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Filed..... 06/26/2008
180th Day 12/23/2008
Staff ..... Susan Craig
Staff report prepared 07/17/2008
Staff report approved by ..... Dan Carl
Hearing date..... 08/07/2008

COASTAL DEVELOPMENT PERMIT APPLICATION

Application number.....**3-08-013, Ocean View Plaza**

Applicant.....Cannery Row Marketplace, LLC

Project location.....Along the seaward and inland portions of Cannery Row between Hoffman Street to the north, Monterey Bay to the east, Drake Street to the south, and the Monterey Peninsula Recreation Trail to the west, in the City of Monterey (Monterey County).

Project description.....Mixed use commercial-retail/residential project consisting of: 87,362 sq. ft. of retail and retail support use, including 30,000 sq. ft. of restaurant use; 38 market-rate condominiums; 13 affordable housing units; 8,408 sq. ft. of coastal/community use; 377 parking spaces in garages; an onsite desalination system with seaward (roughly 1,200 feet offshore) intake/discharge components; rehabilitation of the historic Stohan's building as a history center with an adjacent history plaza; replication of an historic utility bridge over Cannery Row; and development of a community park.

File documents.....Coastal Development Permit Application File Number 3-06-065; City of Monterey Cannery Row Land Use Plan

Staff recommendation ...**Denial**

A. Staff Recommendation

1. Summary of Staff Recommendation

The Applicant proposes to construct a mixed-use commercial-retail and residential project on a combined 3.5-acre site consisting of bayside and inland parcels located along Cannery Row in the City of Monterey. The proposed project includes: four new buildings (Buildings A and B, to be located on the bayside parcel; Buildings C and E, to be located on the inland parcel); commercial retail, retail support uses, a retail plaza, and restaurant space on the first floors of Buildings A, B, and E; 38 market-rate condominium housing units on the second and third stories of Buildings A and B; 13 moderate-

income housing units on the second story of Building C; an onsite desalination facility (in Building B) and associated ocean water intake and discharge pipelines extending roughly 1,200 feet seaward of the shoreline; redevelopment of the existing Stohan's building for use as a Cannery Row history center, with an adjacent public history plaza; public viewing areas and a public access promenade located adjacent to Building A and the history plaza, leading down to a 10-foot-wide public access easement along the rocky shoreline; a community park on the inland parcel; and a combined total of 377 garage parking spaces in enclosed garages on both the bayside and inland parcels.

The primary Coastal Act issue with respect to the proposed project is the lack of an available public water supply to serve the proposed project, and the Applicant's proposal to include a desalination facility as part of project as its means of providing adequate water to serve the range of uses proposed. The availability of a public water supply for the project has been an issue since the project's inception. Public drinking water for the project area is managed by the Monterey Peninsula Water Management District (MPWMD) and is provided by the California-American Water Company (Cal-Am), the retail water purveyor for the Cannery Row area. The City of Monterey, however, is currently using its full allotment of water from the MPWMD and additional domestic water from Cal-Am is not available to serve the project's water needs due to restrictions on Cal-Am pumping from the Carmel River and Seaside groundwater basin aquifer, which are the sources of Cal-Am water. In response, a project specific desalination facility is proposed to provide water for the project. Due to Coastal Commission and Monterey County requirements that a desalination plant be publicly owned and operated, the City applied to and received approval from LAFCO to form a Community Services District to operate and manage the proposed desalination plant.

While it is clear that the developer has gone to great lengths to try to address the lack of water available to serve the proposed land-based portion of the development proposed here, it is equally clear that the proposed project cannot be found consistent with the Coastal Act. These inconsistencies are fundamental inasmuch as the project proposes impermissible fill of coastal waters which would result in impacts to marine resources through impingement and entrainment of marine organisms, brine discharge, and seafloor manipulation in order to provide feedwater for the onsite desalination system. In addition, even if these marine resource issues were surmountable, which they aren't, the Applicant cannot provide 100% assurance that the proposed project will not require supplemental Cal-Am water if, for whatever reason, the desalination system does not provide adequate water to otherwise serve the development. It is not that staff expects the desalination system to fail, and can demonstrate conclusively that it will fail. Rather, it is that the Applicant cannot demonstrate conclusively that it won't. In other words, if the proposed desalination water supply does not provide adequate water to serve the development, there will be pressure to use Cal-Am water to supply the development. The proposed project does not include a contingency plan to ensure that any unexpected water supply problems do not exacerbate the tenuous water supply condition for the greater Monterey peninsula area. To the extent such pressure results in Cal-Am water being used to serve the development, the project would result in further degradation of the Seaside Aquifer and the Carmel River systems inconsistent with the Coastal Act. Absent 100% assurance that the project will not so impact these systems, the project cannot be found consistent with the Coastal Act in this respect either. Thus, as proposed, the offshore components of the project involve impermissible fill of coastal waters and adverse impacts to marine life of the Monterey Bay inconsistent

with Coastal Act Sections 30230, 30231, and 30233, potential impacts to the Carmel River and Seaside groundwater basin aquifer inconsistent with Coastal Act Sections 30231, 30240, and 30250, and similar cumulative impacts inconsistent with Coastal Act Sections 30250 and 30254.

In addition to the fundamental water supply and related marine resource inconsistencies, the proposed project also raises Coastal Act issues and inconsistencies with respect to public recreational access, visual resources, community character, natural hazards, historic resources, provision of low cost visitor-serving opportunities, water quality protection, parking and traffic, archaeological resources, and would prejudice the ability of the City to complete its LCP. Coastal Act inconsistencies include a lack of adequate view protection, including along the seaward side of the proposed buildings; inadequate design specificity to maintain Cannery Row's historic community character; a lack of clear and enforceable public use parameters for the community park, history plaza, and history center; inadequate post-construction BMPs necessary to filter and treat all runoff from the site, particularly given the value of the offshore receiving waters (the Monterey Bay National Marine Sanctuary, and the Edward F. Ricketts State Marine Conservation Area); inadequate protection of public parking opportunities; and impacts to public recreational access from new traffic.

Perhaps most importantly, the project does not provide adequate public recreational access. Although the Applicant has provided public access amenities in the form of the proposed inland park, the history plaza, an elevated walkway along the seaward portion of Building A, and a stairway to the rocky shoreline, the proposed project does not include clear and enforceable parameters to ensure their continued availability for public use, including no-cost/low-cost public use, and does not include any developed lateral access along the seaward frontage of Building B. The proposed lateral accessway along Building A provides only limited lateral access and does not provide the possibility for connections along the shoreline up and downcoast. The rocky shoreline easement and the stairways to reach it do not adequately serve to offset the project's lack of lateral access because the rocky shoreline is often subject to tidal influence that is not conductive to providing the type of seaward lateral connectivity envisioned for the Cannery Row area. Without complete developed and continuous lateral access along the seaward side of the site and connectivity up and downcoast, the project as proposed cannot be found consistent with the public access and recreation provisions of the Coastal Act.

In sum, although some components of the project that result in Coastal Act inconsistencies could possibly be rectified by conditions of approval (e.g., providing for a continuous, developed lateral accessway along the seaward side of the site connected to up and downcoast access areas, etc.), the core water supply mechanism presents fundamental Coastal Act inconsistencies that cannot be so fixed. In particular, the offshore components of the project involve impermissible fill of coastal waters that cannot be made by condition to be one of the development types for which fill of coastal waters is allowed. Thus, staff recommends that the Commission deny the coastal development permit application. Motions and resolutions do follow.

2. Staff Recommendation on CDP Application

Staff recommends that the Commission, after public hearing, **deny** the CDP for the proposed development.

Motion. I move that the Commission approve Coastal Development Permit Number 3-08-013 for the development as proposed by the Applicant.

Staff Recommendation of Denial. Staff recommends a **NO** vote. Failure of this motion will result in denial of the coastal development permit and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

Resolution to Deny a Coastal Development Permit. The Commission hereby denies the coastal development permit on the grounds that the development will not conform with the policies of Chapter 3 of the Coastal Act and will prejudice the ability of the local government having jurisdiction over the area to prepare a Local Coastal Program conforming to the provisions of Chapter 3. Approval of the coastal development permit would not comply with the California Environmental Quality Act because there are feasible mitigation measures or alternatives that would substantially lessen the significant adverse impacts of the development on the environment.

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B. Findings and Declarations

The Commission finds and declares as follows:

1. Proposed Development

a. Project Location

The proposed project is located along Cannery Row in the City of Monterey, between Hoffman Street to the north, Monterey Bay to the east, Drake Street to the south, and the Monterey Peninsula Recreation Trail to the west. The project site consists of two main parcels of land (each consisting of multiple lots), one located on the bayside of Cannery Row and one located on the inland side of Cannery Row. The 2.2-acre bayside parcel is sandwiched between the El Torito Restaurant (downcoast) and the Chart House Restaurant (upcoast) and was historically occupied by two canneries: the Pacific Fish Company on the northern portion of the site and the San Xavier Canning Company on the southern portion of the site. These canneries closed in the early 1960s and the project site has been essentially vacant since that time, except for the use of the San Xavier Canning Company's Fish Reduction Plant, which was occupied by the Stohan's Gift Gallery until 1997. In addition to the vacant Stohan's building, the bayside parcel includes an abandoned storage tank and various remnants of former buildings from past development at this location. The 1.3-acre inland parcel is currently occupied by a paved parking lot, the remains of the foundation of the former San Xavier Warehouse, and other structural remnants of the Cannery Row cannery era, including a storage tank. The project site totals about 3.5 acres of land along Cannery Row. See Exhibits 1 and 2 for location maps and photographs of the site.

Click on the link to go to the exhibit.

b. Project Description

The Applicant proposes a mixed-use commercial and residential project on the combined 3.5-acre site (bayside and inland parcels). The proposed project includes:

- Two new buildings on the bayside parcel, Buildings A and B, each consisting of three stories above ground (up to a maximum height of 44 feet) and a basement;
- Two new buildings on the inland parcel (each 35 feet in height), Building C (two stories and a basement) and Building E (three stories and a basement);
- Commercial retail, retail support uses, a retail plaza, and restaurant space on the first floors of Buildings A, B, and E;
- 38 market-rate condominiums units on the second and third stories of bayside Buildings A and B (ranging in size from 1,534 square feet to 1,934 square feet plus outdoor deck areas);
- 13 moderate-income housing units on the second story of inland Building C (ranging in size from 626 square feet to 1,302 square feet plus outdoor deck areas);
- Redevelopment/rehabilitation of the existing bayside Stohan's building for use as a Cannery Row history center, with an adjacent public history plaza;
- Public viewing areas and a public access promenade located adjacent to bayside Building A and the history plaza;
- Dedication of a 10-foot-wide public access easement along the rocky shoreline below bayside Buildings A and B (this access easement would extend to the Mean High Tide line, which is coterminous with the fee-title property line), with stairway access to the easement area provided near Building A and the proposed history center;
- An onsite desalination facility in bayside Building B and associated ocean water intake and discharge pipelines extending roughly 1,200 feet seaward of the shoreline and placed almost entirely under the ocean floor;
- A utility bridge crossing over Cannery Row (connecting bayside Building B to inland Building C), designed not for passage across the street but rather as an architectural interest feature;
- A roughly 14,000 square-foot public community park between the Monterey Peninsula Recreation Trail and Cannery Row (inland parcel); and[1]
- Parking facilities providing 377 total parking spaces that are designated for specific uses (123 for residential use, 168 for restaurant use, and 86 for retail use) and are located in multiple project areas (93 basement-level spaces on the bayside parcel (45 spaces in Building A; 48 spaces in Building B), and the remainder on the inland parcel: 132 basement-level spaces, 48 second-level spaces, 48 third-

[1] Note that the park occupies the site of formerly proposed Building D; Building D is no longer a part of the proposed project.

level spaces, and 56 roof-level spaces).

The table below summarizes various components of the proposed project; see Exhibit 3 for detailed project plans.

Use	Bayside Parcel	Inland Parcel	Total
Retail/Restaurant (sq.ft.)	55,622	31,740	87,362
Residential (sq.ft., including circulation/support)	87,257	15,260	102,517
Market Rate Residential Units (number)	38	0	38
Moderate-Income Residential Units (number)	0	13	13
Total Residential Units (number)	38	13	51
Desalination Facility (sq.ft.)	2,135	0	2,135
Total Area of Above Project Components (sq.ft.)	147,264	55,799	203,063
Community Park (sq.ft.)	0	13,796	13,796
Parking Area (sq.ft.)	42,398	124,786	167,184
Covered Ramps (sq.ft.) (to access parking areas)	2,250	8,799	13,299
Parking Spaces (number)	93	259	377

c. Project Background

The proposed project represents a substantial redesign of a previous project proposed for this site in 1997. The 1997 project was known as the Cannery Row Marketplace project. The environmental impact report (EIR) on the Cannery Row Marketplace project was not certified and the project was denied by the Monterey City Council in August 1999, primarily due to concerns regarding mass and scale.

Subsequently, the project was modified and a draft EIR (DEIR) for the modified Ocean View Plaza project was prepared in 2001. In 2002, the City certified a final EIR (FEIR) and approved the Ocean View Plaza project. The City's decision was challenged, and ultimately a 2003 Monterey County Superior Court decision found that the FEIR for the Ocean View Plaza project lacked analysis of a sufficient range of project alternatives. Following this decision, a supplemental EIR was completed in 2004 that analyzed an expanded range of project alternatives, including a range of reduced project densities (see Exhibit 4 for a summary of these project alternatives). Ultimately, the City certified the EIR and approved Alternative 4, which was similar to the project approved by the City Council in 2002 and included architectural and design changes required by the City's conditions of approval in 2002; an increase in the number of housing units; and a decrease in the square footage of the retail/restaurant components of the project.[2] Alternative 4 approved by the City is the current proposed project.

The availability of a public water supply for the proposed project has been an ongoing matter of concern. Public drinking water for the project area is managed by the Monterey Peninsula Water Management District (MPWMD) and is provided by the California-American Water Company (Cal-

[2] The City-certified EIR includes a Supplemental EIR on traffic due to traffic restrictions through the Presidio of Monterey implemented subsequent to September 11, 2001; a Supplemental EIR on Alternatives; a Findings and Mitigation Monitoring Chart; and adoption of a Statement of Overriding Considerations regarding project impacts to historic resources and traffic.

Am), which is the retail water purveyor for the Cannery Row area. The City of Monterey, however, is currently using its full allotment of water from the MPWMD and additional domestic water from Cal-Am is not available to serve the project's water needs due to restrictions on pumping from the Carmel River and Seaside aquifer which are the sources of Cal-Am water (see water supply findings below for more detail). Therefore, an onsite desalination facility is proposed to provide water for the project.

Another ongoing issue of concern has been whether the water supply for the project would be public or private. The Monterey County Health Department requires that desalination plants be publicly managed and operated. The DEIR originally had stated that Cal-Am would likely operate and maintain the proposed desalination plant, but an agreement to that effect did not come to fruition. Because Coastal Act Section 30250 requires such a supply to be publicly managed, this issue has been at the fore of the coastal development permit (CDP) application process, with the Commission expressing concerns to the Applicant that the water supply for the project be publicly managed, including through a public hearing and action by the Commission regarding whether to file the CDP application for the project. In that action, wherein the Applicant was challenging the Executive Director's determination that the application could not be filed without the proper approvals for a public desalination water supply, the Commission found:

> *The City and the Applicant understand the Coastal Act requirement that the water supply for the proposed project be provided for by a public entity. Therefore, the Applicant is proposing the creation of a Community Services District, to construct, operate, and maintain the proposed desalination plant that will provide water for the Ocean View Plaza project. …*
>
> *In this case, the application presented fails this initial [filing] test because it lacks evidence of necessary governmental approvals for the creation of a Community Services District needed to construct, operate, and maintain the proposed desalination plant that will provide the water supply that is a basic and fundamental component of the proposed project.*[3]

The Commission then upheld the Executive Director's determination that the application could not be filed without the proper approvals from other agencies.

Subsequently, the City of Monterey requested that the Monterey County Local Agency Formation Commission (LAFCO) review the establishment of a Community Services District (CSD) for the project site only that would own, operate, and maintain the proposed desalination plant once it is constructed. In late 2005, LAFCO approved the formation of the Ocean View Community Services District (OVCSD) and a Sphere of Influence for OVCSD (see Exhibit 7). The members of the Monterey City Council act as board members for the OVCSD. The OVCSD has met eight times since its formation.

[3] California Coastal Commission, Adopted Findings, Executive Director's Determination to Reject the Submittal of a Permit Application, Ocean View Plaza, May 5, 2005, pp. 5 and 8.

2. Standard of Review

The standard of review for this coastal development permit decision is the Coastal Act because the City of Monterey does not have a certified LCP.[4,5] The City's certified Cannery Row Land Use Plan (LUP)[6] can provide non-binding guidance to inform the Commission's coastal permit decision, but it cannot be used as a basis for approval or denial of the coastal permit for the project. The findings that follow identify applicable Coastal Act policies, and also identify select LUP policies as relevant.

3. Coastal Development Permit Determination

A. Water Supply

This finding analyzes multiple Coastal Act issues raised by the proposed water supply for the project. As detailed below, the Commission finds that the project is inconsistent with Coastal Act Sections 30230, 30231, 30233, 30240, 30250, and 30254.

1. Applicable Policies

Public Services

The Coastal Act requires that new development be located in existing developed areas with adequate public services and where it will not have significant adverse effects on coastal resources. Coastal Act Section 30250(a) states:

> ***Section 30250(a):*** *New residential, commercial, or industrial development, except as otherwise provided in this division, shall be located within, contiguous with, or in close proximity to, existing developed areas able to accommodate it or, where such areas are not able to accommodate it, in other areas with adequate public services and where it will not have significant adverse effects, either individually or cumulatively, on coastal resources…*

This policy is directly applicable to the proposed project because it is located in an already developed area – Cannery Row in the highly urbanized City of Monterey – that is struggling with serious limitations on adequate public water supplies.

Because the Applicant is proposing an alternative water supply outside of the current public service system for the City of Monterey, Section 30254 of the Coastal Act also is applicable. It provides for new or expanded public works facilities and states:

> ***Section 30254.*** *New or expanded public works facilities shall be designed and limited to*

[4] The Cities of Monterey, Seaside, and Pacific Grove are the only remaining jurisdictions of the 15 local governments in the Central Coast District that do not have certified LCPs. The City of Monterey still needs to submit an updated land use plan for the Laguna Grande segment (there are five LUP segments in Monterey) and the Implementation Plan for all five segments for review and approval by the Commission in order to complete the certification of its LCP.

[5] The standard of review for the ocean portion of the proposed project would be the Coastal Act regardless because the ocean portion of the project is located in what would be the Coastal Commission's retained coastal permitting jurisdiction if the LCP were certified.

[6] The Cannery Row LUP was certified in 1981, and it has been amended several times since, although it has not undergone a periodic review and thus has not been completely updated.

accommodate needs generated by development or uses permitted consistent with the provisions of this division;…Special districts shall not be formed or expanded except where assessment for, and provision of, the service would not induce new development inconsistent with this division. Where existing or planned public works facilities can accommodate only a limited amount of new development, services to coastal dependent land use, essential public services and basic industries vital to the economic health of the region, state, or nation, public recreation, commercial recreation, and visitor-serving land uses shall not be precluded by other development.

Finally, although only advisory in this case because the City's LCP is not certified, Cannery Row LUP Water Resources Policy (a) requires that development in the City of Monterey not exceed existing water supplies allocated to the City by the Monterey Peninsula Water Management Agency. LUP Water Resources Policy (a) states:

a. *Development in the City of Monterey is to be monitored so as to prevent said development from using any more than the share of the existing water supplies allocated to the City by the Monterey Peninsula Water Management agency. The City of Monterey agrees to abide by the allocation procedures of the Water Management Agency and to enforce said procedures in the City of Monterey.*

Additionally, Cannery Row LUP Water Resources Policies (b) through (d) require, among other things, water conservation in new development:

b. *Promote water conservation by requiring new development to meet all the appropriate requirements of the City of Monterey's Water Conservation Ordinance.*

c. *Promote water conservation in the Coastal Zone by requiring water-saving devices (i.e. dishwashers) in all new restaurant developments.*

d. *Promote water conservation in the Coastal Zone by requiring landscaping in new development to be native or other plant landscaping which minimizes water use.*

Protection of Coastal Waters

As detailed below, the current public water service provider for the City of Monterey is having a direct adverse impact on the Carmel River and the Seaside groundwater basin aquifer (water is withdrawn from these resources as shown in Exhibit 8). In addition, the proposed alternative onsite desalination water supply raises potential concerns with the protection of the coastal waters and resources of the Monterey Bay. Therefore, Coastal Act Sections 30230, 30231 and 30233, which provide for the protection of marine resources and coastal waters, including their biological productivity, are also relevant:

Section 30230. *Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all*

species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.

Section 30231. *The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.*

Coastal Act Section 30233(a) provides criteria for when fill can be placed and when dredging can occur in coastal waters, limiting such activities to seven enumerated development types:

Section 30233(a). *The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following: (l) New or expanded port, energy, and coastal-dependent industrial facilities, including commercial fishing facilities. (2) Maintaining existing, or restoring previously dredged, depths in existing navigational channels, turning basins, vessel berthing and mooring areas, and boat launching ramps. (3) In open coastal waters, other than wetlands, including streams, estuaries, and lakes, new or expanded boating facilities and the placement of structural pilings for public recreational piers that provide public access and recreational opportunities. (4) Incidental public service purposes, including but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines. (5) Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas. (6) Restoration purposes. (7) Nature study, aquaculture, or similar resource dependent activities.*

The Coastal Act also protects environmentally sensitive habitat areas (ESHA). Such policies are applicable in a water supply context most specifically in terms of potential impacts of water withdrawals on ESHA resources, such as the Carmel River system. Coastal Act Section 30240 states:

(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.

