report; and curation of the collection and supporting documentation at a qualified institution, or return of cultural items per a pre-excavation agreement with a Luiseño tribe. At the completion of the activity that requires an archaeological monitor, the archaeological monitor shall submit a monitoring report including a daily log of all monitoring activity and possible recommendations to the Planning Director for proper treatment of any burial remains found.

SAN LUIS REY BAND OF MISSION INDIANS

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August 28, 2014

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VIA ELECTRONIC MAIL
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**RE: COMMENTS ON THE NOTICE OF INTENT TO ADOPT A MITIGATED
NEGATIVE DECLARATION FOR THE SAN MARCOS 13, LLC
PROJECT IN SAN MARCOS, CA (ND 14-005; CASE NO. P14-0013:TSM
14-003, CUP 14-007)**

Dear Mr. Pedersen:

We, the San Luis Rey Band of Mission Indians (“Tribe” or “SLR”) thank you for the opportunity to submit the following comments regarding the San Marcos 13, LLC Mitigated Negative Declaration (“MND”) hereinafter referred to as the San Marcos 13 Project (“Project”). The Project is requesting the City of San Marcos (“City”) to approve a Tentative Subdivision Map for a 14-lot subdivision of a 3.95 acre property for single family housing. The Project is located on the south side of Oleander Avenue, west of Smilax Road in San Marcos, and is commonly known as Assessor’s Parcel Numbers 217-234-04 and 217-231-05 (“Project Location and/or Project Area”). SLR respectfully requests that the following recommended mitigation measures be considered during the public review and analysis of this Project given the potential negative impact to our sacred Native American cultural resources.

As you are aware, we are a northern San Diego County Tribe whose traditional territory includes Camp Pendleton, the current cities of Oceanside, Carlsbad, Vista, San Marcos and Escondido, as well as the unincorporated areas in northern San Diego County, such as the communities of Fallbrook and Bonsall. We are resolute in the preservation and protection of cultural, archaeological and historical sites within all these jurisdictions.

It is important for the City to understand that the Tribe does not oppose the proposed development and/or improvements contemplated within the MND generally; however, we are passionately opposed to any plans that may damage or destroy any potentially significant cultural or sacred sites and human remains that may be located within the Project’s proposed location. After the Tribe’s review of the MND, the Tribe believes that at the minimum, mitigation measures for cultural resources are justified and necessary to be in compliance with the California Environmental Quality Act (“CEQA”). Without the incorporation of measures of

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mitigation for cultural resources, as detailed below, the Tribe firmly believes that the potential significant impacts associated with the construction and development of the Project will NOT have been mitigated to reduce or eliminate the significant or potentially significant effects to our sacred cultural resources.

I. THE PRESENCE OF A LUISEÑO NATIVE AMERICAN MONITOR DURING ALL EARTH DISTURBING ACTIVITIES IS JUSTIFIED, AND AS SUCH, NATIVE AMERICAN MONITORS SHOULD BE CONTRACTED WITH DURING THIS PROJECT.

Luiseño Native American monitors should be utilized during all ground and/or earth disturbing activities contemplated by the MND. Extensive ground disturbing activities are proposed for this Project that extend past the previous residence's footprint and, as such, Luiseño Native American monitors must be present to adequately protect and preserve our Native American cultural resources that may lay beneath the surface. Much of the proposed construction at the Project will involve extensive excavation and/or disturbance of native soils, as reflected in the geological investigation (dated 12-19-13) prepared by GeoTek, Inc.. Having a Luiseño Native American monitor present during all ground disturbing activities must be a requirement.

