



CARMEL AREA WASTEWATER DISTRICT

Special Board Meeting

3945 Rio Road, Carmel, CA 93923

August 1, 2023
Tuesday
9:00AM

Presentation

James Gilpin, Partner of Best Best & Krieger, Law Firm concerning general issues and considerations for a local public agency considering the possibility of eminent domain/condemnation proceedings.



BBK

BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW

Carmel Area Wastewater District

Eminent Domain Presentation

About Best Best & Krieger LLP



BBK has over 250 attorneys in 12 offices nationwide focused on being trusted advisors to our clients.

BBK attorneys are experienced in addressing the issues that water projects implicate including environmental, water rights, water quality, infrastructure development, finance, property acquisition, public contracting, and construction dispute resolution.

About Our Eminent Domain Practice



Jim Gilpin

Partner

James.Gilpin@bbklaw.com

619-525-1341

Our Eminent Domain practice group provides comprehensive guidance on all aspects of eminent domain and inverse condemnation, regulatory takings, and litigating disputes when they arise.

We have decades of experience representing all types of public agencies, including cities, counties, transportation agencies, school districts, water districts, and other special districts in property acquisitions for public projects and infrastructure development.

About Eminent Domain

Eminent Domain is the right of government to take **Private Property** for **Public Use** after paying **Just Compensation**.



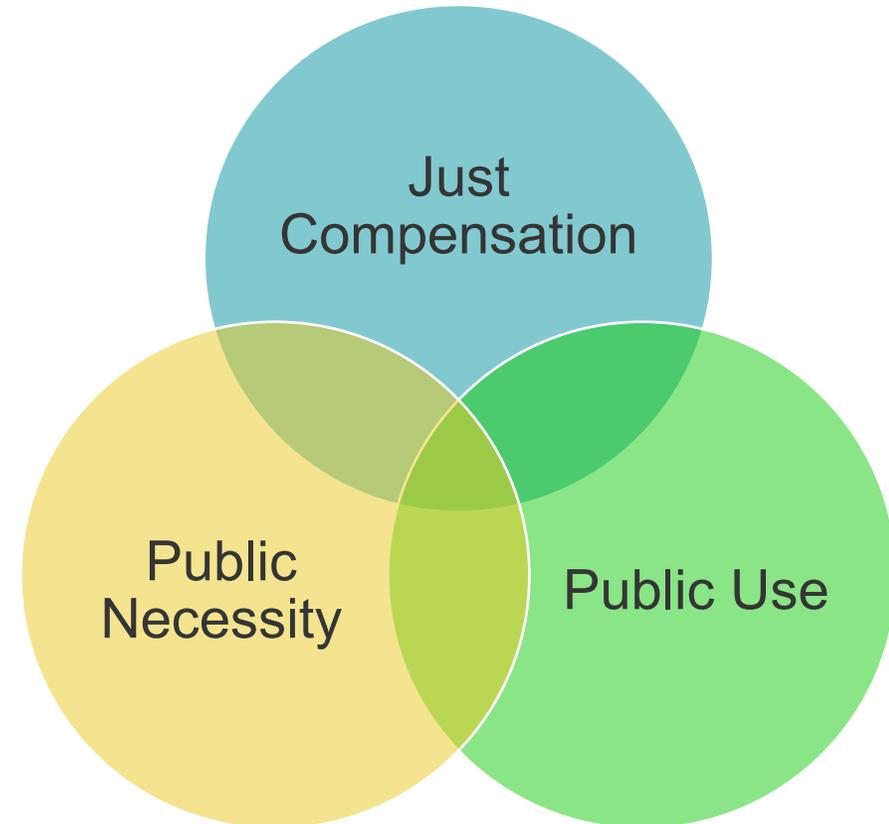
Power to Condemn



- The power of eminent domain may be exercised to acquire property for a particular use **only by a person authorized by statute to exercise the power of eminent domain** to acquire such property for that use.
 - Code of Civil Procedure § 1240.020.

General Requirements

- Public Use
- Public Necessity
- Just Compensation



- Property may be acquired by eminent domain only for a public use.
 - Cal. Const., art. I, § 19
 - Code Civil Procedure § 1240.010.

Future Use



Any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire property to be used in the future for that use, but property may be taken for future use only if there is a reasonable probability that its date of use will be **WITHIN SEVEN YEARS** from the date the complaint is filed or within such longer period as is reasonable.