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

Coastal Act Section 30240 also protects parks and recreation areas, such as the Edward F. Ricketts State Marine Conservation Area, which is located offshore of the project site.

2. Project Water Supply Context

a. Existing Public Water Supply for the Project Area

Public drinking water for the communities on the Monterey Peninsula, including the City of Monterey, is managed by the Monterey Peninsula Water Management District (MPWMD) and is provided by the California-American Water Company (Cal-Am). Cal-Am thus is the retail water purveyor for the City of Monterey, including the Cannery Row area, where the project would be located. Cal-Am's water is drawn from the Carmel River and the Seaside coastal groundwater basin aquifer (see Exhibit 8 showing the locations of these sources in relation to the City). The MPWMD allocates existing water supplies among various cities and the County, who in turn decide how to distribute their allocations to users within their jurisdictions. Currently, the City is using its entire water allocation from the MPWMD.

When the Cannery Row LUP was first certified in 1980, it was thought that the maximum total amount of water that could be prudently produced by Cal-Am facilities at the time was 18,000 acre-feet per year (afy); and with development of four new wells, that Cal-Am would have an assured water supply of 22,000 afy.[7] Existing demand for Cal-Am water on the Monterey Peninsula in 1980 was estimated at 16,565 afy.[8]

Carmel River Extractions

Water supply conditions for the City of Monterey have changed significantly since 1980, making it clear that the LUP's optimistic water outlook is in accurate. In fact, current Cal-Am water withdrawals are having significant adverse impacts on the Carmel River. The river, which lies within the approximate 250 square mile Carmel River watershed, flows 35 miles northwest from the Ventana wilderness in Big Sur to the Ocean. Surface diversions and withdrawals from the river's alluvial aquifer have had significant impacts on riparian habitat and associated species, particularly in the lower reaches.[9] This includes adverse impacts to two federally threatened species, the California red-legged frog (*Rana aurora draytonii*), listed in 1996, and steelhead (*Oncorhynchus mykiss*), listed in 1997. In particular, water diversions and withdrawals reduce the stream flows that support steelhead habitat and the production of juvenile fish, especially during dry seasons.

In 1995 the State Water Resource Control Board (SWRCB) issued SWRCB Order 95-10, in response to complaints alleging that Cal-Am did not have a legal right to divert water from the Carmel River and that the diversions were having an adverse affect on the public trust resources of the river. SWRCB found that Cal-Am has a legal right only to withdraw about 3,376 afy from the river, and that the Cal-Am diversions were having an adverse effect on the lower riparian corridor of the river, the wildlife that depends on this habitat, and the steelhead and other fish inhabiting the river. SWRCB thus ordered Cal-Am to extract no more than 11,285 afy from the river, to implement measures to minimize harm to public trust resources, and to reduce its withdrawals. Although Cal-Am withdrawals in recent years have stabilized (see Exhibit 8), existing withdrawals continue to have adverse effects on the coastal resources

[7] Cannery Row LUP, p. I-C-2; see also Monterey County Del Monte Forest LUP, p. 92.

[8] Id.

[9] See, for example, *Instream Flow Needs for Steelhead in the Carmel River: Bypass flow recommendations for water supply projects using Carmel River Waters*, National Marine Fisheries Service, June 3, 2002.

of the river. Unfortunately, it has not to date been determined what the "safe yield" of the Carmel River might be so as to assure protection of the river's habitat resources.[10]

Order 95-10 also reduces the amount of water Cal-Am could take from the Carmel River aquifer by 20 percent in the near-term and up to 75 percent in the long-term, and also requires that any new water that is developed by Cal-Am must first completely offset Cal-Am's unlawful diversions from the Carmel River before any water produced by Cal-Am can be used for new construction or expansions in use. The MPWMD requested relief through the courts, but the Monterey County Superior Court upheld the 20 percent reduction in water use specified by the Order. Since that time, the jurisdictions along the Monterey Peninsula, including the City of Monterey, have been implementing conservation measures, and have focused their efforts on improving water conservation programs while working on other water supply augmentation proposals. With other regional stakeholders, Cal-Am has been pursuing the implementation of the Coastal Water Project, which is a proposed large-scale desalination facility that would produce 10,370 afy. The California PUC is currently working on the DEIR for this project. Cal-Am has also been developing the Aquifer Storage and Recovery Project (ASR) under which excess winter flows of the Carmel River would be diverted to and injected into the Seaside groundwater basin for storage and use.

In addition to Cal-Am's efforts to find new water supplies, the Pajaro Sunny Mesa Community Services District has submitted an application for a pilot desalination plant at the former National Refractories Moss Landing site in northern Monterey County, but the application is still incomplete. Also, the Water Standard Company has made several presentations to Commission staff and staff from other agencies about their proposed ship-based desalination facility; however, that company has not yet submitted an application for such a project. Most recently, the City of Monterey itself has issued a Request for Proposals to analyze hydrogeologic conditions along the shoreline of the City for the purposes of considering the feasibility of a desalination facility for the City.

Unfortunately, Cal-Am has not yet met the requirements of Order 95-10, which is now 13 years old. In response, the SWRCB recently issued a draft cease and desist order that would compel Cal-Am to reduce its pumping of the Carmel River by 15% by October 2009, increasing to a 50% reduction by 2014 (see Exhibit 9).[11] The draft order states that Cal-Am's unauthorized diversions are continuing to have adverse effects on the public trust resources of the Carmel River and should be reduced. Further, notwithstanding Order 95-10, Cal-Am water withdrawals have not been reduced beyond the initial 20% reduction in 1995, even while the Monterey peninsula urban population has increased from approximately 100,000 in 1995 to 112,000 today. Thus, the order observes:

> *Order 95-10 condition 2 intended that Cal-Am would make one-for-one reductions in the unlawful diversions from the Carmel River for water obtained from other sources, such as conservation. The current water management strategy used by Cal-Am/MPWMD, however, has*

[10] Neither Cal-Am's legal right (3,376 afy) nor the SWRCB Order 95-10 maximum (11,285 afy) is meant to imply safe yield.

[11] State of California, State Water Resources Control Board, Division of Water Rights, Draft Cease and Desist Order WR 2008-00XX-DWR (January 15, 2008); see Exhibit 9.

> *not resulted in any significant reduction of unlawful diversions from the Carmel River since 1998. Instead, it appears that water savings resulting from conservation efforts have been redirected to support marginal increases in development.*[12]

The cease and desist order proceedings have not yet completed (phase II of the hearing process will take place July 23-25, 2008 at the SWRCB offices in Sacramento). Regardless of the outcome, it is clear that the public water supply currently drawn from the Carmel River is having a significant adverse impact on the coastal resources of the Carmel River system. In addition, it is clear that it will be many years before any new regional public water supply is available for new development on the Monterey Peninsula.

Seaside Aquifer Extractions

Cal-Am water withdrawals are also adversely impacting the Seaside coastal groundwater basin aquifer. A recent technical report completed for the MPWMD shows consistently declining water levels and deficit water budgets over an 8-year period, indicating that the basin is in a state of overdraft since groundwater extractions exceed the sustainable yield.[13] Because it is being over-drafted, the basin is at risk of seawater intrusion, as well as other negative outcomes such as basin subsidence, chronically declining groundwater levels, and water quality degradation. According to the MPWMD-sponsored report, in the event of a prolonged drought, storage in the Seaside basin could not be relied upon to sustain current levels of production for very many years in row.[14]

More recently, existing and potential withdrawals from the basin have been adjudicated in Monterey County Superior Court.[15] The Court concluded that the "natural safe yield" of the Seaside basin is between 2,581 to 2,913 afy, but that total groundwater production withdrawals over the last five years ranged between approximately 5,100 and 6,100 afy, or roughly twice the safe yield of the basin. The Court concludes that while there is some uncertainty, all parties were in agreement that continued production from the basin beyond the safe yield will ultimately result in seawater intrusion and deleterious effects to the basin in the foreseeable future. The Court also appointed a special water master to implement a long-term management program to reduce production from the basin over time to the natural safe yield. Under the general schedule set out by the Court, withdrawals from the basin would have to be reduced 10% every three years after the first three years. All things being equal, at this rate of reduction, the basin would reach equilibrium in approximately 20 years.

Conclusion

There is little dispute that both of the Cal-Am water sources – the Carmel River and the Seaside coastal groundwater basin aquifer – are being adversely affected by current water withdrawals. From a coastal resource protection standpoint, both water sources are significantly over-drafted. The effects of this

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[12] Id; p. 5.

[13] Eugene Yates, Martin Feeney and Lewis Rosenberg, *Seaside Groundwater Basin: Update on Water Resources Conditions* April 2005 for MPWMD (available at http://www.mpwmd.dst.ca.us/seasidebasin/index.html). Estimated sustainable yield is about 2,880 afy while average extractions are about 5,600 afy.

[14] Id; p. 28.

[15] *California American Water v. City of Seaside*, Monterey County Superior Court Case M66343.

over-drafting include significant impacts to riparian habitat in the river, especially for the sensitive steelhead species, and potential seawater intrusion and continued degradation of the Seaside basin. Any new water withdrawals from these over-drafted sources thus will further adversely affect coastal resources. The evidence shows that not only should there not be any new withdrawals from these resources, but existing withdrawals should be significantly reduced. From a water management standpoint, there is no water currently available from the City's MPWMD allocation. In short, there is no public water available from the Cal-Am system for new development in the City of Monterey coastal zone that would be consistent with Coastal Act Sections 30231, 30240, and 30250.

Given the state of both the Carmel River and the Seaside groundwater basin, the only water available for new development is that which may become available through the management and allocation of existing connections or some new public supply. As mentioned above, the City of Monterey is currently using its full allotment of water from the MPWMD and additional water is not available to serve the proposed project's water needs. The City of Monterey (as well as other jurisdictions within the Cal-Am service area) also maintains a waiting list for new water hookups. As of the date of this report, the Applicant's project was 21st out of 32 projects on the City's water waiting list, and a cumulative total of 37.177 acre feet of water would need to become available in the City of Monterey to serve the projects ahead of the Applicant's project on list before the Applicant would "clear" the waiting list and be eligible to receive Cal-Am water (see Exhibit 10). In the last 5 years, less than four acre feet of water has become available. Thus, based on recent experience, and barring the development of a major new water source in the near future, it will likely be many years before the proposed project could clear the City's water waiting list and become eligible to receive Cal-Am water.

Because of the lack of water available from the Cal-Am system for the project, the Applicant has proposed an onsite reverse osmosis desalination facility to provide water for the proposed residential and commercial development. As discussed in more detail below, the desalination facility would be owned and operated by the recently formed project-specific Ocean View Community Services District (OVCSD).

b. Public Services Requirement

The Coastal Act Section 30250 requirement that new development in urban areas be served by public infrastructure has been an ongoing concern for the project. This policy provides that if an urban area lacks critical infrastructure—e.g., water, sewer, or road capacity—to support further urban development, then new development must be delayed unless and until the capacity of the limited service can be increased, preferably through a comprehensive urban planning process, in order to support it. It does not mean that urban uses should proceed incrementally, using what are essentially rural-level services (e.g., private wells and septic systems). The proliferation of rural services within an urban area causes practical problems (e.g., wells run dry, lot sizes are too small to accommodate septic systems, etc.) and planning problems. In addition, these services often draw from the same source as public supplies, further exacerbating public service constraints and related problems. Ultimately, incremental development without comprehensive planning or the reliable institutional and management structure to assure its performance may lead to serious cumulative environmental resource impacts such as groundwater overdraft, polluted groundwater, degraded riparian habitat, and so on.

The Commission has recognized that the authorization of private wells or private desalination facilities within the City of Monterey, whether for potable water or supplemental non-potable water for irrigation purposes, could lead to potential cumulative impacts that could undermine Cal-Am's ability to provide adequate water supplies to existing service connections within their service area. For this reason, the Commission's 2003 approval of the Del Monte Beach LUP and Harbor LUP components of the City's LCP included policies clearly requiring that development be served by an adequate *public* water supply, as well as a prohibition on private water supplies to serve existing and new development within the City of Monterey. Additional policies in those LUPs allow for development of *public* desalination facilities, provided any adverse environmental impacts are mitigated.

The circa 1980 water supply policies of the Cannery Row LUP, which is advisory only in this case, have not been updated, but the core Coastal Act requirement that new development be served by public services applies equally in this area. With respect to the project, the DEIR for the proposed project was completed in April 2001. At that time, the proposed project's expected water demand was estimated at 25.6 acre-feet of water per year. The DEIR noted that the City of Monterey was at that time using most of its full allotment of water as allocated by the MPWMD. Given that there was no public water available for the project from the City's water allotment, the DEIR evaluated a number of alternative water supply sources for the project and determined that a seawater desalination plant was the only feasible alternative.[16]

The DEIR also noted (independent of the Coastal Act 30250 requirement) that County regulations required that any desalination facility be owned and operated by a public entity.[17] The DEIR also noted that Cal-Am had expressed a willingness to assume such responsibility. MPWMD staff, however, expressed concerns regarding the appropriateness of Cal-Am being the owner-operator of the desalination plant. The FEIR included a letter from the Applicant's representative stating that instead of Cal-Am operating and maintaining the desalination plant, that the Applicant would instead form a mutual water company to oversee these duties regarding the desalination plant.

When the City approved the project in 2002, the City noted that the Applicant proposed to form a mutual water company to construct, operate, and maintain the desalination component of the project. However, in December of 2004, after project delays related to litigation of the EIR and circulation of a supplemental EIR, the Applicant informed Commission staff that the Applicant no longer planned to form a mutual water company to operate the desalination plant for the project. Instead, the Applicant was seeking to create, pursuant to Government Code §§ 61000 *et seq*., a community services district (CSD) to construct, operate, and maintain the proposed desalination plant.[18]

The creation of a CSD to construct, operate, and maintain the proposed desalination plant required

[16] The other alternatives considered included an onshore seawater well, a nearshore infiltration trench system, a fixture retrofit program, and trucking potable water to the site. Each of these alternatives was rejected for feasibility, adverse impact, or regulatory reasons.

[17] Section 10.72.030(B) of the Monterey County Code states: *Provide assurances that each facility will be owned and operated by a public entity.*

[18] The purpose of a CSD is to provide a community with various needed public services, such as an adequate water supply, trash collection and disposal, fire and police protection, etc.

additional approvals from the City of Monterey, the County of Monterey, and, pursuant to Government Code section 61107, the Local Area Formation Commission (LAFCO) of Monterey County.[19] LAFCOs were created to discourage urban sprawl and encourage the orderly formation and development of local government agencies. Specifically, LAFCO of Monterey County is responsible for coordinating logical and timely changes in local governmental boundaries, including annexations and detachments of territory, incorporations of cities, formations of special districts, and consolidations, mergers, and dissolutions of districts, as well as reviewing ways to reorganize, simplify, and streamline governmental structure.

In December 2004, Commission staff informed the Applicant's representative that staff would not accept an application submittal for the project until all local approvals had been obtained, including the specific approvals needed for the proposed CSD to provide water for the proposed project. Ultimately, this filing decision was challenged by the Applicant, and in May of 2005, the Commission upheld the Executive Director's determination that the project could not be filed absent the requisite approvals of the CSD. A primary concern of staff was that that there was no guarantee that the City, the County, and LAFCO would approve the creation of a CSD to serve not a community but a single project. Also, until a CSD was established, there was no entity to take responsibility for the future construction and operation of the facility and its discharge. Given the fundamental lack of a public entity to take responsibility for construction, operation, and maintenance of the proposed desalination facility, the Commission found that the project application could not be accepted. As detailed below, the Applicant has since received LAFCO's approval and formed a CSD, the Ocean View Community Services District (OVCSD), for the project site to operate and maintain the proposed onsite desalination plant.

c. Avoiding Impacts to Marine Resources

The avoidance of marine resource impacts is a third important area of concern for the proposed desalination component of the project. The Commission is familiar with this issue, having identified and addressed significant potential resource impacts of desalination plants up and down the California coast.[20] Generally these impacts fall into three areas of concern: impingement and entrainment of marine resources in the intake, potential adverse discharges from the outfall, and the fill of ocean waters or disruption of the marine environment from infall, outfall, and related structures. The Commission has analyzed these issues in a number of major desalination proposals in the last several years.[21]

In this project, Commission staff identified these issues during the application process and advised the Applicant that in order to avoid impacts that potentially would be inconsistent with the Coastal Act, the Applicant should evaluate the feasibility of a subsurface intake and outfall for any necessary desalination components. This was because the project proposed an open water intake and outfall, which

[19] LAFCOs were created in each county in California by the Legislature in 1963; this initial legislation was replaced by the Cortese-Knox Local Government Reorganization Act of 1985 (Government Code §§ 56000 et seq.).

[20] See, generally, *Seawater Desalination and the California Coastal Act,* March 2004, California Coastal Commission.

[21] For example, the Commission approved a desalination plant proposed by the City of Sand City in Monterey County, in part because the potential entrainment, impingement, fill and discharge impacts associated with the intake and outfall were avoided through the use of subsurface beach wells for both intake and outfall structures. (See A-3-SNC-05-010, Adopted Findings, California Coastal Commission, May 11, 2005).

raised concerns about entrainment and impingement, fill of ocean waters, and adverse discharges to the Monterey Bay. As described below, the current project includes components that would be below the seabed floor, and components that would be above the seabed floor in the open ocean water column.

3. Description of Proposed Project Desalination System

a. Design and Operation

The proposed desalination facility would be comprised of onshore pumps, desalination equipment, water storage reservoirs, and offshore seawater intake and brine disposal pipelines and structures. With the exception of the seawater intake and brine disposal elements, all other components of the project desalination facility would be located on the project site in the lower level of bayside Building B (see pages 15-24 of Exhibit 3 for desalination facility plans and description.

Under the LAFCO conditions of approval and an agreement between the Applicant, the City of Monterey, and Cal-Am, operation of the facility is specifically limited to the period of time commencing with the Applicant's dedication of the plant to OVCSD and ending when water is made available to the project from Cal-Am, consistent with its franchise agreement for the service area (see Exhibit 7). OVCSD would also be required to apply to LAFCO for dissolution of the CSD at that time.

Onshore Components

The reverse osmosis system would be manufactured as a complete, skid-mounted unit equipped with all necessary piping, instruments, housing, and pumps. Potable water produced by the system would be pumped into two 75,000-gallon reservoirs located onsite adjacent to the desalination system, which would be capable of storing a three-day supply at maximum daily demand of 50,000 gallons per day (gpd) (or six days at average daily demand of 25,000 gallons gpd).[22] The reservoirs would consist of rectangular poured-in-place concrete basins. From the reservoirs, water would be pumped to a 1,000-gallon hydro-pneumatic tank, located adjacent to the desalination facility, which would deliver pressurized water to the project's potable water delivery system. The proposed desalination facility would be designed to meet the average demand of 25,000 gpd, which is equivalent to a project demand of approximately 27.89 afy.

Offshore Components

As proposed in the EIR, the desalination plant would have included the exclusive use of open ocean intake and outfall lines. To provide 25,000 gpd of desalted water, the project would take in about 86,400 gallons per day of seawater (120 gallons per minute for 12 hours per day) from coastal waters and would cause entrainment due to its proposed use of an open-water intake. Bracketing related public service issues, Commission staff expressed concern that the open ocean intake would not conform to Coastal Act provisions related to protection of marine and coastal waters, including Coastal Act Sections 30230 and 30231. Commission staff also expressed concern to the Applicant that the proposed open ocean intake and outfall lines would constitute placement of fill within the Monterey Bay and that the project's proposed intake and outfall structures did not appear to conform to the provisions of Coastal Act Section

[22] The 25,000 gpd of estimated average daily demand includes an approximately 2,000 gpd surplus as a safety factor.

30233(a) related to the allowable placement of fill in coastal waters.

In response to these concerns, the Applicant engaged an engineering firm to perform a feasibility study to determine if subsurface (below the ocean floor) intake and discharge structures would be a feasible alternative to the open ocean intake/discharge proposed in the EIR (the results of this feasibility study are presented in a technical memorandum attached as pages 17-21 in Exhibit 3). The main difference between a subsurface alternative and the open ocean intake/discharge alternative is that the subsurface alternative consists of horizontally-oriented pipes with intakes placed inside well screens buried beneath the sand deposits of the ocean bottom.

The final seawater intake and discharge design currently proposed would include two six-inch diameter intake pipes, to which one emergency intake line would be connected, and one six-inch diameter discharge pipe. These pipelines would be installed by first directionally drilling a 20-inch bore hole from the inland side of the site to a location roughly 350 feet offshore where the bore will exit the underlying granite formation adjacent to a submarine sand channel on the ocean floor in about 25 feet of water. The two discharge pipes and the one intake pipe would then be bundled together and pulled into the bore hole. At the exit point of the bore, permanent collar anchors would be installed around the pipes and six-inch diameter pipe extensions extending further seaward would be attached to each of the three pipes. These pipe extensions would be jetted two to three feet into the surficial sediment of the sandy bottom (by divers using air hoses) where they would be anchored in place using concrete weights, and they would be re-covered (buried) with sandy bottom sediments. The one discharge pipe would be extended in this manner approximately 850 additional feet to a point roughly 1,200 feet offshore in about 50 feet of water, where it would daylight about one to two feet above the ocean floor and into the water column. The two intake pipelines would also be extended in this manner approximately 450 beyond the bore exit point to a point roughly 800 feet offshore where they would extend into a concrete vault at a water depth of about 40 feet. The concrete vault (approximately 15 feet in length, 6 feet wide, and 6 feet high and consisting of two chambers) would be assembled onshore, and jetted into the seabed floor and re-covered (buried) with sandy bottom sediments in a similar manner as the pipes. The larger chamber of the vault would be filled with sand, and the smaller chamber would be open; the sand-filled chamber would be where seawater is pulled through the sand filter, and the smaller chamber would be fitted with a cover to allow for diver access to the vault and to allow for removal of pipeline inspection gauges ("pigs") sent through the intake pipes for cleaning and maintenance purposes.