Moreover, the assumption that there will be no impact on Native American cultural resources during the development of this project appear to be based solely on three factors: the property has been previously disturbed by the construction of the previous residence, the Project Location is adjacent to constructed residential homes, and no known cultural resource sites exist within the parameters of the Project Location. It does not take into consideration, as the geotechnical investigation reflects, that the prior disturbance to the Project location was the construction of a single family dwelling unit and the placement of fill-soils. In fact, according to the GeoTek report, all soils will need to be excavated, including the alluvium soils¹, to native material and then be re-compacted for the Project Location to be suitable for development as proposed. There is extensive excavation required for this Project Location; excavation that necessarily will impact native soils. While it appears that these earth disturbing activities would extend onto areas previously affected, the vast majority of the Project Location has not been disturbed and may hold evidence of our ancestors' previous habitation and/or burial grounds.

An area's status as being previously developed no longer predicates whether inadvertent discoveries of Native American remains or cultural resources will or will not be made. In fact, within the last few years, many sites within the City of San Marcos' jurisdiction have been discovered, re-located, updated and/or determined to be unique archaeological resources. These locations are not limited to undeveloped areas, but rather have been in both previously developed and undeveloped areas. This isn't a project that is staying with the parameters of the existing footprint. This Project must go outside the existing footprint in order to achieve the applicant's goal of subdividing these two parcels into a 14-lot subdivision. Such pre-conceived notions that no negative impact will occur because the land had been previously disturbed, however, can no

¹ Alluvium soils preserve and maintain our ancestors' tools of habitation and burial areas.

longer be concluded. The previous development of an area, does not, in itself, refute the possibility that cultural resources, or archaeological resources, will be discovered during redevelopment activities. This is not only evidence in the City's own jurisdiction, but was witnessed by the travesty at La Plaza de Cultura Y Artes in Los Angeles in 2010.

Furthermore, if the Tribe had been consulted prior to the release of the MND, SLR would have shared with the City that a Luiseño sacred site is within close proximity to the Project Location. A block away from this Project was a Luiseño habitation and tool processing site. Just because there is no "recorded cultural resource site" within a project's specific location, does not mean that there will be no impact to Native American cultural resources. In fact, from the environmental documents made available to the Tribe, it is currently unknown if the original residence, or the surrounding residences, were constructed while an archaeologist and/or Native American monitor was present and/or constructed prior to the adoption of CEQA, but there is a multitude of sites with close proximity to this Project Location, including one just a block away. This area is significant and sacred to the Luiseño people. A Luiseño Native American monitor should be present.

The experience of finding "inadvertent discoveries" of sacred sites and/or Native American burial sites within previously developed areas is becoming more and more common place. Indeed, inadvertent discoveries of Native American sacred artifacts have been discovered in San Marcos within the past few years in a previously, heavily developed urban area of the City that had been constructed in the early 1960's. These sacred artifacts were found just below the surface during "redevelopment and reconstruction" activities, where the developers were excavating many feet of soils that had been classified as "fill" down to native soils, similar to what the applicant is proposing for this Project. Therefore, given the depths of excavation proposed by this Project and the number of sacred sites which are known to exist within close proximity to the Project Location, potentially significant adverse impacts and/or effects may occur if Native American monitors are not allowed to be present during the Project's earth disturbing activities. Hence, the Tribe requests that a Luiseño Native American monitor be contracted on this Project for all earth disturbing activities.

Furthermore, if cultural resources are discovered during construction, all earth-moving activity within and around the immediate discovery area must be diverted until the Native American monitor and the archaeologist can assess the nature and significance of the find. Therefore, the Native American and archaeologist must be given joint-authority to divert or halt ground disturbing operations when cultural resources are discovered so each may access the nature and significance of such find.