Public Necessity



A public agency may not exercise the power of eminent domain unless:

- (1) The Public Interest and Necessity require the Project;
 - (2) The Project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury; and
 - (3) The Property sought to be acquired is necessary for the Project.
- Code Civil Procedure § 1240.030

Just Compensation



Fair Market Value is “. . . the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.”

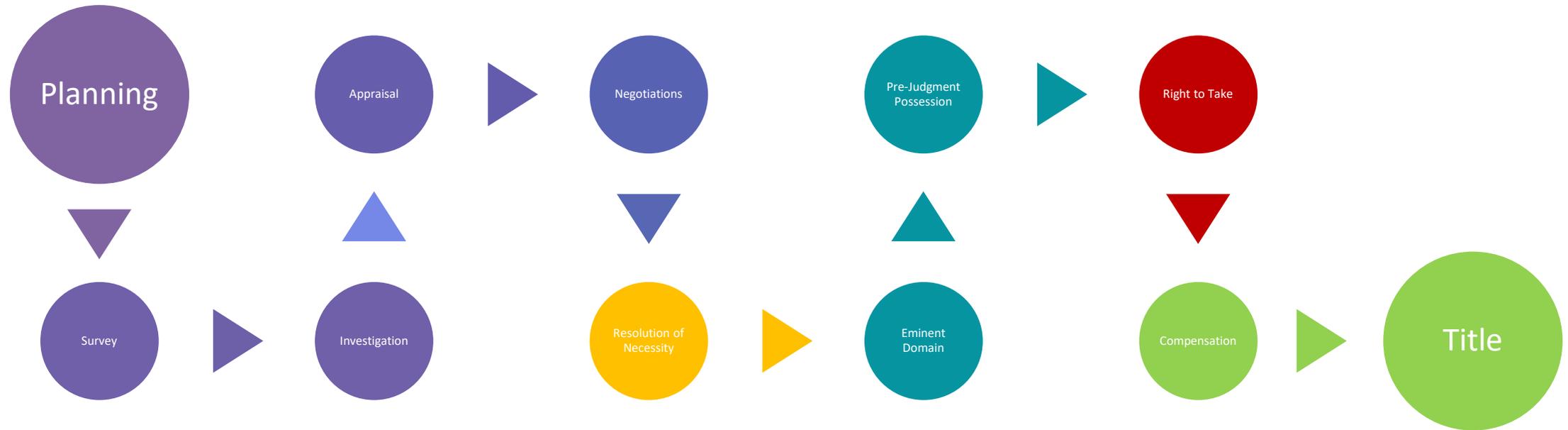
Fair Market Value must be assessed as of a **Date Of Value**.

Compensable Interests

- Real Property
 - Part Taken
 - Damage to Remainder
 - Benefits
- Improvements Pertaining to Realty
- Goodwill



Property Acquisition Process



Identify and Assess Potentially Affected Properties

1. The Project must be planned or located in the manner that will be most compatible with the greatest public good and the least private injury.
2. The Property sought to be acquired must be necessary for the Project.