The Applicant indicates that the pipes would be reburied under two to three feet of sediment at the bore hole exit, and up to six to seven feet where the pipes enter the vault, and that the vault itself would be reburied under six inches to 2 feet of sediment.[23]

A six-inch emergency intake pipe riser would be attached to the two intake pipes through a Y-valve near the concrete vault, and it would be extended so that it would daylight about one to two feet above the ocean floor and into the water column. This intake pipe would be fitted with a velocity cap to limit maximum intake to no more than 0.2 feet per second, and it would be perforated with 1-inch diameter, screened ports through which seawater would be drawn.

[23] Email from Jared Ficker, Applicant's representative, to Dan Carl, Coastal Commission staff, dated June 26, 2008.

Operations and Maintenance

The proposed desalination facility would be operated and maintained by the Ocean View Community Services District (OVCSD),[24] under the direction of a State-certified water treatment plant operator, as required by State regulations that govern potable water supplies. The Applicant indicates that one of the six-inch intake pipes will provide sufficient seawater to serve the development, and that the second line provides complete system redundancy (e.g., in the case of maintenance for the other intake pipe).[25]

The proposed desalination facility would be operated 12 hours a day to meet the anticipated demand of the users.

In the event that the subsurface intakes malfunction, use of the emergency open ocean intake would begin a day or two prior to depletion of the onsite stored water in order to avoid a disruption in water supply to the Ocean View Plaza residents and tenants. In case of a situation in which the emergency open ocean intake also malfunctions and the onsite stored water is depleted, potable water would be trucked in to the project.

It is estimated that the desalination system would require one hour per day of routine maintenance plus an additional 160 hours per year for periodic maintenance and repair. Maintenance to the onshore components would consist of: 1) backwashing the system filters with seawater; 2) internal cleanings of the reverse osmosis unit using a cleaning solution drawn from a tank and returned to the same tank for reuse and/or temporary storage; 3) changing the reverse osmosis filters monthly. Maintenance to the offshore components would consist of: 1) backwashing the pipelines with seawater; 2) hydro-blasting and/or manually scraping the intake screens clean; 3) using a "pig" to remove marine growth from the intake lines and to remove deposits from the diffuser pipeline; 4) clearing the diffuser ports and inspecting valves; 5) inspecting all intake and outfall structures (annually); 6) inspecting warning buoy and mooring hardware (annually).

b. Institutional Design

Governance

LAFCO's approval of the project was conditioned to restrict the OVCSD area to the project site and to disallow expansion of the OVCSD within the Cal-Am service area for any new development or to otherwise serve an already existing Cal-Am service (see Exhibit 7 for LAFCO's conditions of approval). LAFCO's approval also limits the OVCSD's authorization and authority to provide water to the project to the period of time commencing on the date on which the Applicant has completed construction of, and dedicated to the OVCSD, the desalination facility and related water system and continuing until such time as Cal-Am is able to provide water service to the project. At that time, the desalination plant is required to be decommissioned within 90 days following commencement of Cal-Am water service for the project, unless the OVCSD and Cal-Am otherwise agree in writing to an alternate disposition of the desalination plant and equipment.

[24] See also Institutional Design findings below.

[25] Parsons Brinkerhoff, April 21, 2008 letter.

OVCSD, governed by its board of Directors, will operate and function as an independent governmental entity pursuant to express powers and authority granted by LAFCO and statutory law. As required by the LAFCO approval, the City of Monterey Council members are serving as the OVCSD Board. Because OVCSD will have the specific power to own or operate a water system, it may contract with any person, private corporation, or public agency to purchase or acquire from, or to sell to, or jointly acquire, construct, operate, or maintain the water system or water supply to serve its inhabitants. Regarding real and personal property, OVCSD will have express statutory authority to acquire these items, whether located within or outside of its boundaries, and it may hold, use, enjoy, lease or dispose of any of its property. In addition, OVCSD will be authorized to collect rates or other charges for the services and facilities it furnishes, such as water service rates and charges. The cost of the services that OVCSD will provide include all costs associated with operation and administration of the desalination plant, the related water distribution infrastructure, and OVCSD administrative costs that are necessary for the provision of water service within the OVCSD, i.e. the project site.

With respect to financial matters, OVCSD may: 1) borrow money or incur or assume indebtedness and issue bonds; 2) levy and cause to be collected taxes for the purposes of carrying on its operations and paying its obligations; 3) impose a "special tax", and; 4) set revise, and collect rates or other charges for the services and facilities it furnishes. Any such indebtedness, bonds, taxes, and rates would only impact the residents and tenants of the Ocean View Plaza project. Liability issues are discussed separately in the findings below.

With respect to its day-to-day operations, OVCSD may employ labor and professional services, either contracted with the City for the services of City staff to perform administrative support services on behalf of OVCSD, or OVCSD may contract with outside professionals for administrative support.

Financial

The cost of constructing the desalination plant and related water distribution infrastructure will be the responsibility of the Applicant. Additionally, the cost of the initial administration of OVCSD prior to dedication and operation of the desalination plant and related water distribution infrastructure will also be the responsibility of the Applicant. Ultimately OVCSD will operate and own the desalination facility and related water distribution infrastructure, and the cost of operating the OVCSD will be born by the residents and commercial tenants of the Ocean View Plaza project.

Liability

OVCSD can sue or be sued. Because the City Council members will serve as the OVCSD's Board of Directors, the Council members could be named as defendants in an action against the OVCSD in their capacity as the OVCSD Board of Directors. City staff has obtained a comprehensive insurance program that will protect OVCSD and its board members in the case of a lawsuit. Additionally, there is always a possibility that a lawsuit could be brought not only against OVCSD but also against the City on an "alter ego" theory—claiming that the City should be responsible for the actions of OVCSD because it "essentially controls" OVCSD. If such a case arises, the courts would look at a variety of factors to determine whether liability should flow to the City. To address liability issues related to the OVCSD formation process, the construction of the desalination plant and related water distribution infrastructure,

and any costs incurred by the City on behalf of OVCSD related to the administration and operations of OVCSD, City staff has negotiated an Indemnification Agreement with the Applicant (see Exhibit 13). The Indemnification Agreement applies for ten years and requires the Applicant to indemnify the City against all claims that arise from:

1. The formation of the OVCSD.

2. Any liability arising in connection with the construction, testing, and operation of the desalination plant and related water distribution infrastructure by the Applicant and the Applicant's contractors, as well as any construction defect claims arising in the first 24 months following commencement of water service to the Ocean View Plaza project by OVCSD. The indemnity by the Applicant does not extend to any liability arising from the management and operation of OVCSD following dedication, which liabilities will be addressed through the comprehensive insurance program.

3. The indemnity provisions include an obligation of the Applicant to defend the City, at the Applicant's sole expense, from claims against which the City is indemnified with counsel acceptable to the City and with the City in control of the defense.

4. Although the Indemnification Agreement provides broad protection for the City, such protection is only as good as the ability of the City to enforce the terms of the Agreement against the Applicant. Given the limited liability nature of the entity being used by the Applicant for the project and the possibility of bankruptcy in the event that the project is unsuccessful, there is a practical risk that the City will be unable to enforce the Applicant's obligations under the Indemnification Agreement. According to the City, during the period prior to and immediately following the dedication of the desalination plant and related water distribution infrastructure, and commencement of operation by OVCSD, this risk is offset by the insurance requirement on the Applicant and its contractors, naming the City as an additional insured. Following this period, the risk will be partially offset to the extent of the insurance coverage maintained by OVCSD.

5. According to the City, it is expected that the Applicant (i.e. Cannery Row Marketplace, LLC) will dissolve once the Ocean View Plaza project is complete. Thus, the Indemnification Agreement requires the purchaser of the retail/commercial portion of the project (excluding the residential owners) to assume the Applicant's indemnity obligations for the duration of the ten-year indemnity period. The City notes that although the indemnity obligations against any successor owner are enforceable, there is the potential risk that a court or jury could view this arrangement as oppressive to such property owner given a sympathetic set of facts.

6. The construction of the desalination plant and related water distribution infrastructure by the Applicant will be further secured by an obligation that the Applicant provides a surety bond for the completion of the desalination component of the project. The City has agreed that the Applicant can satisfy this obligation with the surety bond that the Applicant intends to obtain in connection with its financing, provided that: 1) all bond proceeds are used to complete the desalination facility and may not be diverted by the lender, and; 2) the City receives notice of all activity with respect to such a bond.

7. In addition to the indemnity obligation of the Applicant with respect to construction defects in the water system, the Applicant is required to obtain extended 24-month warranties from all providers of materials and equipment for the water system. To the extent that the Applicant cannot obtain extended 24-month warranties for the entire water system, the Applicant will be required to fund a warranty reserve equal to 20% of the replacement cost of the portions of the water system without an extended warranty (e.g., accordingly, if a warranty for a portion of the water system is for only 12 months, then the Applicant would be required to fund the warranty reserve for months 13-24). Because the extended warranties would commence with the completion of the water system, the Applicant's 24-month indemnity with respect to construction defects, which would run from the commencement of OVCSD providing water serve to the project, would cover any lag time between completion and operation.

4. Coastal Act Consistency Analysis

a. Marine Resource Impacts

Impingement and Entrainment

Coastal Act Sections 30230 and 30231 require the protection of marine resources. As discussed, the Applicant has redesigned the project to include two subsurface intake lines in order to avoid the impingement and entrainment of marine organisms. If constructed as recommended in the Parsons-Brinkerhoff Technical memorandum (i.e. using a concrete vault filled with sand to contain intakes that are located solely below the seafloor), the impingement and entrainment of marine organisms should be insignificant. This is due to the natural filtering that would be provided by the surrounding sand both in and above the vault, and the low intake velocities associated with this design (less than 0.1 feet per second).

However, the project also includes a backup open ocean intake in the event that the subsurface intake fails. The EIR concluded that an open water intake (for full project use at the originally contemplated scale and design) would "essentially eliminate any impingement impacts to marine mammals and large fish." However, the EIR does not include a comprehensive entrainment/impingement analysis nor does it contain detailed evidence to support this statement. Presumably there would still be impingement impacts to smaller fish and other marine organisms. The EIR also concluded that full open ocean intake would result in entrainment impacts, including mortality of organisms entrained into the facility, but that these impacts would be "less than significant in the context of the entire Monterey Bay ecosystem given the relatively small volume of seawater (intake of approximately 86,400 gallons per day for full project use, including water use, water storage, and brine disposal) entering the intake." Although entrainment impacts from use of the now-proposed above-surface emergency intake would be less than those impacts from full project use of above-surface intakes, detrimental impacts to marine organisms will inevitably occur even with emergency above surface intake use. Even though the emergency line has been developed to minimize such impacts, these impacts cannot be eliminated when a line is pulling water from the open ocean where marine organisms are present. [26]

[26] Commission staff has previously requested that a more comprehensive entrainment study be completed for the project, which has not been done.

In this respect, the project site is located immediately next to, and the intake and outfall pipelines and related components are located in, the waters of the Monterey Bay National Marine Sanctuary, which has been established in part to protect one of the most diverse marine ecosystems in the world. Also, the waters in the immediate vicinity of the project, including the location of the outfalls and intakes, are designated by the California Department of Fish and Game (CDFG) as a State Marine Conservation Area (SMCA) under the California Marine Life Protection Act (MLPA) (the Edward F. Ricketts SMCA), the primary purpose of which is to protect or conserve marine life and habitat (see Exhibit 11).

According to MLPA program documents, this SMCA prohibits the take of all living marine resources except for the recreational take of fin-fish by hook and line and the harvesting of kelp under strict limitations. Although the MLPA program documents do not specifically allow for entrainment of marine organisms within this SMCA, CDFG has reviewed the details of the proposed operation of the subsurface seawater intake and open ocean emergency backup intake and finds these project components consistent with the requirements of the Edward F. Ricketts SMCA (see page 7-8 of Exhibit 15). However, CDFG also notes that the proposed process for installation of the intakes would require further review to determine if these activities would result in any potential impacts to this SMCA or marine resources in general. CDFG's review was also limited only to the intake operation of the desalination facility, and not to the discharge operation. Finally, repair and maintenance of the proposed pipelines and vault could also cause marine resource degradation, but CDFG's correspondence does not address potential impacts associated with repair and maintenance of the sea-based project elements over time.

The coastal waters of the project area clearly have been recognized as a significant area in relation to the larger ongoing efforts to protect the sensitive marine and coastal resources of the Monterey Bay, the Central Coast, and California. Coastal Act Section 30230 requires that marine resources be maintained, enhanced, and where feasible, restored. Significantly, this section also requires that "special protection be given to areas and species of special biological . . . significance," such as the MBNMS and the Edward F. Ricketts SMCA. Coastal Act Section 30231 further requires that the biological productivity of coastal waters be maintained, including through "minimizing adverse effects of wastewater discharge and entrainment…"

The open water emergency intake component of the project cannot be found consistent with these Coastal Act requirements because it would not maintain (nor enhance or restore) marine resources. On the contrary, the project would be expected to lead to some mortality of marine organisms. Even if this is "minimal take," as described by CDFG, it will detract from existing marine resource values, contrary to Coastal Act Sections 30230 and 30231. Given the Coastal Act requirement that special protection be given to the marine resources at stake here, this Coastal Act inconsistency is only further highlighted. In addition, as discussed below, it is possible that the subsurface intakes and onsite reverse osmosis components may not work as planned, which could entail even more significant use of the open ocean intake, only exacerbating these impacts. Finally, these issues would only be further aggravated on a cumulative basis (see below).

Brine Discharge

The Applicant proposes an above-surface outfall diffuser to discharge the brine from the desalination plant because:

> *…modeling results have indicated that near-ambient salinity conditions are achieved within a ZID [Zone of Initial Dilution] of less than 10 feet. Further, if the diffuser was buried, there is a distinct possibility that the velocity of the effluent through the diffuser ports could excavate or destabilize the surrounding sediment creating a pit that could jeopardize the integrity of the diffuser.*[27]

However, according to the Commission's staff desalination expert, employing appropriate discharge velocities through a subsurface multi-port diffuser would better protect marine resources and avoid potential sediment disturbances. In addition, as discussed below, an above-surface outfall is not consistent with Coastal Act Section 30233, which limits the fill of coastal waters only to certain specified uses, not including the proposed project. Although it appears feasible to construct a subsurface multi-port diffuser that would avoid sediment disturbances and also meet water quality concerns associated with the brine discharge, the Applicant has not analyzed the technical design and feasibility of such a subsurface outfall at the project location.

Fill of Coastal Waters

Coastal Act Section 30108.2 defines fill as "earth or any other substance or material, including pilings placed for the purposes of erecting structures thereon, placed in a submerged area." The seaward component of the project would include placement of pipelines, a vault, and related structures in a submerged area. Thus, the seaward portion of the project includes fill of coastal waters.

Coastal Act Section 30233 limits fill of coastal waters to certain specified types of developments, such as coastal dependent industry, or maintenance of existing pipelines incidental to an existing public service (see Section 30233 text cited previously). The specified uses do not include the proposed project. The project is not a port or energy project, boating-related project or facility, or a public recreational facility, and it does not involve nature study, restoration, or mineral extraction. The project also does not qualify as a coastal-dependent industrial facility. The intent of this exception is to provide for large-scale power plants, offshore oil projects and other industrial developments, such as those specifically called out as such in Coastal Act Sections 30260-30262 (under Article 7 of Chapter 3, "Industrial Development"). In this case, the proposed project is a mixed-use residential and commercial project which includes a small-scale (in comparison to a larger-scale municipal desalination facility) desalination component. The small-scale desalination component is accessory to the primary residential and commercial development that would be the only user of the water supply. In other words, the project is unlike a stand-alone desalination plant project that might constitute a coastal-dependent industrial facility (e.g., the recently permitted Poseidon desalination facility in Carlsbad). Rather, the proposed project is to develop a major mixed-use project on Cannery Row that happens to include an onsite water system as a part of it.

[27] November 16, 2007 email communication from Applicant's representative to Commission staff.

With respect to the incidental public service purposes exception (Section 30233(a)(4)), this exception has been interpreted to limit such fill to that associated with temporary disruptions, and this interpretation has been upheld by the courts.[28] The proposed seaward components would result in permanent—as opposed to temporary—fill. In fact, although the proposed burying of the seaward components could be argued to be a temporary fill of a type specifically contemplated by Section 30233 (i.e., "…burying of…pipes…"),[29] the open water backup intake pipe and the end of the discharge pipe would both be permanently located in the water column and could not so qualify. In addition, to the extent that any other seaward components become unburied due to sediment dynamics, these structures also would also constitute impermissible fill.[30] In any case, and even if limited solely to the proposed open water emergency intake line and brine discharge diffuser, the proposed project does not qualify for the incidental public services exception and thus results in impermissible fill of coastal waters inconsistent with Coastal Act Section 30233.

Disruption of the Seafloor and Marine Environment

As described above and in the technical memorandum submitted by the Applicant (see pages 17-21 of Exhibit 3), the project will entail the installation of pipelines, a concrete vault, and related development (e.g., collars to hold the pipelines, etc.) below the surface of the ocean floor by jetting the seabed floor to create voids into which the components would be placed and then buried with the jetted sediments. Although the technical memorandum describes the lines as being buried under 5 feet of sand, the DEIR describes the sediment depths along the pipeline route as ranging from 2 feet to over 6 feet.[31] The Applicant indicates that the pipes would be reburied under two to three feet of sediment at the bore hole exit, and up to six to seven feet where the pipes enter the vault, and that the vault itself would be reburied under six inches to 2 feet of sediment.[32] Thus, it appears that the pipes would be buried under as little as 2 feet of sandy bottom sediments in places, and the vault would be buried under as little as six inches of sediments.

Based on technical documents in the record and the current project design, it appears that the total surface area disruption of the seabed for the initial installation of the pipelines would be approximately 1,600 square feet. This includes a 20-inch-wide by approximately 800 foot long corridor for the pipelines to the vault location, and an additional approximately 8-inch-wide by 400 foot long corridor from the vault location to the end of the outfall line. The installation of the vault, which is preliminarily

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[28] See, for example, *Bolsa Chica Land Trust et al., v. The Superior Court of San Diego County* (1999) 71 Cal.App.4th 493, 517, where the court of appeal found that: "…we accept Commission's interpretation of sections 30233 and 30240…In particular we note that under Commission's interpretation, incidental public services (IPS) are limited to temporary disruptions and do not usually include permanent roadway expansions. Roadway expansions are permitted only when no other alternative exists and the expansion is necessary to maintain existing traffic capacity." Although the court referred in that case to a roadway as opposed to a water system, it was focused on incidental public services in general and the finding is just as applicable to a water system (as one type of IPS) as a roadway or another type of public service. In other words, the court validated the temporary nature of IPSs in general and not just IPSs of the roadway variety.

[29] As could maintenance/repair activities that would involve cycles of unburying and reburying such components.

[30] The Applicant indicates that it would be unlikely that the buried components would become unburied, and that "sediment deposition is more likely than erosion" in this regard (Haro, Kasunich and Associates Inc. April 30, 2008 letter).

[31] DEIR, pg. 228.

[32] Id; per Jared Ficker, June 26, 2008.

designed to be approximately 540 cubic feet (15 ft x 6 ft x 6 ft) would result in additional disruption of the seafloor.

Based on diver surveys conducted in 1998, the marine habitat in the vicinity of the project's intake and outfall lines has been characterized as primarily sedimentary, with only isolated low-relief outcrops. The species observed in the area included tube-building worm, anemones, and bat star. The divers observed gumboot chitons, algae, bat stars, and sand castle worms in association with hard substrate. No substantial kelp was noted in the offshore portion of the proposed pipeline corridor, although there is dense kelp bed to the north, approximately 130 feet from the proposed brine discharge point. The EIR concludes that the pipeline installations would have a less than significant impact because the habitats and species affected are "common and widespread" in the region and in California. The lines will be directionally drilled under the seabed to a depth of -30ft to avoid nearshore and intertidal rocky habitats, and pipelines would be routed to stay as far as possible from kelp areas and rocky habitat areas.

There is no specific analysis in the EIR of the potential impacts to the marine organisms that would be present in the areas of the pipelines, other than the conclusion that the impacts would be insignificant because the species are common. However, there is no doubt that there would be some amount of mortality and/or injury to marine organisms in the area of seafloor disruption. In addition, periodic daylighting and reburying (whether for maintenance and repair or if buried components become unburied otherwise) would create the potential for some ongoing periodic disruption of the sandy seafloor in order to maintain the subsurface design. The project entails potential impacts to marine organisms, and disruption of the seafloor, in a marine/coastal environment that has been specifically recognized by the state and the federal government as a special marine ecosystem for which the Coastal Act requires "special protection" over and above the normal Coastal Act protection requirements. In addition, if approved as designed, the project would set a precedent for potentially significant cumulative impacts from other possible similar projects. As such, the project does not maintain or enhance marine resources and does not maintain biological productivity and quality of coastal waters and is thus inconsistent with Coastal Act Sections 30230 and 30231.

Other Agency Review

The Commission also notes that the installation of the pipelines and the vault under the seafloor of Monterey Bay will require state approvals from the California State Lands Commission (SLC) and the California Department of Fish and Game (CDFG), and federal approvals from the Monterey Bay National Marine Sanctuary, the U.S. Army Corps of Engineers (ACOE), National Marine Fisheries Service, U.S. Fish and Wildlife Service (USFWS), and the U.S. Coast Guard. USFWS has concluded its consultation required by ACOE, indicating that the proposed development is not likely to adversely affect the federally endangered brown pelican or the federally threatened southern sea otter (pages 1-2 of Exhibit 15). NMFS has concluded its consultation required by ACOE, determining that the proposed project minimizes potential adverse effects to essential fish habitat such that the effects are temporary and minimal (pages 3-6 of Exhibit 15). CDFG has reviewed the details of the subsurface seawater intake and open ocean emergency backup intake and finds these aspects of the project consistent with the requirements of the Edward F. Ricketts State Marine Conservation Area (ERSMCA), which is located directly offshore of the land portion of the project site (pages 7-8 of Exhibit 15). CDFG also

states, however, that the proposed process for installation of both the subsurface and emergency intake would require further department review prior to construction. CDFG's correspondence does not address the brine discharge outfall. Neither the State Lands Commission nor MBNMS have made any formal determination regarding the project at this time.