II. A PRE-EXCAVATION AGREEMENT MUST BE COMPLETED BETWEEN THE APPLICANT AND THE TRIBE AS AN ADDITIONAL MEASURE OF MITIGATION

The Tribe requests that the City require the Applicant to enter into a Pre-Excavation Agreement, otherwise known as a Cultural Resources Treatment and Monitoring Agreement, with the Tribe prior to any commencement of earth disturbing activities and/or the issuance of

any City permits. This agreement will contain provisions to address the proper treatment of any cultural resources or Native American human remains inadvertently uncovered during the course of the Project. The Pre-Excavation Agreement should be entered into prior to any ground-disturbing activities for this Project. The agreement will outline the roles and powers of the Native American monitors and the archaeologist, if applicable. Such an agreement is necessary, as the City may be aware, to guarantee the proper treatment of cultural resources or Native American human remains displaced during a project development. The Tribe requests that the Pre-Excavation Agreement be an additional mitigation measure, or in the alternative, a prerequisite to any City permits being issued for the Project associated with this MND.

III. THE MND SHOULD REFLECT THAT ANY AND ALL UNCOVERED ARTIFACTS OF NATIVE AMERICAN CULTURAL IMPORTANCE SHOULD BE RETURNED TO THE TRIBE, OR THE MOST LIKELY DESCENDENT, IF APPLICABLE, AND NOT BE CURATED.

It is the religious belief, custom, and practice of the Tribe to repatriate all cultural resources that are unearthed during ground disturbing activities. Therefore, any plans to curate any such items would blatantly disregard the respect due to these cultural resources. Instead, any such items should be returned to the Tribe, or the Most Likely Descendant, if applicable. The Tribe considers all cultural items found in this area to belong to their ancestors, and the ancestors of their sister tribes. Hence, any additional mitigation measures should reflect that any and all uncovered artifacts of Native American cultural importance should be returned to the Tribe, or the Most Likely Descendant, if applicable, and not be curated.

IV. THE LUISEÑO NATIVE AMERICAN MONITOR SHALL BE PRESENT AT THE PROJECT'S PRECONSTRUCTION MEETING.

In addition, the Luiseño Native American monitor must be present at all preconstruction meetings. The Luiseño Native American monitor must be permitted to consult with relevant contractors concerning excavation schedules and safety issues, as well as consult with the archaeologist, concerning the proposed archaeological techniques and/or strategies for the Project. Therefore, an additional mitigation measure and/or pre-requisite requirement to the City issuing the necessary permits for the Project, shall be requiring that a Luiseño Native American monitor be present during the Project's preconstruction meeting.

V. IF UNIQUE ARCHAEOLOGICAL RESOURCES AND/OR SACRED SITES ARE INADVERTENTLY DISCOVERED DURING GROUND DISTURBING ACTIVITIES, THEN AVOIDANCE IS THE PREFERRED MITIGATION MEASURE BY THE TRIBE AND A RE-DESIGN OF THE PROJECT SHOULD BE SERIOUSLY CONSIDERED AND WEIGHED BY THE CITY AND APPLICANT AS A VIABLE ALTERNATIVE.

Many times when a unique archaeological resource or sacred site is discovered inadvertently during ground disturbing activities, the lead agency and/or contracted archaeologist's first response and solution is to initiate a data recovery plan. A data recovery plan

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should not be the first and preferred mitigation measure. Instead, avoidance of the sacred resource should be the primary mitigation measure contemplated by the City and the Applicant. As such, re-design of the Project then should be seriously considered and weighed by the City and the applicant as a viable alternative to the proposed Project. Avoidance as a primary mitigation measure is supported by CEQA, the Native American Heritage Commission and the Luiseño community. Therefore, the Tribe respectfully requests that the MND reflect the City's commitment to protecting unique archaeological resources and/or sacred sites through avoidance and project re-design when feasible.

VI. THE TRIBE MUST BE CONSULTED IF A SIGNIFICANT CULTURAL RESOURCE AND/OR UNIQUE ARCHAEOLOGICAL RESOURCE IS DISCOVERED DURING GROUND DISTURBING ACTIVITIES.

If a significant cultural resource and/or unique archaeological resource are unearthed during ground disturbing activities for this Project, the Tribe respectfully requests that they be notified and consulted with in regards to the respectful and dignified treatment of those resources. The Tribe's preference will always be for avoidance and that the resource be protected and preserved in perpetuity. If however, a data recovery plan is authorized by the City as the Lead Agency, the Tribe respectfully requests that as a condition of any authorization, the Tribe be consulted regarding the drafting and finalization of any such recovery.