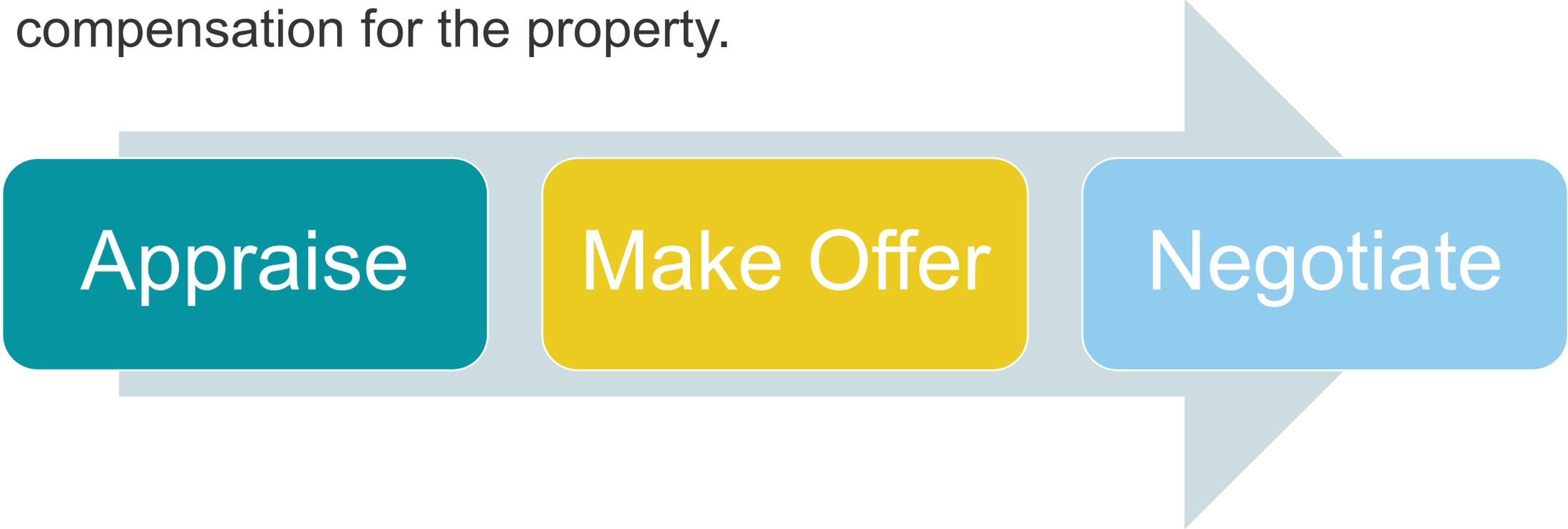


Code of Civil Procedure § 1245.010

Any person authorized to acquire property for a particular use by eminent domain may enter upon property to make photographs, studies, surveys, examinations, tests, soundings, borings, samplings, or appraisals or to engage in similar activities reasonably related to acquisition or use of the property for that use.

Acquisition Process

Before negotiations are initiated a public entity must have the property appraised and establish an amount it believes to be just compensation for the property.



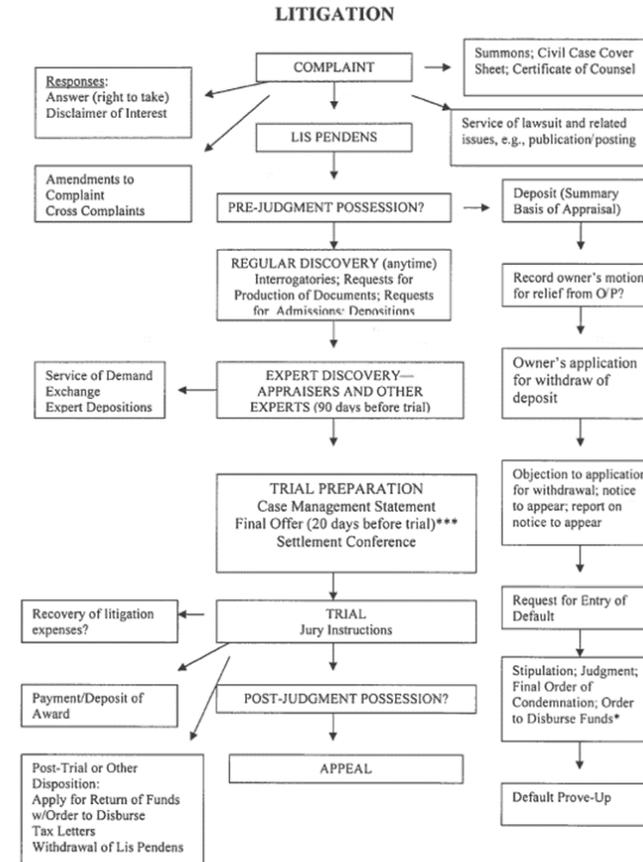
Appraise

Make Offer

Negotiate

Eminent Domain Process

- Resolution of Necessity
- Eminent Domain Complaint
- Deposit Probable Compensation
- Prejudgment Possession
- Right-to-Take Trial
- Compensation Trial
- Final Order of Condemnation



* Board action required
** Board action may be required
*** Board action required (approval of Final Offer or Settlement)

Resolution of Necessity



- If the agency proceeds with eminent domain, the first step is for agency staff to request authority from the legislative body to file a condemnation action. The approval from the legislative body is called a "Resolution of Necessity."

Owner's Right to Appear & Be Heard



- The owner must be given notice and an opportunity to appear before the legislative body when it considers whether to adopt the Resolution of Necessity.
- The owner or its representatives can raise any objections to the Resolution of Necessity and the condemnation either orally before the legislative body or in writing to the legislative body.
- The owner usually must object in writing within 15 days of mailing of the notice of the hearing on the resolution.

Eminent Domain Complaint



- If the legislative body adopts the Resolution of Necessity, the agency can file a complaint in court to acquire title to the property upon payment of the property's fair market value.
 - The agency is the plaintiff.
 - Anyone with a legal interest in the property, generally determined from a title report on the property (including tenants or mortgage holders), are named as defendants.