The EIR calls for buoy markers in the location of the open water intakes and discharge. According to the Applicant, the only approval needed from the Coast Guard is with regard to the light, design, lettering and location of the buoys. According to the Applicant, the Coast Guard has been notified of the project in connection with the permit to be issued by the ACOE, but no correspondence has been received from the Coast Guard regarding the project.

Conclusion

The Applicant has made efforts to reduce the marine resource impacts of the project including by burying most of the seaward components of the desalination facility under the seabed. However, as currently designed the offshore components of the project involve impermissible fill of coastal waters and adverse impacts to marine life of the Monterey Bay inconsistent with Coastal Act Sections 30230, 30231, and 30233. These Coastal Act inconsistencies cannot be fixed through conditions of approval. In particular, the project cannot be made by condition to be one of the development types for which fill of coastal waters is allowed. Thus, the project is fundamentally inconsistent with the Coastal Act and must be denied.

b. Water Supply Reliability, Cost, and Risks to Coastal Resources

The fact that there is no new water currently available from the existing public water system for new development in the coastal zone, and the fact that current water withdrawals for the existing system are leading to resource degradation in the Seaside Aquifer and the Carmel River, places heightened concern on the operational and institutional reliability of the proposed water supply. In other words, if the proposed desalination water supply does not provide adequate water to serve the development, there will be pressure to use Cal-Am water to supply the development. To the extent such pressure results in Cal-Am water being used to serve the development, the project would result in further degradation of the Seaside Aquifer and the Carmel River systems inconsistent with Coastal Act Sections 30231, 30240, and 30250. Absent 100% assurance that the project will not so impact these systems, the project cannot be found consistent with the Coastal Act in this respect. As described below, the proposed project does not include such 100% assurance, and thus the project is inconsistent with the Coastal Act.

Reliability of Supply/Contingency Planning

The operational reliability of desalination facilities to provide acceptable potable water over the long term is a significant issue. This is particularly true when the sole source of water would be the desalination facility, as is the case here.[33] As described, the residential and commercial tenants of the project would be the sole users of the desalination component, and rely completely on it for their drinking and other water. The only other water supply would be a connection to the Cal-Am system for

[33] Desalination projects typically address the question of a backup contingency supply designed to supplement the water supply portfolio.

emergency fire-fighting purposes only.[34] Indeed, the project and the DEIR were specifically modified to remove any backup potable water supply connection to the Cal-Am system because of conflicts with Cal-Am obligations under Order 95-10; such conflicts are only intensified in light of draft Cease and Desist Order WR 2008-00XX-DWR.

The project proposes a series of mechanisms to ensure a potable water supply that is not dependent on Cal-Am. This includes the provision of two subsurface intakes (one would be redundant and available for times when the other was not working or shut down for maintenance). The project also includes a backup open ocean intake in case the proposed subsurface intakes become inoperable. The project also includes a 3-6 day supply of water onsite, in two tanks. The length of time for this backup supply would be dependent on the amount of conservation implemented during an emergency. Thus, during emergencies, the project contemplates mandatory conservation, imposed through the covenants and restrictions of the tenants, of up to 50% by all residential and commercial users. The reverse osmosis plant itself is designed with operational redundancy because it will only operate 12 hours a day to meet the anticipated demand of the users. Thus, in the event of a failure in operation, the plant can be operated for a longer period (once repaired) to build the onsite storage back up. Other equipment redundancies include extra seawater intake, brine, and distribution pumps, as well as an emergency power generator, other spare parts and a 30-day supply of chemicals, either onsite or stored nearby.

Although desalination plants are in use around the world, this type of technology still poses some challenges. For example, if the pre-treatment and reverse osmosis system is not matched well to the source water, excessive fouling of the system may take place, leading to the need for premature replacement of parts and an increase in operational costs. The original project, for example, anticipated daily maintenance of the intake screens, and quarterly or annual maintenance of other components, to assure its reliable operation.[35]

In general, desalination plants may run into trouble when they aren't designed, built, and tested based on the specific type of water they'll be pulling in—for example, a different pre-treatment system would be needed if the source water had very high levels of total dissolved solids or high iron content. If that kind of problem occurs, a facility may have to do a complete revamp of its pre-treatment system. The Commission is well aware of the case of the failure of a full-scale desalination plant in Tampa Bay, which is operating properly only after four years of redesign. When it initially started operating in 2003, it had to shut down almost immediately due to equipment failure, clogging, etc. It only started operating properly in early 2008.

Other problems may occur with desalination facilities when there is a sudden change in source water quality (i.e., a fuel spill, a red tide, etc.) if the system is not able to react to these changes in water quality. One benefit of the proposed subsurface intake, assuming it otherwise functions as anticipated, is

[34] This emergency connection would only provide water for the project's interior fire suppression system (sprinklers). The MPWMD allows a special fire meter connection (plumbed to Cal-Am) directly to a project's sprinkler system. Firefighting flows would also be provided by existing hydrants (connected to Cal-Am) along Cannery Row.

[35] No doubt these intervals or requirements would change with a mostly subsurface intake system due to elimination of significant entrainment and the lack of light, for example, that might facilitate the growth of organisms and fouling of the intakes.

that it provides a buffer to these kinds of potential water quality problems. Other problems could also occur in terms of the integrity of the underwater components themselves. Other more serious technical or operational problems lasting more than the 3-6 days of water storage in this case, such as the need to replace outfall and/or intake pipelines, could also arise.

In short, although the Applicant does not expect there to be a problem that would result in the need for potable water other than from the desalination system, and they have submitted materials showing the proposed reverse osmosis technology to be sound on a general level, they have not provided for any alternative supplies in the case that their hypothesis proves false for whatever reason. That is not to say that the Commission expects the desalination system to fail, and can demonstrate conclusively that it will fail. Rather, it is to say that the Applicant cannot demonstrate conclusively that it won't. Given the significance of the resources at stake in the event the project requires water supply augmentation from other than the desalination system, and the pressure that would be brought to bear to so serve a completed and occupied project in such an occurrence, the most conservative approach is warranted. In order to protect the Seaside groundwater basin and Carmel River systems, there must be assurance and a contingency plan in place to ensure that any unexpected water supply problems do not exacerbate the tenuous water supply condition for the greater Monterey peninsula area. The proposed project includes no such assurance nor plan.[36]

This same assurance and contingency planning is also required by the Monterey County Health Department (MCHD). Specifically, the Applicant will require permits for the desalination treatment facility from a number of other agencies, including MCHD. To allow the project to proceed, MCHD will be required to find the proposed desalination treatment facility consistent with Chapter 10.72 (Desalination Treatment Facility) of the Monterey County Code. As part of the permit application process, Section 10.72.020(F) of the Monterey County Code regarding desalination treatment facilities requires the Applicant to:

> ***10.72.020(F)(in relevant part).*** *Submit a contingency plan for alternative water supply which provides a reliable source of water assuming normal operations and emergency shutdown operations. Said contingency plan shall also set forth a cross connection control program…*

It is not yet clear that the proposed project can meet the permitting requirements of the MCHD because there is no alternative water source for the project other than the redundancies built into in the desalination component. Although the Applicant has submitted a variety of materials that indicate that they expect the system to function without the need for an alternative contingency water supply, it is not only prudent to account for an unexpected problem that would render the system incapable of providing water to serve the development, it is required by MCHD. In addition, it is also required in order to make the requisite Coastal Act findings that the project will not adversely impact the Seaside groundwater basin and the Carmel River due to requiring Cal-Am water in this respect. Although the Applicant clearly believes that the system will be so reliable as to obviate the need for contingency planning of this

[36] The Applicant has indicated that if supplemental water was needed, then that water would be provided by water trucks from outside Cal-Am's service district, although the Commission is not aware of any specific arrangements having been made in this respect (see Tony Lombardo April 30, 2008 letter, p. 13; email from Jared Ficker dated July 15, 2008.).

sort, the Applicant has not conclusively demonstrated that the project will never require Cal-Am water (and thus will avoid off-site coastal resource impacts associated with providing that water), and has not provided a contingency plan to assure this to be the case should there be unexpected difficulties with the sole desalination source proposed. As such, the project cannot be found consistent with Coastal Act policies protecting the Seaside groundwater basin and Carmel River systems, including Sections 30231, 30240, and 30250.

Desalination is the Project's Only Water Source

In addition, in this case, desalination is the project's only water source. This fact makes it all the more critical to provide the level of assurance and contingency planning described above. In fact, in its other recent decisions on desalination facilities, the Commission has generally reviewed proposed projects to determine how they fit within a community's overall water portfolio and what measures are available to provide backup or emergency water supplies. Most recently, for example, the Commission recognized that water provided by Poseidon's Carlsbad facility is expected to provide only a portion of the water used by several nearby water districts and that each district would also rely on other water sources, such as imported water, groundwater, recycled water, conservation, or others. Even the City of Carlsbad, which could obtain nearly 100% of its supply from that project, would remain on the regional water supply system and would continue to use that water if it is less expensive or if it is needed for emergencies.

Similarly, recent Commission reviews of desalination proposals in Sand City and Cambria have identified how water that might be provided through desalination would continue to be augmented by supplies from other sources. Additionally, although the Monterey Bay region is under severe water constraints, the desalination facility being planned by the regional water supplier (i.e., Cal-Am) would only partially replace just one of the several over-tapped water sources in the region, resulting in a more robust and flexible water portfolio.

As discussed, the desalination facility in this case would be the sole source of water for the proposed residential and commercial uses. The water supply would not be part of a larger portfolio of water sources. It would not be connected to Cal-Am for potable water, and would appear to be prohibited from doing so by SWRCB Order 95-10 and the recently proposed SWRCB order that more aggressively targets Cal-Am withdrawals in this respect. In addition, all other alternatives, such as an onshore well or trucking water to the site, were determined in the EIR to be infeasible or otherwise unacceptable.

No Testing of Proposed Technology in Specific Circumstances

In response to reliability issues, the current standard industry approach is to determine appropriate desalination processes by constructing and operating a pilot plant before committing to a full-scale facility. This is evidenced by the number of pilot plants being proposed or operated in the Monterey area, along the California coast, and nationally.

The Applicant proposes to use a desalination facility similar to a pilot plant recently operated by the Marin Water District (District). The District used the pilot plant to determine which of several different desalination systems might be best to use in a full-scale facility that it may construct at a later date to

desalinate water from San Francisco Bay. As part of implementing its pilot plant, the District conducted a number of tests and studies to compare various desalination methods and to determine which would most efficiently provide the necessary level of treatment for the Bay water's particular characteristics. For example, it compared different pretreatment systems and conducted tests of both one-pass and two-pass processes to determine which was best suited to the source water conditions. As described in the District's Engineering Report, selecting the appropriate system for their particular location on the Bay was based on comparing results from a number of tests.

For this proposed Ocean View Plaza project, however, the Applicant has not conducted site-specific tests or pilot studies to determine whether a desalination system found suitable for treating San Francisco Bay water would be equally suitable for treating water from Monterey Bay. The Applicant states, however, that the historical data collected during the operation of the Monterey Bay Aquarium's desalination facility over almost the last 20 years indicates that it is very unlikely that the source water would experience any sudden changes of sufficient magnitude that would prevent the reverse osmosis membranes from working adequately. However, unlike the Marin pilot plant and the Aquarium's desalination facility, the Ocean View Plaza desalination facility would be expected to immediately provide water of drinking water quality to residents and businesses that would have no other water sources available. The lack of adequate test data provides an insufficient level of certainty to rely on this pilot as a sole drinking water source.

Costs of Operating the CSD and Desalination Plant

The Applicant will pay for the costs associated with construction of the proposed desalination facility. The residential, retail, and restaurant tenants of the project site will pay the costs associated with operation and maintenance of the desalination facility, as well as the overhead, management, and administrative costs of the OVCSD.

The City of Monterey initiated two studies related to the costs of administering the CSD and operating and maintaining the desalination plant and related water distribution infrastructure. Prior to these studies, the Applicant's consultants prepared a "Desalination Plant Preliminary Pro-Forma," which estimated the 10-year operation and maintenance cost for the desalination plant and related water distribution infrastructure to be $6.25 per 1000 gallons of water. This estimate, however, did not include the overhead, management, and administrative costs of the CSD. A peer review of the Applicant's cost estimate was performed by CH2M Hill.[37] CH2M Hill estimates the cost of operating and maintaining the desalination plant at between $9.64 and $11.75 per 1000 gallons of water produced, or 54% to 88% more than the cost estimated by the Applicant's consultants. This cost estimate, however, also does not include the overhead, management, and administrative costs of the CSD.

A second study performed by Economic and Planning Systems[38] (EPS) sought to determine the preliminary budget for the CSD. The CSD's overhead, management, and administrative costs will add

[37] As stated on its website, CH2M Hill is a "multinational firm providing engineering, construction, operations, communications, security, environmental, and related services to public and private clients in numerous industries."

[38] As stated on its website, EPS is a "land economics consulting firm experienced in the fill spectrum of services related to real estate development, market analysis, public-private partnerships, and the financing of government services and public infrastructure."

approximately 43 percent to the desalination plant's annual operating and maintenance costs. Thus, the total cost for producing 1000 gallons of water is estimated to be between $13.79 and $16.80. According to this study, the resulting water rates for the residential, retail, and restaurant tenants of the proposed project will be approximately 291% to 354% above the current rates paid by other water users (i.e. water provided by Cal-Am to City of Monterey residents) in the Monterey area. The current estimated monthly water bill for each of the proposed project's residential units is:

Unit Description	**Projected Monthly Water Cost**
Moderate Income – 1 Bedroom, 1 Bath	$39.59 to $48.23
Moderate Income – 2 Bedroom, 2 Bath	$39.59 to $48.23
Market Rate – 2 Bedroom, 2 Bath	$60.56 to $73.77
Market Rate – 3 Bedroom, 3.5 Bath	$87.91 to $107.10

As evidenced by the varying prior estimates of costs, there is some uncertainty as to the what the actual cost to the water provided to tenants of the project will be once the desalination plant is operational. This is particularly true given the reliability issues and the fact that these uncertainties in future operating costs, including potential liabilities, could increase costs substantially. There is no question that, at current Cal-Am rates, the water would be more expensive than the Cal-Am water that is provided to adjacent uses and the Monterey peninsula more generally.[39]

Institutional Weaknesses

As originally described in the EIR for the project, the desalination component of the project would be owned and operated by the Applicant, a private entity. As previously described, the Ocean View Community Services District (OVCSD) was formed on December 27, 2005 to own, operate, and maintain the proposed desalination plant once it is constructed, with the members of the Monterey City Council acting as board members for the OVCSD (see Exhibit 7).[40]

Commission staff wrote two letters to LAFCO staff regarding the proposed Community Services District. In these letters, Commission staff raised a number of concerns regarding the proposed formation of a project-specific Community Services District, including that the CSD:

- May not have adequate financial and staff resources to ensure that operation of the desalination plant will protect coastal resources and public safety. Operational problems may cause adverse impacts to coastal water quality, marine resources, and aquatic habitats, inconsistent with Coastal Act Sections 30230, 30231, 30232, and 30240;

[39] Cal-Am has applied to the California Public Utilities Commission for a significant rate increase; if this rate increase is approved, the cost of Cal-Am water may approach the cost estimated for the residents of Ocean View Plaza.

[40] LAFCO hastened its approval of the OVCSD in late 2005 to avoid approving the CSD under State Senate Bill 135 (SB 135), which became law on January 1, 2006. SB 135 substantially amended State Law regarding Community Services Districts. Formation of a CSD under the provisions of SB 135 requires a vote of the City's residents (Section 61014). Any CSD formation subject to the new law requires an election for the initial members of the CSD board (Section 61021). By approving the CSD five days prior to January 1, 2006, LAFCO avoided the need for a public vote on the CSD formation and was also able to appoint the Monterey City Council members to the OVCSD board without a public vote.

- May interfere with current efforts to develop a regional solution to address existing water shortages and related environmental problems by reducing incentives for participation in such efforts; and

- Sets a precedent for similar project-specific proposals that may cumulatively induce growth and preclude a well planned allocation of limited water resources consistent with the land use priorities and resource protection requirements of the Coastal Act, including Section 30254.

Additionally, Commission staff noted that the LAFCO staff report regarding formation of the CSD relied upon the project EIR, which did not specifically analyze the environmental impacts, such as potential cumulative growth impacts, attributable to the creation of a project-specific services district that might be emulated by other projects in the future.[41]

Although the OVCSD is a public agency, approved by the Monterey County LAFCO and supported by the City of Monterey, including having the City Council members acting as the CSD board members, there remain significant questions that raise concerns about the long-term viability of the CSD and its public obligations with respect to water supply. One of the primary issues concerns long-term responsibility, legal and otherwise, for the reliable operation of the plant. As detailed in the project description above, the developer is a limited liability corporation, and is expected to dissolve once the desalination facility is constructed, operating, and dedicated to the OVCSD. Because of this, a detailed Indemnification Agreement (see Exhibit 13) has been negotiated that ultimately requires the purchaser of the retail/commercial portion of the project (but not the residential owners) to assume the Applicant's indemnity obligations for the duration of the total ten-year indemnity period. Thus, after a period of developer liability of approximately two years for claims concerning the construction, testing and operation of the desalination facility, the liabilities are assumed by the purchaser of the retail component of the project. Even still there may be some liability that flows to the City. In considering whether to pursue the LAFCO formation of the CSD for the project site, the City analysis noted that although the indemnity obligations against the successor retail owner are enforceable, there is the potential risk that a court or jury could view this arrangement as oppressive to the property owner given a sympathetic set of facts.

The Applicant's indemnity also does not extend to any liability arising from the management and operation of the CSD following dedication of the desalination facility to the OVCSD. Thus, a requirement for comprehensive insurance to be provided by the Applicant has been required by the City.

Pressure to Use Cal-Am Water

In the event of failure of the desalination plant, or perhaps simply as a result of ongoing and recurring operational problems, increasing costs, and perhaps litigation related to these issues, there is the potential that the residents, retail tenants, and restaurant tenants of the project site could be without water either for an extended period of time or for sporadic periods of time. As indicated, the project does not include a specific contingency plan to address this issue. In such situations, to avoid the need for residential tenants to live without water or relocate, and to ensure that the onsite retail and restaurant

[41] See letter dated December 27, 2005.

businesses would continue to function, it is foreseeable that great pressure would be brought to bear on local officials, the MPWMD, and Cal-Am to provide water for the project. The alternative would be to let the residents of the 51 residential units relocate or live without water for an unknown period of time, and to potentially require the retail and (especially) the restaurant tenants on the site to close their businesses until water again became available. As discussed, there is no contingency for such a potential outcome. Although there is no potable water connection to the Cal-Am system, such a connection is not prohibited by the current project authorizations.

Conclusion

Given all of the above, the creation of the project-specific CSD in this case to allow construction of and operation of the proposed project-specific desalination plant is inconsistent with Coastal Act Section 30250(a), which requires that new development be located in areas with adequate public services and where it will not have significant adverse effects, including growth-inducing effects, on coastal resources. Although the probability of debilitating operational or institutional failures may be small, the risks associated with such an occurrence, namely that the project would become a user of Cal-Am water, are too high to support approval of the project. In the event that the CSD and/or the desalination facility fail to provide a long-term reliable water supply to the project, pressure would be brought to bear to connect the project to the Cal-Am system. It would appear unlikely that 51 residential units and the significant commercial retail components and restaurants would be left without water. As described at the outset of this finding, such a connection to the Cal-Am system would, in turn, result in adverse impacts to the Carmel River and the Seaside groundwater basin, inconsistent with Coastal Act Sections 30231, 30240, and 30250. Absent 100% assurance that the project will not so impact these systems, the project cannot be found consistent with the Coastal Act in this respect. As described below, the proposed project does not include such 100% assurance, and thus the project is inconsistent with the Coastal Act and must be denied.

c. Cumulative Impacts of Proliferation of Package Desalination Plants

Coastal Act Section 30254 requires that special districts not be formed except where provision of the service would not induce new development inconsistent with this division. Section 30250 requires that new development in urban areas not have adverse cumulative impacts on coastal resources. As discussed above, neither the EIR for the project nor LAFCO's approval of the formation of the OVCSD specifically analyzed the environmental impacts, such as the potential cumulative growth impacts, attributable to the creation of a project-specific services district. However, it is foreseeable that approval of a project-specific desalination plant under the auspices of a CSD specifically created for a single project could lead to similar proposals in other coastal areas, including the Monterey peninsula, where public services, such as water, are limited. The prospect of multiple onsite desalination plants[42], each with the potential for adverse impacts to marine resources of the types described above, including fill of coastal waters, is not consistent with Coastal Act Sections 30250 and 30254.

[42] Currently the City of Pacific Grove is proposing a desalination facility as part of a redevelopment plan of the American Tin Cannery site.

5. Conclusion

While it is clear that the developer has gone to great lengths to try to address the lack of water available to serve the proposed land-based portion of the development proposed here, it is equally clear that the proposed project cannot be found consistent with the Coastal Act. These inconsistencies are fundamental inasmuch as the project proposes impermissible fill of coastal waters which would result in impacts to marine resources, through impingement and entrainment of marine organisms, brine discharge, seafloor manipulation, in order to provide feedwater for the onsite desalination system. In addition, even if these marine resource issues were surmountable, which they aren't, the Applicant cannot provide 100% assurance that the proposed project will not require supplemental Cal-Am water if, for whatever reason, the desalination system does not provide adequate water to otherwise serve the development. Again, it is not that the Commission expects the desalination system to fail, and can demonstrate conclusively that it will fail. Rather, it is that the Applicant cannot demonstrate conclusively that it won't. In other words, if the proposed desalination water supply does not provide adequate water to serve the development, there will be pressure to use Cal-Am water to supply the development. To the extent such pressure results in Cal-Am water being used to serve the development, the project would result in further degradation of the Seaside Aquifer and the Carmel River systems inconsistent with the Coastal Act. Absent 100% assurance that the project will not so impact these systems, the project cannot be found consistent with the Coastal Act in this respect either.