In addition, when cultural resources are discovered during the Project, if the archaeologist collects such resources, a Luiseño Native American monitor must be present during any testing or cataloging of those resources. Moreover, if the archaeologist does not collect the cultural resources that are unearthed during the ground disturbing activities, the Luiseño Native American monitor, may in their discretion, collect said resources and provide them to the Tribe for respectful and dignified treatment in accordance with the Tribe's cultural and spiritual traditions.

Lastly, if Native American remains and/or associated burial goods are unearthed during the Project, and prior to a Most Likely Descendant being determined by the Native American Heritage Commission, it is the Tribe's request that the ancestral remains be kept *in situ* (in place), or in a secure location in close proximity to their discovery and that a forensic anthropologist perform their analysis of the remains on-site in the presence of a Luiseño Native American monitor. Any transportation of the ancestral remains would be considered by the Tribe as disrespectful and undignified treatment. Therefore, the Tribe requests that in addition to the strict adherence to the protocol stated in the California Health and Safety Code Section 7050.5 and California Public Resource Code Section 5097.98, if Native American remains are discovered, then the Native American remains shall be kept in situ, or in a secure location in close proximity to where they were found, and that the analysis of the remains occur only on-site in the presence of a Luiseño Native American monitor.

VII. LASTLY, ONLY "CLEAN FILL" SHOULD BE UTILIZED DURING THIS PROJECT

The Tribe is opposed to any undocumented fill being used during the proposed development of the Project area. The Tribe requests that any proposed use of fill be clean of cultural resources and documented as such. It has been a practice of many in the construction profession to utilize fill materials that contained cultural resources from other "unknown" areas thereby contaminating the potential cultural landscape of the area being filled. This type of fill material is unacceptable. Moreover, if the fill material is to be utilized from areas of the Project Site, then we ask that that fill be analyzed and confirmed by an archeologist and/or Luiseño Native American monitor that such fill material does not contain cultural resources. A requirement that fill material be absent of any and all cultural resources should therefore be included as an additional mitigation measure of the Final MND.

VIII. CONCLUSION

In conclusion, the San Luis Rey Band of Mission Indians appreciates this opportunity to provide the City of San Marcos with our comments on the San Marcos 13, LLC Mitigated Negative Declaration. The Tribe is optimistic that the City will adopt the mitigation measures for Cultural Resources as herein requested and that they will appear in the Final MND. As always, we look forward to working with the City to guarantee that the requirements of the CEQA are rigorously applied to this MND.

Sincerely,



Merri Lopez-Keifer
Tribal Legal Counsel

cc: Mel Vernon, SLR Captain
Carmen Mojado, SLR Secretary of Government Relations and President of
Saving Sacred Sites

Planning Commission September 2, 2014
San Marcos 13 ND 14-005 Response to Comment

The City is in receipt of a joint email response to ND 14-005 dated August 27, 2014 from the U.S. Fish & Wildlife Service and the California Department of Fish & Wildlife. The City Planning Division offers the following response to comment:

The biological assessment conducted for the site by Brian Smith & Associates (February 25, 2014) identified non-native grassland on the project site. The Multiple Habitat Conservation Plan (MHCP, Volume 1, 2003) requires that non-native grassland (NNG) be mitigated as a ratio of 0.5:1. However, the MHCP also states in Appendix K in order to conserve grasslands or require mitigation for impacts to grasslands, the MHCP must clearly define and map annual grasslands as opposed to agricultural, ruderal, or disturbed lands. Historically, different biologists have mapped these vegetation communities in different ways. For example, some areas mapped as annual grasslands may be actually be fallow agricultural fields. Consequently, subarea plan implementation must include unambiguous mapping of grasslands, as distinct from non-regulated vegetation communities.