Deposit Probable Compensation



- The agency can deposit the amount it believes is the "probable amount of compensation" with the Court or the State Treasurer when the complaint is filed.
- A deposit must be made if the agency is seeking to acquire possession of the property before agreement is reached or a decision is made on the fair market value to be paid.
- The deposit sets the Date of Value. Alternatively, the Date of Value will be either the date the ED Proceeding was filed, or the date of Trial.
- The owner has the right to ask the court to require the agency to increase the amount deposited if the amount deposited is less than the "probable amount of compensation."

Prejudgment Possession



- In some cases, the agency may decide it needs possession of the property before the property's fair market value is finally determined.
- In such a case, the agency must apply to the court for an order of prejudgment possession to allow it to take possession and control of the property prior to resolution of the property's fair market value.

Withdrawal of Deposit



- Subject to the rights of any other persons having a property interest (such as a lender, tenant, or co-owner), the owner may withdraw the amount deposited before the eminent domain action is completed.
- If the owner withdraws the amount on deposit, the owner may still seek a higher fair market value during the eminent domain proceedings, but may not contest the right of the agency to acquire the property.

Right-to-Take Challenges



- Anyone with an interest in the property can challenge the agency's right to acquire or condemn the property.
- Right-to-Take challenges are usually be decided by the judge, not a jury.
- If the Right-to-Take challenges are successful, the Eminent Domain action will be dismissed.

Valuation Exchange

- The parties exchange valuation information before trial, i.e., name of appraiser and appraisal reports.
- After exchange, the parties typically depose the other party's appraiser.



Final Offers and Demands



- California law provides for the Agency to make a FINAL OFFER and for the Property Owner to make a Final Demand at least 20 days prior to the Compensation Trial.
- If the case goes to trial, the FINAL OFFER and FINAL DEMAND will be compared by the Court to the jury verdict to assess whether the Owner is entitled to recover Litigation Expenses.

Compensation Trial



- The Agency and Property Owner present valuation evidence to the jury who determines the Fair Market Value to be paid for the Property.

Eminent Domain Judgement



- Costs
- Litigation Expenses
- Abandonment
- Final Order of Condemnation
- Relocation Benefits – Displaced Person/Business



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ATTORNEYS AT LAW

Questions?

DISCLAIMER: BB&K presentations and webinars are not intended as legal advice. Additional facts, facts specific to your situation or future developments may affect subjects contained herein. Seek the advice of an attorney before acting or relying upon any information herein. Audio or video recording of presentation and webinar content is prohibited without express prior consent.

CLOSED SESSION

A. Conference with Legal Counsel-Potential Litigation

Significant exposure to litigations pursuant to paragraph (2) of subdivision (d) Government Code section 54956.9-one potential case

B. Public Employee Performance Evaluation

Pursuant to Government Code Section 54957.6 the Board will meet in closed session to consider a Personnel Matter: **General Manager Performance Evaluation**

*Reconvene Into Open
Session As Directed By
The Board*

Staff Report



TO: Board of Directors

FROM: Barbara Buikema, General Manager

DATE: August 1, 2023

SUBJECT: TBC Communications Contract For Pescadero Sewer Relocation Project (#21-05)

RECOMMENDATION

It is recommended that the Board of Directors adopt a resolution authorizing the General Manager to execute a professional services agreement with TBC Communications in an amount not to exceed \$20,000 for public and project related communications services on the Pescadero Sewer Relocation Project (Project #21-05).

DISCUSSION

The District engaged the services of TBC Communications in 2022-2023 for the initial public outreach efforts with the Pescadero Sewer Relocation Project. The principal, Steve Thomas, has attended meetings with District staff, MNS Engineering, and the site tour during this past year.

The engineering on this project is now at a point where the plan is to reach out to each homeowner individually to discuss what their needs are with this project. Homeowners will be offered the option of an ejector pump or the option of remaining on the existing line. To that end, TBC Communications has worked on individualized homeowner outreach materials and will be essential in moving this project forward. Staff believes an early and individualized approach and continued public outreach will provide greater transparency with this neighborhood in addressing their concerns. TBC will be instrumental in partnering with the District to provide a successful outcome.