In conclusion, the proposed project is inconsistent with Coastal Act Sections 30230, 30231, 30233, 30240, 30250, and 30254. These Coastal Act inconsistencies cannot be fixed through conditions of approval. Thus, the project is fundamentally inconsistent with the Coastal Act and must be denied.

B. Public Access and Recreation

1. Applicable Policies

Coastal Act Policies

The project is located in an extremely popular visitor destination. The bayside portion of the project is located along the immediate shoreline seaward of the first public road. The inland portion of the project site is located adjacent to the heavily used Monterey Peninsula Recreational Trail. Public access and recreational issues must be understood in this context. The following Coastal Act Sections specifically address public access and recreation:

> ***30210:*** *In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.*
>
> ***30211:*** *Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.*
>
> ***30212 (in relevant part):*** *(a) Public access from the nearest public roadway to the shoreline and*

along the coast shall be provided in new development projects except where: (1) It is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, (2) Adequate access exists nearby…

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

30220: *Coastal areas suited for water-oriented recreational activities that cannot readily be provided at inland water areas shall be protected for such uses.*

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

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

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

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

30253(5): *New development shall: (5) Where appropriate, protect special communities and neighborhoods which, because of their unique characteristics, are popular visitor destination points for recreational uses.*

LUP Policies

In addition, the Cannery Row LUP provides a number of public access and recreation policies that apply to the rocky shoreline along Cannery Row, including requiring lateral access along the seaward sides of buildings as a condition of new development:

(c)(2). *Require improvements to and a public access easement (a minimum width of ten feet) to the rocky promontory on the site of the former San Xavier Cannery as a condition of new development.*

(c)(4). *Require improvements to and a public access easement for a pedestrian plaza (a minimum of 250 square feet for each 100 linear feet or portion thereof of front footage along the rocky promontory…on the former San Xavier Cannery site) as a condition of development of*

parcels along the rocky shoreline.

(d)(1). *Where new development is proposed for an existing structure or on slabs presently extending over the water, pedestrian access to viewpoints overlooking Monterey Bay, as conceptually shown in Figure 4, is to be provided as a condition of development. This access is to be open to the public during daytime business hours with the exception of those coastal dependent uses where access is not appropriate. Maintenance and liability of this access is to be the responsibility of the property owner. This access and viewpoint may be open or enclosed and within, above, or below the structure. Pedestrian access to the viewpoint, if enclosed, is to be a minimum of six feet. If open, the pedestrian access to the viewpoint is to be a minimum width of ten feet. The viewpoint at the end of the pedestrian access area is to consist of a minimum of 100 square feet of accessible viewing area. The square footage of any public pedestrian access and viewpoint opportunities provided in addition to those required minimum standards is not be counted against the total maximum building square footage allowed by the floor area ratios set in the Development section of this LCP.*

(d)(2). *Pedestrian movement parallel and adjacent to the water shall be required with unobstructed views of the water in the form of an open or enclosed walkway a minimum of eight feet wide across the seaward sides of structures as a condition of all new development, consistent with the Coastal Act's requirements for shoreline access.* ***(a)*** *A cantilevered deck extending beyond existing slabs shall be permitted up to a maximum of 12 feet only to accomplish the aforementioned accessway, but in no event shall new pilings, seawalls or structures be necessitated which physically interfere with the intertidal zone. Extensions beyond existing slabs, for purposes other than access, shall not be permitted.* ***(b)*** *For the greatest length of Cannery row, continuous lateral access linked from parcel to parcel, shall be redeveloped as part of each project. In the four areas shown in Figure 4a…**San Xavier** / Willie Lum's / Western Sardine / Ferrante / Oxnard…lateral access shall be provided. These accessways shall, if possible, be continuous and linked from parcel to parcel. Linked accessways shall be deemed feasible with the following exceptions: (1) Along the backs of historic structures (see development policy o.) where lateral accessways would deface the historic character of the structure. The Doc's Lab parcel shown in Figure 4a is specifically excepted unless demolished and not restored to its original configuration. (2) Along existing sheer walls on property lines where lateral accessways to be provided would have to be located over the adjoining property. (3) Along existing sheer walls where lateral accessways would deface the architectural character of an existing structure. (4) Along stretches of the rocky shoreline where public safety considerations preclude lateral accessways. Access may be precluded only during hazardous periods if the City concurs that public safety concerns existing. Management techniques rather than physical barriers shall be used wherever feasible.*

In the four areas shown in Figure 4a, where significant reconstruction involving the removal or substantial alteration of exterior walls and replacement with new walls is proposed, lateral accessways linked from parcel to parcel shall be provided as a condition of development… (d) The accessways shall be open at a minimum during the normal operating hours of the business.

The liability and maintenance of the accessways shall be the responsibility of the project owner or lessee. Closure of accessways during heavy storms shall be permitted to prevent hazards to public safety.

The Cannery Row LUP's public access and recreation provisions are important to understand inasmuch as they represent what the Coastal Commission has certified as the local expression of the Coastal Act's access and recreation policies as they apply to the specific factset of Cannery Row. Although not the standard of review, they do provide a clear framework and vision for Cannery Row that has been certified by the Commission, and describe the types of access amenities that the Commission has previously found are necessary in order to achieve Coastal Act consistency in this regard. These provisions have been in place since the LUP was certified in 1981, and for many years have helped to define appropriate access requirements that have been made a part of development projects since then (see also description of several recent Commission actions below).

Perhaps most important in terms of these LUP specifications with respect to the current application is the need and vision for development along Cannery Row to provide continuous developed lateral access along the seaward side of structures, including as identified in Cannery Row LUP Public Access Policy d(2) above. The Applicant in this case has been notified of this requirement on a number of occasions during Commission staff meetings with the Applicant and the Applicant's representatives and in letters from Commission staff to the Applicant's representatives. For example, a Commission staff letter to the Applicant's representative dated March 26, 2007 stated:

The Commission has required lateral access on the seaward side of new developments on Cannery Row, e.g., the Monterey Plaza Hotel and the Cannery Row Hotel that is currently under construction. We appreciate the submission of the drawing identified as C103 that shows the proposed public access, but which does not include a lateral public access component across the seaward side of the buildings. Thus, it appears that the proposed project does not provide lateral coastal access. Please clarify if this is not the case.

Similar comments were made in a letter to the Applicant's representative on May 3, 2007:

Recent Commission approvals along Cannery Row (the Cannery Row Hotel, Bubba Gumps' deck expansion, Monterey Plaza Hotel) have required a lateral access component along the entire seaward side of the buildings (not below the buildings) with vertical connections to this lateral access, consistent with the requirements of the Cannery Row Land Use Plan. The proposed project does not include an uninterrupted lateral access component along the seaward side of the buildings. Our previous letter identified this inconsistency not as a filing requirement but as an issue that warrants further consideration by the Applicant.

The Applicant has responded that the LUP does not require access along the seaward side of buildings because it is not so depicted in relation to this site in LUP Figure 4. However, LUP Figure 4 must be understood in light of all of the LUP policies, including LUP Policy d(2). LUP Figure 4 (see page 19 of Exhibit 17) labels the project site for "Lateral Access (Rocky Shoreline)." Although Figure 4 does not specifically label the project site for "Lateral Access (Backs of Structures)," Figure 4 also notes that the

"locations of…access (to backs of structures) shown above within properties should not be interpreted as precise locations…." In part this is due to the compelling vision in articulated in other LUP policies that explicitly require linked, continuous lateral access. Thus, Figure 4 must be understood in relation to the other policies and interpreted in a manner that maximizes public recreational access opportunities consistent with the Coastal Act, including acknowledging that public access along the backs of structures may be required in areas not explicitly identified on LUP Figure 4.

Policy Conclusion

The Coastal Act clearly requires recreational access to and along the shoreline for the project site, and this requirement is further reinforced and further developed by the certified LUP. In particular, seaside access and "plaza style" vertical access, as well as developed lateral access, are clearly necessary along Cannery Row, including to ensure overall connectivity and to address the development pattern here that is unlike other areas of the coast in terms of the area's atypical development style (i.e., large development at and over the water's edge). Such pattern and style of development leaves little space for continuous public access along the immediate shoreline, thus magnifying its importance in cases like this.

2. Consistency Analysis

Cannery Row is an extremely popular tourist destination located along the craggy Monterey shoreline. Cannery Row contains many shops, restaurants, several hotels, and the Monterey Bay Aquarium. The Cannery Row coastline is generally rocky but there are three accessible beaches, specifically McAbee Beach, Aneas Beach, and San Carlos Beach, which are popular with beachgoers and divers. Public access to the coastline has been largely blocked by intervening development. More recent Commission actions have served to begin to open the area to the public, including along the immediate shoreline (e.g., a plaza at the Monterey Bay Aquarium; Steinbeck Plaza; a walkway below the Chart House restaurant, and; vertical, lateral, and courtyard access at the Monterey Plaza Hotel and Spa and at the Clement Intercontinental Hotel; and lateral access at the Bubba Gump Shrimp Company restaurant). Thus, while still not ideal, Coastal Act requirements have resulted in case-by-case access improvements that help define a shoreline vision for Cannery Row within which future projects – such as the proposed project – can be melded.

In addition to the immediate shoreline, a portion of the 18-mile Monterey Bay Coastal Trail (Trail), a biking and hiking path that overlays a section of the old Southern Pacific railroad grade, runs parallel to and inland from the shoreline in Cannery Row. This trail is extremely popular and a portion of it is located directly adjacent to the inland portion of the project site (see page 2 of Exhibit 2). Traveling downcoast from this section of Trail leads to the Monterey Bay Aquarium and Lover's Point in Pacific Grove; traveling upcoast from this section of trail leads to the historical Custom House Plaza, Fisherman's Wharf, Monterey Bay Park, and further out to the communities of Seaside and Sand City.

Recent Commission Actions

In recent years, the Commission's approval of projects along Cannery Row has been premised in part on significant vertical and lateral improvements in order to find consistency with the public access policies of the Coastal Act (and the Cannery Row LUP). For example, the Commission approved an amendment

for the development of the Monterey Peninsula Hotel (now called the Clement Intercontinental Hotel) in 2001 (3-84-139-A1) and processed an amendment to this permit (3-84-139-A2) in 2005. The Commission's approval of the hotel included extensive public access amenities, including vertical connections from Cannery Row street that connect to lateral access that extends along the hotel's entire oceanside frontage. Construction of this hotel was recently completed and the hotel opened for business in May 2008. The hotel's public access promenade is located directly adjacent to the existing Bubba Gump Shrimp Company restaurant. In 2005, the Commission approved an expansion of Bubba Gump's outdoor dining deck to include a viewing deck and a lateral accessway that will connect to the hotel's promenade. As completed, these accessways provide significant continuous and developed recreational access opportunities that previously did not exist along the downcoast end of Cannery Row.

Likewise, the Monterey Plaza Hotel, which is located just upcoast from the proposed project site, was approved by the Commission in 1982 (CDP 3-82-077). This hotel consists of two separate buildings with a main courtyard located between the buildings. Vertical access from Cannery Row exists along the hotel's upcoast building. This vertical access either leads to a stairway down to Aneas Beach or to a lateral accessway that wraps around the entire upcoast building and connects to the main courtyard (the main courtyard also provides a vertical access connection to Cannery Row). The courtyard contains an overlook area. From the courtyard, doors lead through the downcoast building briefly, emerging to a lateral walkway that wraps around the end of the building and connects to vertical access that leads back to Cannery Row. From this point on Cannery Row there is direct access to a walkway below the Chart House Restaurant (the Chart House restaurant is directly adjacent to the proposed project site). The walkway below the Chart House restaurant ends at the rocky shoreline, approximately 30 feet upcoast from the property line of the proposed project's bayside parcel.

In 2000, the Commission approved development of an IMAX theater along Cannery Row.[43] Consistent with the public access requirements of the Coastal Act and the Cannery Row LUP, the project approval included a minimum 8-foot-wide public vertical coastal access through a gallery on the south side of the project. The gallery was proposed to be approximately 24 feet wide and would also have provided an area for theater patron queues. The approved vertical access connected to a 10-foot-wide lateral public accessway located along the bayside portion of the project. As approved, this lateral access included a 100-square-foot public overlook area that connected to existing access along the bayside of an existing hotel located immediately southeast of the approved IMAX project. In its approval, the Commission found that these public access features provided a significant contribution to the overall provision of vertical and lateral access in the Cannery Row area.

Proposed Access and Recreation Features

As discussed above, the proposed project represents a redesign of a previous project proposed by the Applicant for this site in 1997. The 1997 project was known as the Cannery Row Marketplace project and the project Applicant was the Cannery Row Marketplace, LLC, as is the case for the proposed Ocean View Plaza project. The proposed Cannery Row Marketplace project included a vertical access component from Cannery Row through a plaza located between Buildings A and B on the bayside

[43] CDP 3-99-076; the Applicant received three extensions of the permit but neglected to apply for an extension of the permit in 2005 and the permit expired.

parcel. This vertical access was proposed to connect to a 10-foot-wide dedicated lateral accessway extending along the entire seaward frontages of Buildings A and B. Stairways from this lateral accessway to the rocky shoreline were also a component of the proposed Cannery Row Marketplace project. In a comment letter dated March 5, 1999 to the City of Monterey regarding the Cannery Row Marketplace EIR, Commission staff stated:

> *The public access and recreation improvements proposed by the project, particularly the vertical and lateral accessways, stairways to the rocky shoreline, open plaza area, and Cannery Row museum are beneficial components that generally achieve Coastal Act and LCP objectives and are strongly supported by Commission staff.*

Since that time, the Applicant has modified the proposed access parameters including such that continuous developed lateral access is not proposed along the shoreline frontage. Public access now proposed by the Applicant includes a history plaza located between Buildings A and B, which would provide vertical access to the shoreline. The Stohan's building, which will be located in the center of the history plaza, will be redeveloped as a history center and museum.[44] Vertical access to the history plaza will be from Cannery Row. The history plaza will lead to bayside overlook areas (constructed atop historic fish-holding tanks) located adjacent to Building A. Steps will lead down from these overlook areas to a covered promenade (open to the bayside) located along the lower edge of Building A. This 13- to 22-foot-wide promenade will also connect to a stairway leading down to the rocky shoreline. The public access plan also includes a 10-foot wide lateral access easement along the rocky shoreline on the bayside parcel. Another stairway located adjacent to the history center will also lead down to the rocky shoreline and the easement area. However, the Commission notes that this shoreline easement will not provide generally available public access to many potential users. In part this is because the rocky shoreline is just that, and is not a suitable continuous lateral accessway for many who might desire to traverse the shoreline. Additionally, this easement area will be unusable during higher tide events,[45] and there will be no alternative continuous access along the ocean side of the buildings. Nor will this easement area be suitable for meeting the objectives of the California Coastal Trail, which aspires to be a continuous shoreline trail available to all, in a location as close as possible to the ocean.

Additional public access would be provided in the proposed approximately 14,000 square foot community park located on the inland parcel between Cannery Row and the Recreation Trail. Along the inland side of the project site, the City conditioned its approval to require widening of a 50-foot length of the adjacent Monterey Bay Coastal Trail between the project's property line and the existing Trail (see page 2 of Exhibit 3). This section of Trail would be widened by approximately 10 feet.

In sum, the proposed project includes inland public park access (serving as vertical access from the Recreational Trail to Cannery Row), vertical access through the center portion of the site to the shoreline through the history plaza area, overlook areas along the seaward edge of the history plaza, developed lateral access along the base of bayside Building A, stairway access to the rocky shoreline at two locations, and dedication of a ten-foot-wide public access easement along the rocky shoreline (see page

[44] A fee may be charged to enter the history center and museum.

[45] The rocky shoreline is often not accessible due to tidal influx.

2 of Exhibit 3 for the project's public access plan). Although these public access improvements are beneficial, they are inadequate with respect to the type of public access that would be necessary to find the project consistent with the Coastal Act and the Cannery Row LUP.

Lateral Access

The shoreline lateral access is inconsistent with the Coastal Act and the Cannery Row LUP specifically because it does not provide continued developed access from property line to property line. Rather, approximately 195 feet of such access is provided along Building A, and about 60 feet of lateral access is provided by virtue of the history plaza overlook areas. However, there remains a gap of about 180 feet of public access along Building B where no such access is proposed. The Applicant indicates that this is addressed by the proposed shoreline easement area, but this type of access is not equivalent. Specifically, due to the rocky nature of shoreline in this location and associated tidal influx that will often render the easement area inaccessible, the proposed shoreline easement area will not provide not a suitable continuous lateral accessway across the entire seaward frontage of the project site.

Given the vision for Cannery Row, including as articulated in major Commission actions discussed above that have been premised on continuous lateral access, and including as articulated in the Cannery Row LUP, the proposed project cannot be found consistent with Coastal Act Sections 30210, 30212, 30213, 30221, and 30222, nor with Cannery Row LUP public access and recreation policy d(2), which requires lateral access along the seaward side of structures, including those of the proposed project site.

Vertical Access

The proposed project provides vertical access through the center of the bayside parcel in the form of a history plaza that will surround the proposed history center/museum to be located in the Stohan's building. The history plaza will lead to bayside overlook areas (constructed atop historic fish-holding tanks) located adjacent to Building A. The proposed community park located on the inland parcel will likewise provide vertical access to and between the Recreation Trail and Cannery Row (see page 3 of Exhibit 3 for public access plan). The proposed project, however, does not include vertical access along the downcoast side of Building A that would provide a connection from Cannery Row to the proposed covered promenade located on the seaward side of Building A. Additionally, because there is no lateral access proposed along Building B, the proposed project provides no vertical access connection from Cannery Row along the upcoast side of Building B. As discussed above, major Commission actions along Cannery Row in recent years have required significant vertical access components (to connect to lateral bayside accessways). Thus, the proposed project is inconsistent with Coastal Act Sections 30210, 30212, 30213, 30222, and 30223.

Other Access Along Cannery Row

In addition to the general requirements of the Coastal Act and the LUP, the project will result in significant impacts to public access along Cannery Row. The proposed project will provide new amenities (retail shops, restaurants, history center and plaza, and a community park) that will attract many visitors to this part of Cannery Row. In addition, as discussed in the parking and traffic findings below, there will be significant new demands placed on existing public parking and circulation, some of

which is unmitigated, by the project.

Typically, proposed projects along Cannery Row have been required to provide lateral access along the seaward side of new development that is linked with vertical access that connects to Cannery Row. The absence of a vertical access connection along Building A and the absence of lateral and vertical access along Building B in the proposed project could unduly burden the existing lateral access components present in other facilities along Cannery Row, especially given the proposed project's potential to increase visitation along Cannery Row. It is possible that if complete lateral access along the bayside of the project was provided, and connectivity to adjacent sites was provided for, that the lack of vertical accessways along the perimeter of the site would not be a critical gap. For example providing lateral connectivity to the existing Chart House access, which includes a vertical accessway, may address the need for effective vertical access at that general location.

Offshore Access

Coastal Act Section 30240(b) requires that development in areas adjacent to parks and recreation areas prevent impacts that would degrade these areas and requires such development to be compatible with the continuance of the recreational area. As previously described, the Edward F. Ricketts State Marine Conservation Area (ERSMCA) is located directly offshore of the project site (see page 1 of Exhibit 11 for a map of this area). The ERSMCA is akin to an underwater park, and it is extremely popular for diving and associated interpretation of the Bay's natural resources. CDFG has reviewed the details of the proposed operation of the subsurface seawater intake and open ocean emergency backup intake and finds these project components consistent with the requirements of the ERSMCA (see page 7-8 of Exhibit 15). However, CDFG notes that the proposed process for installation of the intakes would require further review to determine if these activities would result in any potential impacts to this SMCA or marine resources in general. Finally, repair and maintenance of the proposed pipelines and vault could also cause marine resource degradation, but CDFG's correspondence does not address potential impacts associated with repair and maintenance of the sea-based project elements over time.[46] As described in the preceding water supply findings, installation of the proposed seaward components will lead to degradation of the seabed floor, and future repair/maintenance, particularly to the lines and the vault themselves, could lead to similar episodes in the future. Such impacts could degrade recreational use of the area, particularly for divers. Given the status and recreational popularity of the ocean area in question, such impacts will degrade those areas, and the proposed project is inconsistent with Coastal Act Section 30240(b).

3. Conclusion

In summary, the proposed project lacks continuous developed lateral access, specifically any lateral access component across the seaward side of Building B. In addition, while vertical access is provided through the center of the site, the project does not include a vertical access connection to the proposed lateral access promenade along the seaward side of Building A, and it does not include a vertical connection along the property line at Building B to Cannery Row, nor is other lateral connectivity to

[46] CDFG's review was limited only to the intake operation of the desalination facility, and did not encompass discharge and repair/maintenance impacts over time.

such potential vertical accessways provided. The absence of a vertical access connection along Building A and the absence of lateral and vertical access along Building B in the proposed project could unduly burden the existing lateral access components present in other facilities along Cannery Row, especially given the proposed project's potential to increase visitation along Cannery Row. Furthermore, the project could have impacts to the ERSMCA that could in turn impact public use of the ERSMCA in terms of diving.