Mapping conducted for City of San Marcos Subarea identifies the site as Urban/Disturbed on the City of San Marcos MHCP Vegetation Communities/Focused Planning Area Map (2009). The site is not located within or adjacent to areas designated as Final or Proposed Critical Habitat by the U.S. Fish & Wildlife Services.

In addition to above, the City has through its draft Subarea Plan determined that NNG shall be mitigated only when said project site is located within a Focused Planning Area (FPA). The project site is not located within an FPA, not part of a Biological Resource Core, not part of a pre-approved mitigation area, not part of a wildlife movement corridor or linkage and therefore does not contribute to the long-term survival of a sensitive species. In addition, the site is not adjacent to, or contiguous with, undisturbed lands. The site is not part of a primary linkage between the northern and southern populations of the coastal California gnatcatcher, and does not support any sensitive species as evidenced by survey results for the Thread-Leaved and Orcutt's Brodiaea conducted April 30, 2014 by Everett & Associates.

Given the above, the project is consistent with the MHCP which identifies the site as Disturbed/Urban within the City of San Marcos Subarea vegetation mapping, and project impacts to non-native grassland are not considered significant for this reason in addition to the reasons outlined above. No mitigation is required above and beyond bird surveys that shall be conducted should construction occur during the Migratory Bird Nesting season.

Pedersen, Norman

From: Zoutendyk, David [david_zoutendyk@fws.gov]
Sent: Wednesday, August 27, 2014 7:45 AM
To: Pedersen, Norman
Subject: San Marcos 13 Draft MND Comments

In reply, please refer to:

FWS/DFW-14B0379-14CPA0304

Mr. Pedersen,

The California Department of Fish and Wildlife (Department) and U. S. Fish and Wildlife Service (Service), collectively referred to as the Wildlife Agencies, have reviewed the Draft Mitigated Negative Declaration (MND) for the San Marcos 13 project that was received by our offices on August 11, 2014. The project details provided herein are based on the information provided in the Draft Mitigated Negative Declaration (MND) and associated documents, and our knowledge of sensitive and declining vegetation communities in the County of San Diego and our participation in regional conservation planning efforts, including the City of San Marcos' Multiple Habitat Conservation Plan (MHCP) Subarea Plan. The Wildlife Agencies have concerns regarding the potential effects of this project on sensitive biological resources and offer recommendations to assist the City of San Marcos (City) in its analysis of direct and indirect project impacts for the MND.

The project proposes the subdivision of a 3.95-acre property into 14 lots with associated infrastructure and a Conditional Use Permit (CUP) to allow for lot averaging in the Single-Family Residential (R-1-10) Zone. The property consists of two vegetation categories: non-native grassland (3.89 acres) and disturbed land (0.08 acre). The entire property will be impacted by the proposed development.

A focused survey for thread-leaved brodiaea (*Brodiaea filifolia*) was conducted on April 28, 2014. No brodiaea were detected.

The draft MND has determined that impacts to 3.89 acres of non-native grassland would not be considered significant and that therefore no mitigation would be required. However, non-native grassland is considered a sensitive vegetation community in the MHCP. Therefore, to be consistent with the approved MHCP (Volume I, March 2003), the project should mitigate for the impacts to non-native grassland at a ratio of 0.5:1 at a conservation bank or other off-site parcel located within the MHCP planning area.

We appreciate the opportunity to comment on this draft MND. The comments and recommendations provided are based on our knowledge of sensitive and declining vegetation communities in the County of San Diego and our participation in regional conservation planning efforts. We are hopeful that further coordination between the Wildlife Agencies and City will result in the adoption of our recommendations for the biological resources that would be affected by this project. Should you have any questions regarding this letter, please contact Janet Stuckrath (Service) at (760) 431-9440 or Eric Hollenbeck (Department) at (858) 467-2720.

David

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