FINANCIAL

There is sufficient funding in the 2023-24 Capital Budget
Budget = \$500,000

RESOLUTION NO. 2023-50

A RESOLUTION AUTHORIZING THE GENERAL MANAGER TO EXECUTE A CONTRACT FOR A PROFESSIONAL SERVICES AGREEMENT WITH TBC COMMUNICATIONS IN AN AMOUNT NOT TO EXCEED \$20,000 FOR PUBLIC AND PROJECT RELATED COMMUNICATIONS SERVICES FOR THE DISTRICT ON THE PESCADERO SEWER RELOCATION PROJECT (PROJECT #21-05)

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WHEREAS, the District has a need for public relations assistance in dealing with both capital projects and operations and management initiatives; and

WHEREAS, TBC Communications has performed well for the District in 2022-23 and has a firm grasp of the local area and the issues this projects face in the community; and staff is confident of their abilities; and

WHEREAS, the District benefits from professional public relations services in dealing with and completing complex and sensitive projects; and

WHEREAS, the Pescadero Sewer Relocation Project is at a point in the engineering design that it is prudent to reach out to the neighborhood and obtain a case-by-case understanding of neighborhood needs as regards this project.

NOW, THEREFORE, BE IT RESOLVED by the Board of Directors of the Carmel Area Wastewater District that it does hereby authorize the General Manager to enter into a professional services agreement, with a not to exceed amount of \$20,000, with TBC Communications for Public Relations/Management Services .

PASSED AND ADOPTED at a regular meeting of the Board of Directors of the Carmel Area Wastewater District duly held on August 1, 2023, by the following vote:

AYES: BOARD MEMBERS:
NOES: BOARD MEMBERS:
ABSENT: BOARD MEMBERS:
ABSTAIN: BOARD MEMBERS:

Ken White, President of the Board

ATTEST: _____
Domine Barringer, Secretary of the Board

Staff Report



TO: Board of Directors

FROM: Barbara Buikema, General Manager

DATE: August1, 2023

SUBJECT: Carmel Meadows Peer Review (Project #19-03)

RECOMMENDATION

It is recommended that the Board of Directors adopt a resolution authorizing the General Manager to engage a consultant to conduct an engineering Peer Review regarding the Carmel Meadows Pipeline Project (“Project”) and authorize the General Manager to sign a contract in an amount not to exceed \$150K (Project #19-03).

DISCUSSION

The Planning Commission “tabled” the Project at the July 13, 2023 meeting and requested we return with further information in two weeks. The Planning Commission raised concerns that the District had not looked at other engineering alternatives and that the neighborhood residents needed to be provided more information and their concerns taken into consideration more fully. Staff is proposing a third party engineering Peer Review of the Project. The return time table of two weeks to the Planning Commission is not feasible because the Peer Review will take more than two weeks. The Peer Review should assist in addressing concerns raised by the Planning Commission and the neighborhood.

We are finding that with Ms. Lather’s 30+ years in the industry she knows a great number of people – however, she does not have any connection with Carollo Engineers. The preliminary plan is to have Carollo review the feasibility of a Replace-in-Kind alternative in comparison to the Project as well review other options that Carollo might determine to be feasible in comparison to the Project. While we do not have a formal proposal at this time, we have spoken with Carollo and sent them a considerable amount of information and believe the parameters described above are accurate. Carollo will be included at any public meetings regarding the Project or the Peer Review.

To further assist in the earnest effort of the District to work with the constituents of this neighborhood and provide transparency regarding the Peer Review, the General Manager has requested retaining a professional engineering consultant to provide oversight and advice to the General Manager while leading this Peer Review, which will be independent of District engineering staff. This request is taken up in a separate staff report.

We are requesting a not to exceed contract of \$150,000 for the Peer Review. We may need to expand on that budget down the road should we need to request additional services. Also, please understand that the Proposed Project is the only project that has a full design and approved Initial Study Mitigated Negative Declaration in effect. Any other option will require additional engineering and California Environmental Quality Act work.

CEQA

The Peer Review is statutorily exempt from CEQA under CEQA Guidelines section 15262. The Peer Review is a feasibility study that will consider the feasibility of potential alternatives to the Project. None of the alternatives that will be analyzed in the Peer Review have been approved, adopted, or funded.