The public access dedications that other Cannery Row developments have provided consistent with the Coastal Act and the Cannery Row LUP, such as lateral and vertical access at the Monterey Plaza Hotel, the Clement Intercontinental Hotel, the Bubba Gump Shrimp Company, among others, provide benefits to the owners and patrons of businesses along the entire span of Cannery Row, and will enhance the value and marketability of the residential and commercial components of the proposed Ocean View Plaza project. Thus, it is not unreasonable to expect the Ocean View Plaza project to comply with the public access requirements of the Coastal Act and Cannery Row LUP and provide lateral and vertical public access components comparable to those provided by numerous other commercial enterprises located along Cannery Row.[47] Lacking continuous developed lateral shoreline access and appropriate connectivity up and downcoast, and lacking clear public use parameters for the history plaza and park, the proposed project cannot be found consistent with the Coastal Act and LUP policies cited above. At this important location, such public recreational access improvements are required to find the project consistent with these policies. Additionally, the project has the potential to impact diving activities in the ERSMCA.

Thus, as proposed, the project is inconsistent with Coastal Act Sections 30210, 30212, 30213, 30221, 30222, 30223, 30240(b), and 30253(5) protecting public recreational access and cannot be approved as proposed. An approvable, Coastal Act consistent project in this respect would have to include significant, continuous, developed lateral shoreline access and appropriate connectivity up and downcoast; clear and enforceable parameters that ensure that public use of the history plaza and park; and avoidance of diving impacts (and/or offsetting mitigation for any such impacts that area unavoidable). The proposed project does not include such elements and thus cannot be found consistent with the Coastal Act.

C. Visual Resources

1. Applicable Policies

Coastal Act

Coastal Act Section 30251 provides for the protection of scenic and visual qualities of the coast and states, in part:

> ***30251.*** *The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect*

[47] The legal term that courts have given to such a reciprocal program is "average reciprocity of advantage" (e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. 470, 491-93 (1987)).

views to and along the ocean and scenic coastal areas, to minimize alteration of natural land forms, to be visually compatible with the character of surrounding areas, and where, feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas such as those designated…by local government shall be subordinate to the character of its setting.

30253(5): *New development shall: (5) Where appropriate, protect special communities and neighborhoods which, because of their unique characteristics, are popular visitor destination points for recreational uses.*

LUP Policies

Cannery Row LUP Public Recreation Policy b provides protection to viewpoints along the rocky shoreline and states:

b. *(1) Provide viewpoints along the rocky shoreline to enhance recreational opportunities for the casual sightseer. These viewpoints are shown in Figure 5 and discussed in the Coastal Visual Resources section. (2) Provide access to the viewpoints along the rocky shoreline as discussed in the Public Access section.…*

Cannery Row LUP Visual Resource Policies a-d provide for protection of public views and also require that new development respect the visual forms of the old canneries and state:

a. *Preserve and enhance coastal overviews shown in Figure 3 by establishing a punctuated, low-rise skyline respecting the visual forms of the old canneries with roof surfaces of varying sizes, shapes, and heights broken by skylights, towers, vertical stacks, dormer vents, and other projection (punctuated low-rise skyline is defined by policies b, c, d, e, f and g in Development Section, Chapter IV* ***[see Exhibit 14 for LUP Development Section Policies b, c, d, e, f, and g and their associated diagrams]****).*

b. *As part of new private development on presently vacant and private lands, provide viewpoints along the shoreline as shown in Figure 3. Improvements to and an access easement over the viewpoint are to be required as a condition of the new development. As provided for by Section 30212 of the Coastal Act, this access shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability.…*

c. *Preserve view corridors to the water shown in Figure 3 by establishing guidelines for the sideyard setbacks conceptually shown by the asterisks shown in Figure 3.*

d. *Provide new viewpoints within new or rehabilitated structures as shown in Figure 3 by conditioning these viewpoints as a requirement of new development with the possible exception of coastal dependent uses, such as aquaculture, where such viewpoints may not always be appropriate.*

Policy Conclusion

The policies of the Coastal Act and the LUP protect the public and visual qualities of coastal areas and require access to viewpoints along Cannery Row's rocky shoreline. The LUP also provides that new development respect the visual forms of the old canneries through the implementation of specific development standards. Specifically, the Cannery Row LUP provides architectural review guidelines (as shown in Exhibit 14) for new development (including encouraging multiple shed and gable roof forms, rectangular multi-lighted windows, the use of windows in groups, and bridges above streets which are parallel to the ocean). Also, Cannery Row LUP Development Policy f(1)(b) (see page 6 of Exhibit 14) has a basic height limit of 35 feet as measured from Cannery Row, but allows this height to be increased to 45 feet subject to a use permit and requires findings that the additional height above 35 feet is designed so as to assure the historic character and pedestrian-oriented scale and perspective are respected. The maximum height of Building A is 44 feet; the maximum height of Building B is 43 feet. Buildings C and E on the inland parcel do not exceed 35 feet in height.

2. Consistency Analysis

a. Background

Cannery Row is a unique coastal community with cultural and historical significance. A number of factors combine to create unique visual resources in the Cannery Row area. The general location of Cannery Row on the shoreline of the Monterey Peninsula provides highly scenic views of the Monterey Bay, including the generally rocky shores of Monterey. Historically, these views were greatly blocked by canneries. Today, although the canneries are no longer functioning, development along the seaward side of Cannery Row continues to mostly impede wide-open views to the ocean from the street. In fact, other than some view corridors and the subject site, Cannery Row is generally dominated by large building forms along the seaward side of the road. These buildings in large measure define the area's visual character.

The area's visual character is also distinguished by the presence of numerous buildings that reflect the area's cannery-era industrial history and other historic periods. Many of these structures have been renovated and remodeled to accommodate present-day uses. Architectural details typical of historic-era buildings that are currently found along Cannery Row include shed and gabled roofs; varied areas of inset and offset relative to the streets and shoreline; varying roof heights (even within the same building); small, multi-paned windows often arranged in groups; textured and/or industrial surface materials such as corrugated sheet metal, roughcast concrete, brick, and (horizontal and vertical) wood siding; and exposed exterior stairways (see Exhibit 14 for examples of these architectural details as required by the LUP for new development). Examples of local buildings that incorporate some of these design features include the Monterey Bay Aquarium, which occupies a remodeled 1914 cannery structure located at the north end of Cannery Row, and the newly completed Clement Intercontinental Hotel.

In addition to the character as one meanders along Cannery Row proper, the public accessways that run along the seaward side of some Cannery Row buildings, and/or are incorporated into the public spaces of the buildings, also provide an important vantage point for public views. Development on Cannery

Row since the canneries went out of business has generally provided for public access to views of the shoreline and ocean from shoreline walkways along the edge of buildings (and sometimes under buildings). These accessways each have their own character, and the character differences help provide a richly textured visual access experience along the shoreline as well. Given their orientation along the shoreline side of buildings, the character of the seaward side of buildings is also an important component of the public viewshed.

Thus, development scale and design, including accessway design, are critical to protecting the scenic and visual qualities of Cannery Row. Over time, the unique scale and historical character of Old Cannery Row has only been maintained by assuring that new development is of a compatible scale and character.

b. Public Views

The project's bayside parcel extends along Cannery Row and contains a number of abandoned and crumbling foundations (often covered by graffiti), the remains of concrete fish holding tanks, the historic and vacant Stohan's building, and an abandoned storage tank, all interspersed with weedy plant growth. The site is framed on both sides by existing one-to-two-story buildings that extend to the shoreline's edge: the Chart House Restaurant on the upcoast side, and El Torito Restaurant on the downcoast side. Immediately offshore of the project site are the remnants of the foundation piles of an old cannery operation from a bygone era. The project site is currently fronted by a chain-link fence and it appears abandoned, and somewhat incongruous with the rest of Cannery Row. The project's inland parcel spans the same length along Cannery Row, and is currently occupied by a paved parking lot, the foundation of the former San Xavier Warehouse, and other structural remnants of the Cannery Row era, including a storage tank. See photographs of the site in Exhibit 2.

The Monterey Peninsula Recreation Trail (Trail) is an 18-foot-wide paved path that runs for almost 15 miles along Monterey Bay. A portion of the Trail is located along the western boundary of the project's inland parcel (see page 2 of Exhibit 2). This Trail extends from Pacific Grove to Seaside and it is extremely popular and heavily used by local residents and visitors for walking, jogging, bicycling, and skating. The Trail follows an old railroad right-of-way extending right through the heart of the Cannery Row area, and it is framed in by development in most cases. As a result, in terms of views, pedestrians and others traveling along the Trail within the Cannery Row area experience a sequence of views that are intermittently enclosed, open, and partially screened depending on the location. At the project site, the view from the Trail is an unobstructed view of the project's inland and bayside parcels as just described, and an open panorama of the Monterey Bay offshore area.

The project's proposed Buildings C and E will be located on the inland parcel directly adjacent to the Trail (see project plans in Exhibit 3), and these buildings will block existing views toward the bay. The project also includes development of a public community park between Buildings C and E. This community park will not include buildings and will extend for approximately 120 feet along the Trail, allowing through views in this corridor. Thus, although Trail views will be blocked along much of the Trail by Buildings C and E, public views to the bayside will be available from the portion of the Trail that borders the proposed community park, as shown on page 2 of Exhibit 3. On the seaward side of Cannery Row, the proposed buildings will block much of the view of the shoreline and Bay as seen from

Cannery Row. Given their orientation, they will also block some of the view available from the Trail across the proposed community park. However, given the higher elevation of the Trail relative to the bayside parcel, and given that the Stohan's building would be at a lower elevation relative to the project buildings on either side, some amount of Trail view over the Stohan's building would still be expected. As proposed, the project would provide public viewing areas from the bayside parcel between Building A and Building B, as prescribed by the LUP, through the retail plaza and history plaza (i.e., around the Stohan's building), as well as views from two promontories located directly adjacent to the rocky shoreline. Thus, the project as proposed would block some existing public views from both the Trail and Cannery Row, and would also provide for some new public views from the proposed promontories.

c. Community Character

The proposed buildings range in height above Cannery Row from 35 feet (Buildings C and E on the inland parcel) to 43 and 44 feet (Buildings B and A, respectively, on the bayside parcel). (Please see pages 12-13 of Exhibit 3 for site elevations.) The rooflines of the proposed buildings vary in height and form, and include vertical and horizontal offsets, and some shed roofs. Buildings A and B (bayside parcel) have generally been designed to emulate the characteristics of historic cannery-type buildings. Specifically, Buildings A and B include shed and gabled roof elements and other archaeological details that are characteristic of cannery-type buildings. Exterior elements for Buildings A and B also include painted plaster and window elements at street level, with smaller areas of painted wood siding. Materials used on the upper stories would be a combination of painted plaster, wood siding, and ribbed metal siding.

Buildings C and E (inland parcel) have been designed in a simpler, warehouse-type style. Building E will replicate the San Xavier Warehouse that was previously located on this parcel during the cannery era. In these warehouse-type structures, the elevations will be subdivided by means of their fenestration. The facades of Buildings C and E would be a combination of corrugated metal, painted plaster, and painted wood siding. The proposed replication of a utility bridge above Cannery Row proper, which would connect Building B to Building C, would be reminiscent of an historic utility bridge at this location.[48]

The Stohan's building would be restored with historically accurate detailing and include preserved or relocated elements from the existing foundations. The City conditioned its approval to require Architectural Review Committee review of the design elements of the structures and other elements proposed within the view corridor, including but not limited to the walkways, paved areas, benches, lighting and landscaping (see pp 6-7 of Exhibit 5).

Thus, the project as proposed includes some design elements that would appear to match the historic cannery style consistent with the LUP guidance and consistent with the established character of Cannery Row. It also includes some components that do not emulate old cannery aesthetics (such as stucco surfacing, private balconies and decks, etc.).

[48] The utility bridge would not provide through access, but rather would be a decorative architectural feature only.

3. Conclusion

The project as proposed would block protected coastal views, and these view losses would not be offset appropriately through providing replacement views. Regarding the latter, the project could have included shoreline access (and thus visual access) along its entire ocean frontage (see also Public Access and Recreation finding), but it does not. The promontory views are a start in the right direction, but insufficient to make up for what will be almost total blockage of existing views. The project will "improve" the existing views and remove visual clutter associated with a mostly abandoned site, but these improvements are the same that lead to the view blockage. In addition, the public use parameters for the areas that would provide onsite and across site views are not clear enough to ensure that these areas will be kept clear of inappropriate development that might block or impede views (e.g., restaurant chairs, tables, dividers, etc.).

With respect to the character of the proposed design, the project includes appropriate elements with respect to building forms and projections on a gross scale, but finer scale elements lack sufficient definition to ensure that the end result appears reminiscent of cannery and related development as is appropriate and necessary for this area. Although the City conditioned the project to require oversight by the City's Architectural Review Committee, there is no guarantee that the project's inappropriate design elements will be modified to ensure compatibility with old cannery aesthetics. The Commission is aware of the pitfalls – small and large – involved with ensuring a finished facade matches a design aesthetic, and such assurance is predicated on much of the surfacing detail that is inadequately developed with the project to date.

Thus, as proposed, the project is inconsistent with Coastal Act Sections 30251 and 30253(5) protecting public views and community character and cannot be approved as proposed.[49] An approvable, Coastal Act consistent project in this respect would have to include additional public views areas along an easily accessible public accessway spanning the seaward side of the project site; clear and enforceable parameters that ensure that public view corridors are kept clear of blocking an/or degrading elements; clear and enforceable parameters to ensure that public access view areas are clearly available for public use at all appropriate times; and additional specificity on project design (including with respect to camouflaging residential elements, use of historically accurate materials, etc.) that ensure that the end product matches the design sensibility established and required in the future for Cannery Row. The proposed project does not include such elements and thus cannot be found consistent with the Coastal Act.

[49] And it is also inconsistent with the Coastal Act's public access and recreation policies for the same reasons because these policies also protect visual access; see Public Access and Recreation finding above.

D. Natural Hazards

1. Applicable Policies

Coastal Act

Coastal Act Section 30235 addresses the use of shoreline protective devices:

> ***30235.*** *Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion, and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply. Existing marine structures causing water stagnation contributing to pollution problems and fish kills should be phased out or upgraded where feasible.*

Coastal Act Section 30253 addresses the need to ensure long-term structural integrity, minimize future risk, and avoid additional, more substantial protective measures in the future. Section 30253 provides, in applicable part:

> ***30253.*** *New development shall:*
>
> *(1) Minimize risks to life and property in areas of high geologic, flood, and fire hazard.*
>
> *(2) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.*

LUP Policies

Cannery Row LUP Natural Hazards Policy b provides criteria for the construction of seawalls to protect existing development and states:

> ***b(1)*** *Construction of seawalls to protect existing development shall be allowed only if an engineering analysis determines that such protective structures are the least environmentally damaging alternative; and* ***(2)*** *Seawalls and foundations shall be located as far landward as possible.*

Cannery Row LUP Natural Hazards Policy a provides for protection of the public in wave run-up and tsunami areas and states:

> ***a.*** *In tsunami and storm wave run-up areas where public access is provided, install warning signs as a condition of shoreline development, both public and private.*

Cannery Row LUP Natural Hazards Policy c provides for protection of structures in wave run-up areas and states:

> ***c.*** *Minimal structural clearance from the water and adequate unobstructed run-up areas for buildings on the bay side of Cannery Row shall be based upon an engineering analysis for each project relative to protection from waves of a 100-year storm.*

Cannery Row LUP Development Policy h provides standards for development along the shoreline and states:

> ***h.*** *Shoreline development along Cannery Row is not to extend seaward so far as to require new seawalls or alteration of the natural shoreline with the exception of parcels where structures or slabs presently existing over the water, as shown in Figure 28. Existing structures and slabs beyond the mean high tide line are not to be extended horizontally as part of any new development and are not to encroach further on the natural shoreline beneath the structures. Under no circumstances is any existing structure or slab to be extended vertically so as to be any lower than 13 vertical feet above the mean high tide line… (The 13-foot above mean high tide line vertical height requirement is the current approximation of the area subject to flooding or damage from tsunami and storm waves and this 13-foot requirement may be modified based on new information to be developed.)*

Policy Conclusion

The Coastal Act and LUP policies regarding natural hazards limit the construction of new seawalls to protect existing development and require that new development minimize risks to property in hazardous area, such as the Cannery Row area, which is subject to hazards from storms, wave run-up, and tsunamis. The Coastal Act also requires that development assure stability and structural integrity without armoring.

2. Consistency Analysis

The proposed project is located on a shoreline composed of rocky substrate upon which numerous pier pilings are visible from previously existing structures. An analysis of aerial photographs of nearby San Carlos Beach and McAbee Beach detected no change in shoreline width since 1949, suggesting that the shoreline fronting the proposed project has changed very little over time and indicating that the shoreline at this location may be in a state of quasi-equilibrium. Portions of the proposed project, however, are located in an area subject to wave run-up, especially during storms. Also, because California and the west coast of the United States are seismically active, the bayside portions of the project site are also subject to flood hazard from tsunamis, which are generated by submarine earthquakes, volcanic eruptions, and landslides.

The Commission's experience in evaluating the consistency of proposed developments with Coastal Act policies regarding development in areas subject to hazards has been that development has continued to occur despite periodic episodes of heavy storm damage or other such occurrences. Development in such dynamic environments is susceptible to damage due to such long-term and episodic processes. Past

occurrences statewide have resulted in public costs (through low interest loans, grants, subsidies, direct assistance, etc.) in the millions of dollars. As a means of allowing continued development in areas subject to these hazards while avoiding placing the economic burden for damages onto the people of the State of California, Applicants are regularly required to acknowledge site geological risks and agree to waive any claims of liability on the part of the Commission for allowing the development to proceed.

A portion of the bayside section of the project site, from the shoreline to approximately 20 to 60 feet inland, lies within the V6 Velocity Zone on the Federal Emergency Management Agency (FEMA) Flood Map. Areas within the V6 zone are subject to 100-year coastal flooding with wave action to an elevation of 17 feet above National Geodetic Vertical Datum (NGVD). The lower level of proposed bayside Building A is 15 feet above NGVD; the lower level of proposed bayside Building B and the history plaza are 21 feet above NGVD (or 13 and 19 feet above the mean high tide level respectively). Thus, the lower level of Building A would be in an area FEMA maps as subject to coastal flooding. Cannery Row LUP Development Policy 3h prohibits the extension of existing structures or slabs lower than elevation 13 feet above the mean high tide line. The proposed project is just consistent with this policy because both finished floor areas of the proposed bayside buildings would be at least at elevation 13 feet above the mean high tide level. The lower parking levels of Buildings A and B could be subject to flooding and impact damage by storm waves or a combination of storm waves and tsunami.

A separate geotechnical report (not contained in the EIR) was completed that evaluated potential impacts to the proposed project's bayside components due to wave impacts and wave run-up. This report projected a sea level rise of one foot over the next 100 years. Given that some experts are projecting a potential sea level rise of three feet over the next 100 years, Commission staff requested an analysis of the potential wave run-up impacts to the project if a three-foot rise in sea level takes place. The results of this analysis showed that a three-foot rise in sea level over the next 100 years would result in a still water level of approximately 9 feet National Geodetic Vertical Datum (NGVD; which is approximately 0.23 feet below mean sea level in the Monterey Bay area) The wave impacts of concern were for (1) wave run-up at the parts of the project where there will be sloped areas and the opportunity for waves to wash over the walkways and access areas and (2) uplift forces for the parts of the project that might have waves underneath the building area. Wave run up is the flow of water up a slope or beach. Wave run-up is calculated as the vertical height to which the rush of water will reach and it depends upon both the incoming wave energy and the slope of the beach or structure. The calculated maximum wave run-up was approximately 29 feet NGVD with a potential rise in sea level of one foot and 31 feet NGVD with a potential rise in sea level of three feet. In the worst case scenario, wave run-up across the shoreline and up proposed Building B will reach 31 feet MSL. The proposed project includes a three-foot-wide reinforced concrete ledge or "eyebrow" along Building B at elevation 31.1 MSL, which is designed to mitigate splash-up and ensure that windows above this level are not impacted (no windows are located below this level).

Building A is designed so that waves will run under the structure and break, which will dissipate the wave energy. The main concern at Building A is that the bottom level of the building be high enough above the water level that breaking waves and return flow do not impact or push up the bottom of the building. The bottom of the first floor of Building A is at 23 feet NGVD (similar to the Cannery Row

street elevation at this location). The maximum crest of the highest possible refracted wave, with a potential rise in sea level of three feet, would be less than 23 feet NGVD and thus should not cause damage to the portions of the building that are located over the water.

As discussed above, the bayside components of the proposed project are located in an area subject to hazards including flooding due to tsunamis or wave run-up during episodic heavy storms. Additionally, the proposed history plaza, located at an elevation of 15.6 feet NGVD, will get wet based on the maximum calculated run-up of approximately 31 feet. Persons using the lower level promenade in Building A, the coastal access stairs, or the rocky shoreline at the project site would also be at risk during a storm or tsunami.[50]

Given the hazardous location of the bayside portions of the project site, the City conditioned the project to incorporate engineering design and construction materials and methods to withstand wave impacts from a 100-yer storm event, to provide appropriate warning signs and access provisions along the bayside access areas, and to require that the project subscribe to a tsunami early warning system. The City's approval, however, does not require the Applicant to waive any claims of liability for allowing the development to proceed.

3. Conclusion

The proposed project is located directly adjacent to the shoreline in a hazardous area subject to wave run-up, flooding, and tsunamis. The proposed includes a number of conditions imposed by the City that would reduce potential impacts from hazards. The project, however, does not include an acknowledgement of the site's geological and other risks nor does it include an agreement to waive any claims of liability for allowing development to proceed, nor does it include a prohibition on future shoreline armoring. Thus, the proposed project is inconsistent with Coastal Act Section 30253. An approvable, Coastal Act consistent project in this respect would incorporate conditions similar to the City's regarding hazards, but would also include the requirement that the Applicant acknowledge the site's geological and other risks and agree to waive any claims of liability on the part of the Commission for allowing the development to proceed, as well as a prohibition on future shoreline armoring for the project. The proposed project, however, does not include these requirements and thus the project cannot be found consistent with the Coastal Act.

[50] Thus, Natural Hazards LUP policy b(1), which requires that seawalls be allowed only to protect existing development; and only if an engineering analysis determines that such protective structures are the least environmentally damaging alternative; and only if located as far landward as possible, is not directly relevant. The City did contemplate alternative designs that would have pulled the buildings further back from the shoreline; however, it found that these did not meet the project objectives or were otherwise infeasible.

E. Historic Resources

1. Applicable Policies

Coastal Act Policies

Coastal Act Section 30253(5) protects special communities that are popular visitor destinations and states:

> ***30253.*** *New development shall: (5) Where appropriate, protect special communities and neighborhoods which, because of their unique characteristics, are popular visitor destination points for recreational uses.*

LUP Policies

Protection of the special character of Cannery Row, particularly as it relates to its historic cannery era, is a long-standing Coastal Act concern. Cannery Row LUP Development Policies o and p protect historic sites and buildings along Cannery Row and state:

> ***o.*** *Historic sites and buildings shall be designated by the City as part of the implementation phase. Identified historic sites and buildings shall be preserved at existing locations to protect and preserve community character.*
>
> ***p.*** *All new development is to meet the conditions of a historic documentation program to be developed as part of the implementation phase. More specifically, the historic documentation program will require that the history of the site be exhibited as part of any new development (i.e. plaques, pictures, artifacts, etc.).*

2. Consistency Analysis

a. Background

Historic Cannery Row was an intensely developed industrial district. At the beginning of World War I, there were only three canneries along Cannery Row. However, during the war, Monterey's fishing industry took off as canned sardines became popular as food for the troops overseas. As a result, a number of other canneries were built along what came to be known as Cannery Row. During World War II, the U.S. government again bought great quantities of canned fish. At the height of the industry's production in 1945, the canneries along Cannery Row numbered 16. After the end of the war, however, there was a reduction in demand for canned sardines. In addition, the depletion of the sardines was becoming increasingly apparent. The depletion of the sardine fishery caused the majority of canneries to close down, and by 1957 only five plants remained. The last cannery closed in 1973. Today Cannery Row is a special community and a major tourist attraction. Cannery Row retains much of its historical atmosphere while offering a variety of visitor serving commercial and recreational uses along this section of the central coast.

The project site was historically occupied by two canneries: the Pacific Fish Company and the San Xavier Canning Company. Both canneries were built in the typical Cannery Row configuration, with

the cannery buildings on the bayside, the warehouses on the inland side, and the two connected by a second story walkway bridge over Cannery Row. Currently the bayside parcel is occupied by the Stohan's building (the former San Xavier Cannery Company's Fish Reduction Plant, which is proposed to be redeveloped as a history center and museum), a storage tank, and various structural and foundational elements of former buildings of the Cannery Row era (see Exhibit 2 for photos of the site). The inland parcel is currently occupied by a paved parking lot, the foundation of the former San Xavier Warehouse, and other structural remnants of the Cannery Row era. None of the structures on the project site have been listed in *The National Register of Historic Places* or *The California Register of Historical Resources.*

b. Project Impacts to Historic Resources

As part of its approval, the City of Monterey adopted a Statement of Overriding Considerations based on the City's determination that the cumulative historic impacts of the project cannot be fully mitigated because the mitigations set forth in the EIR did not allow full mitigation of the identified historic impacts. Specifically, the proposed removal and non-replacement of several foundations on the site, a fish-holding tank, a cylindrical steel tank, and an historic wall are significant and unavoidable impacts. The EIR determined that these impacts are mitigated to the maximum extent feasible with the project as proposed, by installing interpretive markers displaying their former use and/or by developing an exhibit in the proposed history museum that describes these historic elements of the project site.

c. Analysis and Conclusion

The project includes rehabilitation and restoration of the Stohan's building as an historic museum, and includes covering the bayside fish holding pens with a sea-through covering to allow historic interpretation. The San Xavier Warehouse foundation would be demolished. Although the interpretation of the fish holding pens is identified as part of the project, and although use of the Stohan's building as an historic museum is also clearly stated in the project materials, it remains unclear how the holding pen interpretation would be constructed and made operational for public access, and it remains unclear how the Stohan's building would be renovated and how it would operate in the future as a museum. For example, in discussion with City staff, it has not yet been determined who will operate the history center (the City or a nonprofit group) or if there will be a fee required to enter the history museum. Also, the City conditioned the project to allow a change in use of the History Center with Planning Commission approval (see condition 7(o) on page 6 of Exhibit 5). Thus, the proposed project does not include enough clarity and detail for the Commission to conclude that these resources would be protected as directed by Coastal Act Section 30253(5) (and the Cannery Row LUP). In addition, although the project would result in development that mimicked warehouse development generally, the remnants of the San Xavier Warehouse would be lost. Thus, it does not appear that the project has reasonably mitigated for adverse impacts to the unique historical character of the Cannery Row community, inconsistent with the requirement of Coastal Act Section 30253 to protect special communities that are popular with visitors (and also inconsistent with the Cannery Row Land Use Plan's requirements to preserve identified historic sites and buildings to protect community character). An approvable, Coastal Act consistent project in this respect would include additional mitigations to provide clarity regarding the permanent operation of the history center, including any potential fees to enter the history center, as well as additional mitigations to protect historical resources on the site. The proposed project, however, lacks

the specificity necessary to protect historical resources and thus the project cannot be found consistent with the Coastal Act.

F. Land Use/ Recreation and Visitor-Serving Uses

1. Applicable Policies

Coastal Act Policies

Coastal Act Sections 30213, 30221, and 30222 protect visitor-serving and recreational uses along the coast and state, in relevant part:

> ***30213.*** *Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided. Developments providing public recreational opportunities are preferred…*
>
> ***30221.*** *Oceanfront land suitable for recreational use shall be protected for recreational use and development unless present and foreseeable future demand for public or commercial recreational activities that could be accommodated on the property is already adequately provided for in the area.*
>
> ***30222.*** *The use of private lands suitable for visitor-serving commercial recreational facilities designed to enhance public opportunities for coastal recreation shall have priority over private residential, general industrial, or general commercial development, but not over agriculture or coastal-dependent industry.*

LUP Policies

Cannery Row LUP Development Policy h. states:

> ***h.*** *Development allowed beyond mean high tide: Only in existing structures and on slabs presently extending beyond the mean high tide line. On all other parcels, development is not to extend beyond the mean high tide line.*

The Cannery Row LUP's Visitor-Serving Commercial Chapter contains a number of applicable policies that specify the allowable uses on land designated as Visitor-Serving Commercial:

> ***a.*** *Principal permitted visitor-serving commercial uses are to include food service establishments, sidewalk cafes (but not including fast food restaurants and restaurants/bars with live entertainment), recreation-related commercial uses conducted within a completely enclosed building and shops of a tourist commercial nature (e.g. antique shops, art galleries, personal apparel shops, gift shops, and handicraft and work shops). The above uses are to be in proper character with and scale to the Cannery Row area.*
>
> *Fast food restaurants, restaurants and bars with live entertainment, commercial uses not conducted within a completely closed building, personal improvement uses, and walk-up service windows are allowed in the Visitor-Serving Commercial use area subject to approval of a*

Conditional Use Permit.

g. *Lower cost visitor facilities shall be protected, encouraged, and where feasible, provided in the City of Monterey.*

h. *Mixed use projects consisting of residential use on upper floors above visitor-serving commercial are allowed as conditional uses in the visitor-serving commercial use area at a maximum density of 30 units per acre. The maximum number of residential units associated with mixed use projects developed throughout the Cannery Row coastal zone planning area shall not exceed a total of 183 units. Conversion of existing or previously approved visitor accommodation facilities is prohibited.*

Finally, in addition to the advisory LUP policies, the City of Monterey has an uncertified ordinance (not part of the LUP or otherwise approved by the Commission) that prohibits the construction of any new hotels in the City of Monterey without a vote of the citizens of Monterey.

Policy Conclusion

The Coastal Act places a high priority on visitor-serving uses; residential uses are not a priority use for sites immediately adjacent to the ocean. Section 30221 requires that oceanfront land suitable for recreational use be protected for recreational use and development unless present and foreseeable future demand for public or commercial recreational activities that could be accommodated on the property is already adequately provided for in the area. Section 30222 states that the use of private lands suitable for visitor-serving commercial recreational facilities designed to enhance public opportunities for coastal recreation shall have priority over private residential, general industrial, or general commercial development, but not over agriculture or coastal-dependent industry. Both the inland and bayside parcels of the proposed project site are designated in the certified Cannery Row LUP as Visitor-Serving Commercial.

2. Consistency Analysis

Cannery Row is a highly popular destination for visitors to California's central coast. Attractions such as the Monterey Bay Aquarium, world-known scuba diving sites, major hotels, a variety of retail shops, and the Monterey Bay Coastal Trail, as well as Cannery Row's prime location relative to the overall Monterey Peninsula and its regional attractions (e.g. nearby Pacific Grove, Del Monte Forest, etc.) draw people from near and far to experience coastal access, recreation, visitor serving, and educational opportunities. Cannery Row's proximity to the Monterey City Harbor and Custom House Plaza, as well as its history as the site of California's major sardine canneries, adds to its desirability as a recreational and historical destination.

a. Land Use/Priority Uses

The proposed project includes a mix of visitor-serving uses on the street/bay levels of the proposed buildings, and residential uses on the upper floor levels. Strictly speaking the proposed land uses, particularly the residential units, are not consistent with Coastal Act priorities. The site is a prime oceanfront site suitable for visitor-serving development or other public recreational or commercial activity. No analysis of present and future demand for recreational activities that might be

accommodated on the property has been presented. However, Cannery Row is a special case. In 1997 the Commission approved an amendment to the Cannery Row Land Use Plan which specifically added mixed-use projects as an allowable conditional use within areas designated as Visitor-Serving Commercial in the LUP. Such mixed-use projects allow for the development of residential units above first floor levels only; first floor levels must remain available for Visitor-Serving Commercial land uses. According to information provided by the City at the time the amendment was approved by the Commission, the amendment was designed to assist the City in meeting its Housing Element goals, while still maintaining a high-degree of visitor-serving qualities along Cannery Row. Another key factor associated with this amendment was that, as the result of a past citizen initiative, no new hotels on Cannery Row can be approved without a vote of the electorate.

In approving the LUP amendment, the Commission found that the LUP amendment as submitted did not contain any specific limitations on the amount of residential development that would be allowed to occur within the Cannery Row coastal planning area. Without such a limitation, the proposed amendment had the potential to displace visitor-serving uses with residential development and result in the conversion of existing or approved (but not yet constructed) overnight accommodations for visitors to residential use. To ensure that the amendment would not have an adverse impact on coastal access and visitor-serving recreational uses, the Commission modified the amendment by requiring that mixed-use projects be required to conform to a maximum 30-unit per acre standard. Additionally, to address Commission concerns, the City evaluated the amount of vacant and underdeveloped land within the Cannery Row coastal zone to reliably estimate the number of new residential units that could be accommodated at a maximum density of 30 units per acre. The City found this number to be 183 units. With these data, the Commission also modified the amendment to put a limit of 183 residential units in the Cannery Row LUP area and to disallow the conversion to residential use of existing or previously approved overnight accommodations for visitors (see Visitor Serving Commercial Uses policy h. above). With these modifications, the Commission found that the restricted extent of mixed-use development on Cannery Row will limit associated impacts on visitor-serving recreational uses to an insignificant level, and that the LUP amendment was consistent with Coastal Act Sections 30221 and 30222. The City adopted the Commission's proposed modifications. Although the LUP is not the standard of review in this case, the Commission's deliberations, findings, and ultimate action on this LUP amendment are both instructive and informative to the proposed project, including because the amendment was so clearly tailored to precisely this type of project, and because it was a landmark of sorts in terms of defining certain LCP and land use issues. Thus, although not the standard of review, the parameters of this 1997 decision must be understood as an appropriate context for the land use decision before the Commission today.

In this case, the residential density of the proposed project (bayside and inland parcels combined) is approximately 15 units per acre.[51] The total number of approved residential units along Cannery Row (including this project) would be 56. Thus this aspect of the proposed project would be consistent with the advisory requirements of Cannery Row LUP Visitor-Serving Commercial Policy h.

[51] The project site = 3.5 acres; the total number of proposed residential units = 51 units; 51 units/3.5 acres = 14.57 units/acre.

In terms of the proposed commercial uses of the property, these generally would be visitor-serving components of the project, including shops and restaurants located at street level. However, Commission staff has previously commented that the project should specify or somehow provide for visitor-serving commercial uses that are coastal related. Similarly, the LUP advises that restaurants, shops of a tourist nature, or recreation-related uses are principally-permitted, whereas more generic commercial uses are not. The project currently includes an area of "coastal" commercial space, three restaurant spaces, and more general, unspecified commercial use space. At this time it is unclear exactly what types of commercial uses would result from the project

b. Lower-Cost Visitor-Serving Uses

The project includes a history center/museum and history plaza on the bayside parcel, and a community park on the inland parcel. The community park will be available to the public free of charge and will include amenities such as landscaping and seating. The existing Stohan's building will be rehabilitated and reused as a history center and museum. The goals of the history center/museum would be to create a cultural and historic interpretative center for the historic Cannery Row, including (but not limited to) documenting and celebrating Monterey's cultural history associated with the fishing and canning industry, and exploring the issues, controversies and impacts concerning over-fishing, fisheries management, and conservation practices. The City of Monterey may operate the history center or may find a suitable non-profit group to operate the history center. It is not certain at this time if access to the history center would be free or if a fee would be required. In any event, the history plaza adjacent to the history center and museum would be open to the general public for free and would also include interpretive historical displays. These amenities would provide opportunities for lower-cost visitor-serving uses, as required by Coastal Act Section 30213. In addition, as discussed in the public access finding, the project includes a dedicated public area and access to the shoreline.

3. Conclusion

Although residential development is not a priority under the Coastal Act, particularly immediately adjacent to the ocean, the mix of visitor-serving, public recreational access, and residential uses proposed can be found consistent with the Coastal Act. This is because the project provides for a range of visitor serving/public recreational access uses that will augment and enhance such facilities and opportunities along Cannery Row. If such facilities maximized their utility for visitors, particularly in terms of providing low cost opportunities, such development could offset and allow for the residential uses also proposed as an economic driver of the project. That said, some aspects of the visitor-serving and public recreational access project components are unclear (including the way in which such facilities would be operated, maintained, made open to the public, fee structures, etc.), some are insufficient (see Public Access and Recreation finding, as well as the Visual Resources finding), and the manner in which some of the uses would be protected as visitor serving and public recreational access uses over the long term, such as the history museum, is unclear. For example, the City conditioned the project to allow a change in the history center use or coastal-related retail or community use upon approval by the Planning Commission (see condition 7(o) on page 6 of Exhibit 5). Thus, the project as proposed lacks the necessary certainty needed to ensure that the priority visitor serving and public recreational access uses will be developed and provided over time in a manner consistent with the Coastal Act, including with respect to low-cost opportunities, and thus is inconsistent with Coastal Act Section 30213, 30221,

and 30222. An approvable, Coastal Act consistent project in this respect would have to include enforceable clarity with respect to long term provision of the visitor serving and public recreational access uses, including providing ample free and other low cost options, and would have to correct access, recreation, and visual resource inconsistencies (as identified in previous findings). The proposed project does not include such elements, and thus cannot be found consistent with the Coastal Act.

G. Water Quality

1. Applicable Policies

Coastal Act Sections 30230 and 30231 state:

> ***30230.*** *Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.*
>
> ***30231.*** *The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.*

2. Consistency Analysis

The proposed project is located on the bayside and the inland side of Cannery Row, directly adjacent to the Monterey Bay National Marine Sanctuary and the Edward F. Ricketts State Marine Conservation Area. The bayside portion of the project site contains the Stohan's building and various structural remnants of former buildings of the Cannery Row era. However, much of the bayside parcel consists of grassy areas with ruderal plants (see pages 3-4 of Exhibit 2). The pervious nature of these grassy areas may limit the amount of any polluted runoff currently, although there may also be a level of contamination of the site from prior uses. As stated above, the bayside components of the project include two new buildings that will house underground parking garages, as well as residential and commercial uses, and paved plaza areas. The inland portion of the project site is currently occupied by a paved parking lot, the foundation of the former San Xavier Warehouse, and other structural remnants of the Cannery Row era. Development of the inland portion of the project site would include a parking garage (with a basement component), as well as residential and commercial uses, and a community park.

a. Construction Issues

The proposed project is located directly adjacent to the sensitive bay waters of the Monterey Bay National Marine Sanctuary. Construction work that might adversely affect the habitat and organisms of

the bay waters must be carried out in a manner that will eliminate the possibility of adverse effects. Potential marine impacts occurring from the development of the project site include: (1) destruction of intertidal life due to construction activities; (2) increased sedimentation and turbidity during construction; and (3) increased runoff contamination from impervious surfacing.

As part of the project description, the EIR states that the construction contractor would be required to manage storm water runoff so that there would be no direct discharge into Monterey Bay. The proposed project includes a Construction Storm Water Pollution Prevention Plan (SWPPP). This SWPPP provides the basis upon which the project-specific SWPPP would be prepared pending completion of construction plans for the project. This SWPPP includes a suite of best management practices (BMPs) to be used during construction activities, including sediment controls, BMPs to protect operational storm water inlets or receiving waters from contaminated discharges, waste management practices to reduce the potential for non-storm water discharges, spill prevention and control practices, and other good housekeeping practices. The proposed best management practices contained in the SWPPP would be adequate to protect water quality during construction, consistent with Coastal Act Sections 30230 and 30231.

b. Post Construction Issues

Post construction, water quality can be adversely affected by increased runoff due to an increase in paved/developed surfaces and by post-construction activities and uses on the site, such as parking and restaurant use.

The proposed project does not contain specific post-construction BMPs to protect water quality once construction would be complete. For example, specific BMPs for the proposed parking areas and for restaurant uses, which would be necessary to ensure protection of water quality, are not included in the project. Absent appropriate post-construction BMPs, the project would be expected to result in adverse water quality impacts, inconsistent with Coastal Act Sections 30230 and 30231. Specifically, the project lacks appropriate methods to ensure that oil and other contaminants do not enter ocean waters, including spot cleaning by applying absorbent materials to spilled fluids (e.g., oil, gasoline, antifreeze) and regular inspection and cleaning of garage storm drain inlets and catch basins. Regarding BMPs for restaurants, the project lacks specific BMPs related to restaurant use (e.g. requiring that the cleaning of restaurant equipment take place in designated areas, such as a mop sink, a pot sink, or floor area with a drain connected to the sanitary sewer).

The City-approved project includes minimal setbacks to Cannery Row, meaning that there is minimal area to allow onsite ground infiltration of runoff. In addition, the substrate along Cannery Row is primarily granitic, which does not provide a good base for infiltration. Runoff that flows directly to the Monterey Bay could negatively impact marine, biological, and recreational resources and water quality by contributing additional urban contaminants to marine waters. Urban runoff is known to carry a wide range of pollutants including nutrients, sediments, trash and debris, heavy metals, pathogens, petroleum hydrocarbons, and synthetic organics such as pesticides. Urban runoff can also alter the physical, chemical, and biological characteristics of water bodies to the detriment of aquatic and terrestrial organisms. Such impacts would be at the expense of one of the state's and nation's great treasures, the Monterey Bay National Marine Sanctuary. Such impacts raise questions of consistency with the above-

referenced Coastal Act policies that require protection of these resources. The Commission, however, typically requires new development to maintain peak runoff flows at the same level as the undeveloped site condition, and also requires that new development reduce urban runoff and potential pollutants to the maximum extent feasible.

Runoff from the buildings and other pervious surfaces would be directed into the existing City storm drain system. This drain system ultimately flows to the bay without significant filtering or treatment. This does not meet the objective of maintaining peak flows of runoff at the same level as the undeveloped site condition or of protection of water quality more generally, including the requirement to at the least maintain coastal water quality. In highly urbanized contexts such as the current case, it is important to consider the installation of a low-impact design standard drainage system that maintains runoff onsite to the maximum extent feasible, and allows for appropriate filtering and treating of any runoff anticipated from the site if this is not otherwise available in the urban storm water management system. Examples of a low-impact design include development of a rooftop garden to collect and retain rainwater onsite, or installation of cisterns to collect water that then can be reused onsite for landscaping needs, etc.

3. Conclusion

The proposed project does not contain specific post-construction BMPs to protect water quality once construction would be complete, and does not contain adequate measures to maintain peak runoff flows at the same level as the undeveloped site condition, and to reduce potential pollutants reaching the Monterey Bay to the maximum extent feasible. Thus, as proposed, the project is inconsistent with Coastal Act Sections 30230 and 30231 regarding protecting the biological productivity of coastal waters and minimizing discharges into the marine environment. An approvable, Coastal Act consistent project in this respect would have to include specific BMPs for the proposed parking areas and restaurant uses, as well as the installation of a low-impact design standard drainage system that maintains runoff onsite to the maximum extent feasible. Any runoff anticipated from the site would need to be appropriately filtered and treated to adequately protect offshore receiving water bodies. The proposed project does not include such elements and thus cannot be found consistent with the Coastal Act.

H. Environmentally Sensitive Habitat

1. Applicable Policies

Coastal Act Policies

Coastal Act Sections 30230 and 30231 protect marine resources and the biological productivity/quality of coastal waters and state:

> ***30230.*** *Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational*

purposes.