FINANCIAL

There is sufficient funding in the 2023-24 Capital Budget
Budget = \$2,000,000

RESOLUTION NO. 2023-51

A RESOLUTION FOR THE GENERAL MANAGER TO ENGAGE A CONSULTANT TO CONDUCT AN ENGINEERING PEER REVIEW ON CARMEL MEADOWS PIPELINE PROJECT AND AUTHORIZING THE GENERAL MANAGER TO SIGN A CONTRACT IN AN AMOUNT NOT TO EXCEED \$150K PROJECT (PROJECT #19-03)

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WHEREAS, the District Board believes that a third party peer review of the Carmel Meadows Pipeline Project (#19-03) is appropriate given neighborhood comments and permitting difficulties; and

WHEREAS, a third party peer review will be given instruction to review (a) Replace In-Kind Option; (b) Proposed Project as presented to Monterey County Planning Commission; and (c) Provide other potential options if merited; and

WHEREAS, the staff has presented Carollo Engineers as being qualified to provide the services requested given their experience and depth of engineering services they can provide, and it is recommended that a contract in an amount not to exceed \$150,000 be authorized.

NOW, THEREFORE, BE IT RESOLVED by the Board of Directors of the Carmel Area Wastewater District that it does hereby approve of the General Manager entering into a contract with Carollo Engineers in an amount not to exceed \$150,000 for a Peer Review of Carmel Meadows Project (Project # 19-03).

PASSED AND ADOPTED at a regular meeting of the Board of Directors of the Carmel Area Wastewater District duly held on August 1, 2023, by the following vote:

AYES: BOARD MEMBERS:
NOES: BOARD MEMBERS:
ABSENT: BOARD MEMBERS:
ABSTAIN: BOARD MEMBERS:

Ken White, President of the Board

ATTEST:

Domine Barringer, Secretary of the Board

Staff Report



TO: Board of Directors

FROM: Barbara Buikema, General Manager

DATE: August 1, 2023

SUBJECT: Engineering Consultant Services for Carmel Meadows Project #19-03

RECOMMENDATION

It is recommended that the Board of Directors adopt a resolution authorizing the General Manager to engage a consultant to provide engineering services to assist in management of a third party review of Carmel Meadows Pipeline Project in an amount not to exceed \$100,000 (Project #19-03).

DISCUSSION

The District has proposed engaging a third party firm to perform a Peer Review of the Carmel Meadows Pipeline Project. The General Manager will take lead on managing the Peer Review. Because the General Manager is not an engineer, staff requests authorization to retain a consulting engineer for advice on the technical aspects of the Peer Review and to assist in providing oversight of Carollo Engineering.

Staff has made some preliminary outreach efforts to obtain these services; however, we do not yet have a proposal. In the interest of keeping the Peer Review moving forward so that we may return to the Monterey County Planning Commission in a timely manner we are asking the Board to approve this request today. Our staff engineer estimates a budget of \$100K will be sufficient. Staff will return to the Board with the proposal upon its receipt, and we will ask for assistance at public meetings.

FINANCIAL

There is sufficient funding in the 2023-24 Capital Budget
Budget = \$2,000,000

RESOLUTION NO. 2023-52

A RESOLUTION FOR THE GENERAL MANAGER TO ENGAGE A CONSULTANT TO PROVIDE ENGINEERING SERVICES TO ASSIST IN MANAGEMENT OF THIRD PARTY PEER REVIEW OF CARMEL MEADOWS PIPELINE PROJECT IN AN AMOUNT NOT TO EXCEED \$100,000 (PROJECT #19-03)

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WHEREAS, the District has authorized the engagement of a third party engineering firm to provide a Peer Review of the Carmel Meadows Pipeline Project (#19-03) (“Peer Review”); and

WHEREAS, the General Manager will be acting as lead on the Peer Review, but because the General Manager is not an engineer, she will need the services of a qualified engineering consultant to assist management of the Peer Review; and

WHEREAS, a qualified consultant engineer has not yet been identified;

WHEREAS, in the interest of time and to avoid delay in commencing the Peer Review, the Board of Directors authorizes the General Manager to sign a consulting contract with a qualified engineer in an amount not to exceed \$100,000.

NOW, THEREFORE, BE IT RESOLVED by the Board of Directors of the Carmel Area Wastewater District that it does hereby approve of the General Manager entering into a contract for engineering consulting services in an amount not to exceed \$100,000 to assist in management of the Peer Review;

PASSED AND ADOPTED at a regular meeting of the Board of Directors of the Carmel Area Wastewater District duly held on August 1, 2023, by the following vote:

- AYES: BOARD MEMBERS:
- NOES: BOARD MEMBERS:
- ABSENT: BOARD MEMBERS:
- ABSTAIN: BOARD MEMBERS:

Ken White, President of the Board

ATTEST:

Domine Barringer, Secretary of the Board

Adjournment