30231. *The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.*

In addition, oftentimes when dealing with marine resource issues, the environmentally sensitive habitat area (ESHA) policies of the Coastal Act come into play. Specifically, these policies protect ESHAs against inappropriate development. The Coastal Act defines environmentally sensitive areas as follows:

Section 30107.5. *"Environmentally sensitive area" means any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.*

Almost all development within ESHAs is prohibited, and adjacent development must be sited and designed so as to maintain the productivity of such natural systems. In particular, Coastal Act Section 30240 states:

30240. *(a). Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas. (b). Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.*

LUP Policies

Cannery Row LUP Marine Resources and Habitat Areas Policies a-c protect the shoreline habitats adjacent to Cannery Row and states:

a. *Protect intertidal and tidepool habitat through signing as a condition of shoreline development, both public and private.*

b. *Require sensitive shoreline restoration (debris cleanup) and maintenance (litter control) in a manner that will not impair biological productivity for the habitat and restoration needs areas shown in Figure 2 as a condition for any grading, excavation, demolition, and construction in conjunction with shoreline development.*

c. *Support State Department of Fish and Game regulations controlling spear fishing and kelp harvesting.*

2. Consistency Analysis

The bayside portion of the project site contains the Stohan's building, various structural remnants of former buildings of the Cannery Row era, and undeveloped grassy areas with ruderal plants. The inland portion of the project site is currently occupied by a paved parking lot, the remnants of a warehouse foundation, and other structural remnants of the Cannery Row era. No special status plant or animal species have been identified on the project site. Thus, none of the land based portion of the project site constitutes ESHA.

Regarding the marine areas offshore of the project site, the Cannery Row LUP has found that the adjacent coastal marine environment is unique along the entire California coast in its diversity and abundance of marine life. This area supports a broad range of intertidal and subtidal organisms, as well as marine mammals and birds. The California brown pelican (*Pelecanus occidentalis californicus)* (endangered) feeds in the bay waters offshore of the project site. The southern sea otter (*Enhydra lutris*) (threatened) uses the kelp beds off of Cannery Row. A rocky intertidal habitat is found along the project site's shoreline. California sea lions (*Zalophus californicus)* and harbor seals (*Phoca vitulina*) use the nearshore rocky areas for resting. Also, as previously described, the Monterey Bay National Marine Sanctuary and the Edward F. Ricketts State Marine Conservation Area are located directly offshore of the project site. With respect to these offshore resources, although they clearly have well-known habitat and resource values, and are protected by the Coastal Act as such through the previously-cited policies, they do not in this case constitute ESHA.

Dive surveys were conducted in 1998, in 2001, and in 2004 by the project's biologist within the prescribed proposed desalination intake/outfall corridor and subtidal areas located offshore of the project site. While kelp was observed on the rocky substrates during all the surveys, no eelgrass or surfgrass was observed (see below for a discussion of the biological importance of these marine plant species). Regarding potential impacts to kelp species due to installation of the offshore desalination pipeline, the horizontal directional drilling method of desalination pipeline installation is specifically designed to eliminate impacts to the rocky substrate and associated biota, including kelp. As mentioned above, the installation of the vault and associated intake lines will take place in sandy substrate located offshore of the rock reef habitat, at least 130 feet from kelp habitat. Thus, the proposed project will not result in direct impacts to sensitive kelp species. As a result, there would be no direct disturbance to sensitive kelp habitat or other offshore habitats that might constitute ESHA. In other words, the project does not propose development in ESHA.

In terms of potential ESHA adjacency issues, the construction of buildings as high as 44 feet along the shoreline will result in increased shading of the adjacent intertidal area and bay waters. Tidepool shading, however, is not expected to result in adverse impacts to resident invertebrates. Tidepools occur in a wide variety of geographic locations exposed to varying amounts of direct sunlight. Research has demonstrated that water temperatures, desiccation rates, and wave action all combine to create distinctive species distribution patterns among tidepool communities. Increased shading may cause a shift in the local species composition, but is not expected to decrease overall diversity or productivity.

Shading of marine algae and plants, however, is a greater concern. Eelgrass (*Zostera* spp.) and surfgrass

(*Phyllospadix* sp.) are known to occur along Cannery Row. Eelgrass in particular is known to be very dependent on the amount of available light. These species of marine plants provide significant biological productivity to coastal waters as they serve as a haven for crabs and other small invertebrates and numerous species of fish, providing these creatures with habitat, nursery grounds, and food. The long blades of grass often are covered with tiny marine animals and algae. The DEIR noted that "Eelgrass stands are known to occur at the Coast Guard Breakwater, located to the southeast of the project site, and could potentially be present in the vicinity of the project."[52] More recently, a field survey of the intertidal area located offshore of the project site was conducted in June 2008.[53] Two species of surfgrass (genus *Phyllospadix*) were observed within the intertidal survey area in three different clumped locations, but no eelgrass (*Zostera* spp.) was observed. A shadow simulation study to assess the impacts of shading by the proposed project on the intertidal zone, and specifically on the sensitive surfgrass species located in the intertidal zone offshore of the project site, was also completed.[54] The results of the shadow simulation study show that the surfgrass located offshore of the project site will be shaded between 10% and 50% of the year. However, according to Senior Ecologist Dr. John Dixon, shading during the summer likely has more impacts to surfgrass species than shading during other times of the year. According to the shadow simulation study, during the summer months, the surfgrass located offshore of the project site will be shaded from less than 10% of the time to a maximum of 20% of the time. Given that many surfgrass populations occur at the base of coastal bluffs that also provide shade part of the time, Dr. Dixon has concluded that this amount of shading should not have a significant impact on the surfgrass populations located offshore of the project site.

The proposed installation of seawater and brine discharge pipelines has the potential to impact listed species, such as the federally endangered brown pelican (*Pelecanus occidentalis)* and the federally threatened southern sea otter (*Enhydra lutris nereis).* The Army Corps of Engineers (ACOE) requested concurrence from U.S. Fish and Wildlife Service (USFWS) that the project may affect, but is not likely to adversely affect, the aforementioned species. USFWS staff concurred that the proposed project is not likely to adversely affect the brown pelican or the southern sea otter (see Exhibit 15). Additionally, National Marine Fisheries Service (NMFS) has concurred with the ACOE that the project is not likely to adversely affect listed anadromous salmon species, nor did NMFS have any recommendations for changes to the proposed project that would further protect essential fish habitat (see Exhibit 15).

3. Conclusion

None of the land based portion of the project site constitutes ESHA. Additionally, the horizontal directional drilling method of desalination pipeline installation is specifically designed to eliminate impacts to the rocky substrate and associated biota, and the installation of the vault and associated intake lines will take place in sandy substrate located offshore of the rock reef habitat, away from kelp habitat. Thus, the proposed project will not result in direct impacts to sensitive kelp species or other offshore habitats that might constitute ESHA. Thus, the project is consistent with Coastal Act Section 30240

[52] See page 243 of the Draft Environmental Impact Report for Ocean View Plaza, April 2001.

[53] Ocean View Plaza Intertidal Reconnaissance Survey, Monterey, California (Padre Associates, Inc., June 2008).

[54] Shadow Casting Simulation for the Proposed Ocean View Plaza (Videoscapes.Net, 2008).

regarding protection of ESHA.[55]

I. Parking and Traffic

1. Applicable Policies

Coastal Act Policies

In addition to the public access policies of the Coastal Act cited above that apply to parking and traffic (not cited here), Section 30252 of the Coastal Act states:

> ***30252.*** *The location and amount of new development should maintain and enhance public access to the coast by (1) facilitating the provision or extension of transit service, (2) providing commercial facilities within or adjoining residential development or in other areas that will minimize the use of coastal access roads, (3) providing non-automobile circulation within the development, (4) providing adequate parking facilities or providing substitute means of serving the development with public transportation, (5) assuring the potential for public transit for high intensity uses such as high-rise office buildings, and by (6) assuring that the recreational needs of new residents will not overload nearby coastal recreation areas by correlating the amount of development with local park acquisition and development plans with the provision of onsite recreational facilities to serve the new development.*

Also, Section 30212.5 of the Coastal Act states:

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

LUP Policies

Cannery Row Parking policy h. states:

> ***h.*** *For mixed-use projects, which are not shown on Table 4, first floor visitor serving commercial development shall be required to provide 1 space per 400 square feet for the first 1,000 square feet of floor area and 1 space per 500 square feet for the balance. The residential component of mixed use projects located above first floor visitor serving commercial shall be required to provide a minimum of one on-site parking space for every residential unit to be developed. The City of Monterey shall require more than one on-site parking space per residential unit if necessary to maintain adequate visitor parking opportunities in the Cannery Row planning area. Additional bedrooms may require additional parking spaces as determined on a case-by-case basis.*

LUP Parking Policy f states:

[55] Except with respect to Coastal Act Section 30240 inconsistencies related to water supply and potential impacts to the Carmel River and Seaside Basin aquifer (see Water Supply finding).

> ***f.*** *Within the … parking district where on-site parking requirements are not shown to be provided, require the payment of an in lieu fee for all required spaces not provided and granted a parking adjustment.*

LUP Circulation Policy i states:

> ***i.*** *Support shuttle systems and Peninsula area transit within and to the Cannery Row Coastal Zone.*

2. Consistency Analysis

a. Parking

The proposed project includes a total of 377 auto parking spaces on site: 93 spaces on the bayside portion of the site and 284 spaces on the inland portion of the site. The bayside parking will be provided in a subterranean garage. Inland parking will be provided in an underground level and three above-grade levels (including the rooftop of Building E). In addition, the project includes 43 motorcycle parking spaces dispersed throughout the parking garages, and parking for 79 bicycles (39 bicycle spaces would be located in a secured storage area in the underground level of the inland parking garage; parking for 40 bicycles would be provided in an outdoor rack located adjacent to the Recreation Trail). The auto parking includes 90 spaces restricted for residential use, 138 spaces restricted for use by employees and retail tenants, and 149 unrestricted spaces for the public. See page 5 of Exhibit 3 for the project's parking plan.

Based on proposed project uses (including a maximum of 700 restaurant seats), the proposed project would generate a demand for parking that exceeds the proposed onsite parking supply by 50 spaces during peak Saturday afternoons (primarily during the summer months) when public parking facilities in the area operate at practical capacity.[56] Additionally, as described in the EIR, the project will result in the loss of 71 existing parking spaces on the inland parcel. Thus, there will be a general loss of 71 existing spaces currently available to the public and thus a projected parking deficit on peak Saturday afternoons overall of 121 parking spaces.

The proposed mitigation for this peak-period parking deficit includes use of 121 existing public parking spaces located in the underused public parking garages east of the Lighthouse tunnel in Monterey (according to data submitted from the City of Monterey, these parking garages generally have this amount of availability even during peak periods). These parking garages are also the location for visitors to access the free WAVE (Waterfront Area Visitor Express) shuttle, which operates on a daily basis from the Memorial Day weekend through the Labor Day weekend. The WAVE shuttle departs for Cannery Row from the downtown parking garages every 10 to 12 minutes during the summer months. Also, the City conditioned its approval to require the Applicant to contribute on an annual basis to the funding of the WAVE shuttle, as required by Cannery Row LUP Parking Policy f. An additional

[56] This analysis is based on more than the minimum one space per residential unit as required by Cannery Row LUP Parking policy h., as well as that policy's parking formula for mixed-use projects.

condition imposed by the City includes a requirement to implement trip reduction measures identified within an Employee Transportation Management Program to be prepared by the Applicant.

Coastal Act Section 30252 requires that new development maintain and enhance public access to the coast, including through the provision of adequate parking. The proposed project, however, provides onsite parking for the residential users and employees and retail tenants but there will be an onsite parking deficit for retail customers and general public access users during peak periods. As approved by the City, this deficit would be addressed by other existing parking spaces currently available to the general public during peak periods. This is inconsistent with Coastal Act Section 30252. Specifically, the projected parking deficit on peak Saturday afternoons is 121 public parking spaces. The public will bear the brunt of such a deficit, inconsistent with Coastal Act Section 30252(4).
The project does provide 138 onsite parking spaces for retail employees and tenants. Although the City conditioned the project to require that the Applicant develop an Employee Transportation Management Program, this Program has not yet been developed. In any event, the City-approved project does not require employees and retail tenants to park at an offsite location, i.e. at the public parking garages east of the Lighthouse tunnel, during peak periods to ensure that adequate public parking is available onsite.

b. Parking Conclusion

The proposed project includes a projected parking deficit of 121 public parking spaces during peak Saturday afternoons. Thus, as proposed, the project is inconsistent with Coastal Act Section 30252, which requires that new development provide adequate parking facilities. An approvable, Coastal Act consistent project in this respect would include an offsite employee parking and transportation program during peak periods to require that the 138 onsite employee and retail-tenant parking spaces be made available to the general public during peak periods. As is already contemplated by the EIR (for the general public, at least), the project's employees and retail tenants could park in the public parking garages east of the Lighthouse tunnel during peak periods, and use the WAVE shuttle or other employee van shuttles to access the project site. The proposed project, however, does not include such a program and thus the project cannot be found consistent with the Coastal Act.

c. Traffic

The EIR included a traffic study that evaluated Level of Service (LOS) conditions at street and highway intersections that would potentially be impacted by the proposed project.[57] The City of Monterey has established LOS D as the minimum acceptable level of service for signalized and un-signalized intersections. The EIR identified additional standards of significance for intersections due to the proposed project as follows:

- A degradation in LOS from an acceptable level (LOS D or better) to an unacceptable level (LOS E or F); or
- The LOS is already at an unacceptable level and the addition of project trips causes an increase in

[57] LOS is a qualitative description of operating conditions ranging from LOS A (free-flowing conditions with little delay) to LOS F (jammed conditions with excessive delays). LOS D means operations with longer delays due to a combination of unfavorable progression, long cycle lengths, or high V/C [volume/capacity] ratio; many vehicles stop and individual cycle failures are noticeable.

delay for the intersection's critical movements; or

- The intersection volume-to-capacity ratio (v/c) is 0.95 or less and the addition of project trips causes the v/c to exceed 0.95; or
- The project would generate 50 or more peak-hour trips at an intersection that already operates at LOS D (LOS E for un-signalized intersections); or
- The project will cause or contribute to the need for a traffic signal at an un-signalized intersection.

The EIR included an analysis of existing and projected traffic conditions for 18 signalized intersections and 8 un-signalized intersections, as well as three Highway 1 segments. The EIR found that the proposed project would have a significant impact on six intersections. Additionally, the EIR found that the proposed project would cumulatively have a significant adverse impact on an additional ten intersections by the year 2020.

The City adopted a Statement of Overriding Considerations (Exhibit 6) regarding the proposed project's impacts to the Cannery Row/Prescott Avenue intersection, which would degrade during the Saturday peak hour from LOS D to LOS F due to the project. The City found that this particular intersection is especially heavy with pedestrian activity and that no mitigation was preferred, with the specific intent of gaining safety benefits from slower speeds and intersection saturation during peak periods. Regarding the proposed project's other significant impacts on street intersections, the Applicant has agreed to fund $2,000,000.00 in traffic improvements to mitigate the proposed project's impacts. These improvements include, but are not limited to, a fair-share contribution to the installation of new traffic signals, the addition of new turn lanes and through lanes, and a fair-share contribution to the WAVE shuttle. Additional mitigation includes implementation of trip reduction measures as identified within an Employee Transportation Management Program (ETMP) prepared by the Applicant. However, the options that might be included in the ETMP to reduce the project's traffic impacts have not been specified.

d. Traffic Conclusion

Cumulative traffic and circulation has always been an important issue for protection of public access and recreation in the Cannery Row area. The proposed mitigations will provide some traffic congestion relief in the Cannery Row area during peak periods, but none of these mitigations will address the project's impacts to the Cannery Row/Prescott Avenue intersection. Development of the project will have a significant impact on public vehicular and pedestrian access at this intersection during peak periods, which cannot be mitigated. Thus, the project's traffic impacts are inconsistent with Coastal Act Section 30252 regarding that policy's requirement to maintain and enhance public access to the coast.

J. Archaeological Resources

1. Applicable Policies

Coastal Act Section 30244 protects archaeological and paleontological resources and states:

> ***30244.*** *Where development would adversely impact archaeological or paleontological resources as identified by the State Historic Preservation Officer, reasonable mitigation measures shall be required.*

Cannery Row LUP Development Policy k states:

> ***k.*** *Reasonable mitigations are to be required as a condition of development where it would adversely impact archaeological or paleontological resources as identified by the State Historic Resource Preservation Officer.*

2. Consistency Analysis

The project site lies within the currently recognized ethnographic territory of the Costanoan (often called Ohlone) linguistic group of people. The entire Cannery Row area is designated in the LUP as a high sensitivity zone in which archaeological resources are known to exist in some density and where other prehistoric sites are likely to occur. An archaeological reconnaissance of the surface of the project site was conducted in 1998. By the time of this reconnaissance (and as is still evident today), much of the surface of the bayside parcel was covered by remnants of concrete cannery foundations, concrete fish holding pens, and the abandoned Stohan's building. The visible soil on the bayside parcel was determined primarily to be fill material at that time. The inland portion of the site was predominantly covered by an asphalt paved parking lot and the raised concrete foundation of the former San Xavier Warehouse. An archaeological shell midden was found along the southeast perimeter of this inland area as part of the 1998 reconnaissance.

Thus, the project site includes archaeological resources at least in the form of a Native American shell midden. Given the presence of the shell midden and the LUP-identified high archaeological sensitivity zone, it can be presumed that subsurface archaeological resources are also likely present but weren't identified in the 1998 field work.

Construction of the proposed project will completely excavate the soil cap, where it exists, throughout the project site, thus destroying the known shell midden and any buried prehistoric and historic cultural resources that may be present. The City conditioned its approval (see pages 6-7 of Exhibit 5) to require that a professionally qualified archaeological monitor be present during all foundation removal, demolition, and soil disturbance activities, except for the paved parking lot on the inland parcel (the parking lot area has been excavated extensively previously and there is little possibility that significant archaeological materials remain there). If human remains or archaeological features are discovered during these activities, the City's conditions require that construction work be halted within 50 meters of the find until it can be evaluated by the project's archaeological monitor and appropriate measures can be formulated and implemented and secondary archaeological testing can be conducted. The City's approval also includes the preparation of a Preliminary Archaeological Report and Archeological

Mitigation Plan, as warranted. However, the City's conditions do not require that appropriate Native American consultations take place, with adherence to any recommendations resulting from these consultations, if human remains or archaeological features are discovered on the project site. Thus, the proposed project is inconsistent with Coastal Act Section 30244.

3. Conclusion

The proposed project will destroy known archaeological resources on the site. Although the City required mitigations for this impact, these mitigations do not include Native American consultations, inconsistent with Coastal Act Section 30244. An approvable Coastal Act consistent project in this respect would ensure that appropriate Native American consultations were included as well. The proposed project, however, does not include such a requirement and thus the project cannot be found consistent with the Coastal Act.

K. Local Coastal Programs

The Commission can take no action that would prejudice the options available to the City in preparing a Local Coastal Program that conforms to the provisions of Chapter 3 of the Coastal Act (Section 30604 of the Coastal Act). Because Cannery Row (and the bay waters just offshore of Cannery Row) contains unique features of public access, recreational, visitor-serving, historical biological, archaeological, and scenic value, the City in its Local Coastal Program will need to assure long-range protection of the Cannery Row area.

The City of Monterey LUP consists of five segments, four of which have been certified (the Laguna Grande LUP remains uncertified). The Cannery Row LUP was certified on November 3, 1981. Since that time, the City has periodically worked towards certification of the Laguna Grande LUP segment and the establishment of implementing ordinances, but has not yet obtained full LCP certification. Accordingly, the standard of review for coastal development permits, pending LCP completion, is conformance with the policies of the Coastal Act.

Given the fact that the City of Monterey does not have a certified LCP, the Commission's evaluation of this permit application must take into consideration the impact that approval might have on the ability of the City of Monterey to develop an LCP that conforms to the Chapter 3 policies of the Coastal Act. As proposed, the project will result in a number of inconsistencies with the Coastal Act and with the policies of the certified Cannery Row LUP, in particular with regard to water supply, public access and recreation, visual and scenic resources, community character, natural hazards, lower-cost visitor-serving uses, historical resources, water quality, parking and traffic, and archaeology. Accordingly, if approved, the project could set a precedent for similar development along Cannery Row and thereby prejudice the ability of the City of Monterey to prepare and implement a complete Local Coastal Program consistent with Chapter 3 of the Coastal Act, in conformity with Section 30604(a).

C. California Environmental Quality Act (CEQA)

Public Resources Code (CEQA) Section 21080(b)(5) and Sections 15270(a) and 15042 (CEQA

Guidelines) of Title 14 of the California Code of Regulations (14 CCR) state in applicable part:

> ***CEQA Guidelines (14 CCR) Section 15042. Authority to Disapprove Projects.*** *[Relevant Portion.] A public agency may disapprove a project if necessary in order to avoid one or more significant effects on the environment that would occur if the project were approved as proposed.*
>
> ***Public Resources Code (CEQA) Section 21080(b)(5). Division Application and Nonapplication.*** *…(b) This division does not apply to any of the following activities: …(5) Projects which a public agency rejects or disapproves.*
>
> ***CEQA Guidelines (14 CCR) Section 15270(a). Projects Which are Disapproved.*** *(a) CEQA does not apply to projects which a public agency rejects or disapproves.*

Section 13096 (14 CCR) requires that a specific finding be made in conjunction with coastal development permit applications about the consistency of the application with any applicable requirements of CEQA. This staff report has discussed the relevant coastal resource issues with the proposal. All public comments received to date have been addressed in the findings above. All above Coastal Act findings are incorporated herein in their entirety by reference. As detailed in the findings above, the proposed project would have significant adverse effects on the environment as that term is understood in a CEQA context.

Pursuant to CEQA Guidelines (14 CCR) Section 15042 "a public agency may disapprove a project if necessary in order to avoid one or more significant effects on the environment that would occur if the project were approved as proposed." Section 21080(b)(5) of the CEQA, as implemented by section 15270 of the CEQA Guidelines, provides that CEQA does not apply to projects which a public agency rejects or disapproves. The Commission finds that denial, for the reasons stated in these findings, is necessary to avoid the significant effects on coastal resources that would occur if the project were approved as proposed. Accordingly, the Commission's denial of this project represents an action to which the CEQA, and all requirements contained therein that might otherwise apply to regulatory actions by the Commission, do not apply.